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VOLUME 191

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NORTH CAROLINA REPORTS
VOL. 191

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1925
SPRING TERM, 1926

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
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1926

CITATION OF REPORTS

Rule 62 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:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.	9 Iredell Law	as	31	N. C.
1 Haywood	"	2	"	10 " "	"	32	"
2 "	"	3	"	11 " "	"	33	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"	12 " "	"	34	"
1 Murphey	"	5	"	13 " "	"	35	"
2 "	"	6	"	1 " Eq.	"	36	"
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2 "	"	9	"	4 " "	"	39	"
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4 "	"	11	"	6 " "	"	41	"
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2 " "	"	13	"	8 " "	"	43	"
3 " "	"	14	"	Busbee Law	"	44	"
4 " "	"	15	"	" Eq.	"	45	"
1 " Eq.	"	16	"	1 Jones Law	"	46	"
2 " "	"	17	"	2 " "	"	47	"
1 Dev. & Bat. Law	"	18	"	3 " "	"	48	"
2 " "	"	19	"	4 " "	"	49	"
3 & 4 " "	"	20	"	5 " "	"	50	"
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, 1926

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

W. J. ADAMS,
HERIOT CLARKSON,
GEORGE W. CONNOR,
WILLIS J. BROGDEN.*

ATTORNEY-GENERAL:

DENNIS G. BRUMMITT.

ASSISTANT ATTORNEY-GENERALS:

FRANK NASH,
CHAS. ROSS,
JOHN H. HARWOOD.†

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD C. SEAWELL.

MARSHAL AND LIBRARIAN:

MARSHALL DeLANCEY HAYWOOD.

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* Upon the resignation of Associate Justice Varser, effective 31 December, 1925, Hon. Willis J. Brogden was appointed to succeed him, and took the oath of office 1 January, 1926.

† Succeeded by Oliver H. Allen of Goldsboro, July 8, 1926.

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.
Romulus A. Nunn	Fifth	New Bern.
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.

* Resigned. Succeeded by John H. Harwood of Bryson City, 8 July, 1926.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. SMALL	First	Elizabeth City.
DONNELL GILLAM	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, 1926

List of applicants to whom license to practice law in North Carolina was granted by Supreme Court at Spring Term, 1926:

ABERNETHY, CLAUDE CLARENCE---Spring Hope.
ABERNETHY, LLOYD NORMAN---Newton.
ALBRITTON, RICHARD WILLIAM---Hendersonville.
ALLEY, DOYLE DAVIS---Sylva.
ASCH, BURNHAM---New York, N. Y.
AYDLETT, NATHANIEL ELTON---Elizabeth City.
BEALL, WILLIAM RILAND---Washington, D. C.
BELL, BERDON MANLY---Raleigh.
BENNETT, ALLIE RAYMOND---Whiteville.
BLACKBURN, JETER MARCELLUS---North Wilkesboro.
BRIGGS, ERNEST LELAND---Burnsville.
BROWN, JOHN MCKINLEY---Wilkesboro.
BROWN, JOHN PEACOCK---Crossnore.
BROWN, JOSEPH WILBUR---Chadbourn.
BURNS, AUGUSTUS MERRIMON, JR.---Roxboro.
CARAWAN, JOHN RICHARD PINKNEY---Messic.
CAUDLE, THERON LAMAR, II---Wadesboro.
COCKE, PHILIP CHARLES, JR.---Asheville.
CONGLETON, LUTHER FLOYD---Wilmington.
COOPER, DAISY STRONG---Oxford.
COSTEN, THOMAS WILLIAM, JR.---Gatesville.
COYNER, RANDOLPH STRATTON---Chapel Hill.
CRAVEN, WALTER GLUYAS---Charlotte.
DAVENPORT, JOHN THOMAS---Sanford.
DEARMAN, CLAUDIUS HURSELL---Turnersburg.
DERAMUS, JUDSON DAVIE---Charlotte.
EDWARDS, HENRY BARRY---Scotland Neck.
FORBES, CHARLES SIDNEY---Washington, D. C.
GINTER, WILLIAM COYLE---Charlotte.
GRADY, HENRY ALEXANDER, JR.---Clinton.
GRANTHAM, GEORGE LEIGHTON---Fairmont.
GRAY, NORMAN ADRON---Washington, D. C.
HALLINAN, DAVID FRANCIS---Raleigh.
HARRIS, JOHN OATES---Dunn.
HODGES, BRANDON PATTON---Asheville.
HOLT, BRYCE ROSWELL---McLeansville.
HOOD, BRODIE EARL---Goldsboro.
HORTON, ALEXANDER TELFAIR, JR.---Raleigh.
HORTON, OSSIE LEE---Apex.
JIMISON, THOMAS PEARSON---Charlotte.
JORDAN, CHARLES EDWARD---Durham.

LLOYD, ALFONSO.....Raleigh.
LONG, MERL MALTBY.....Charlotte.
MEADOR, LESLIE DAVIS.....Burlington.
MEYER, JULIUS EDWARD.....Charlotte.
MEYERS, FORD MONROE.....Thomasville.
MITCHELL, HUGH GORDON.....Statesville.
MOORE, JOSEPH UNDERWOOD.....Fayetteville.
MOORE, OGDEN.....Charlotte.
MORRIS, CHESTER RALPH.....Sunbury.
MORTON, GARRETT HOBART.....Albemarle.
MOSS, CLIFTON DEAN.....Enfield.
NAYLOR, JOSEPH HESCHOL.....Dunn.
O'DONNELL, JOHN JOSEPH.....Brooklyn, N. Y.
OVERTON, RICHARD BUXTON.....Nashville.
OWEN, FREDERICK CLEMENT.....Durham.
PACE, HUGH NAPOLEON.....Wilmington.
PEGRAM, SAM JAY.....Asheville.
PINER, JOE WHEELER.....Morehead City.
PRICE, WILSON HORACE.....Charlotte.
PRIDGEN, CARL WALDO, JR.....Lumberton.
PROCTOR, ROBERT WRIGHT.....Lumberton.
RAPER, SAMUEL EUGENE.....Lexington.
RAY, JACK.....Newland.
RICE, ALBERT MORRIS.....Lumberton.
SEARCY, WILLIAM GUY.....Charlotte.
SHAW, GILBERT AVERY.....Fayetteville.
SLEDGE, JOHN WAYLAND.....Louisburg.
SMITH, CHARLES BRANTLEY.....Pikeville.
SMITH, WILLIAM HARLEY.....Durham.
TAYLOR, ELTON BERDON.....Asheville.
THOMPSON, MELVIN JOSEPH.....Durham.
THORNTON, CHARLES ANTHONY.....Chapel Hill.
TOWNSEND, FOLGER LAFAYETTE.....West Durham.
UHLER, ARMIN.....Charlotte.
UZZELL, GEORGE RANDOLPH.....Salisbury.
WALKER, BARNEY WILLIAMS.....Spray.
WARD, DAVID LIVINGSTON, JR.....New Bern.
WARREN, THOMAS JULIAN.....Hurdle Mills.
WATSON, LEMUEL EDGAR, JR.....Smithfield.
WEAVER, RUSSELL MAUZY.....Island Ford, Va.
WILLIAMS, BYRON ERWING.....Marshville.
WHITE, JOHN FERNANDO.....Edenton.
WHITENER, THOMAS MANLY.....Hickory.
WHITTINGTON, JOHN HENRY.....Charlotte.

Under Comity Act—

GENTRY, JOHN JOSEPH (from South Carolina).
HAMER, A. L. (from South Carolina).
HYDRICK, JOHN HENRY (from South Carolina).

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL TERM OF 1926

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, 1926
First District	August 31
Second District	September 7
Third and Fourth Districts	September 14
Fifth District	September 21
Sixth District	September 28
Seventh District	October 5
Eighth and Ninth Districts	October 12
Tenth District	October 19
Eleventh District	October 26
Twelfth District	November 2
Thirteenth District	November 9
Fourteenth District	November 16
Fifteenth and Sixteenth Districts	November 23
Seventeenth and Eighteenth Districts	November 30
Nineteenth District	December 7
Twentieth District	December 14

SUPERIOR COURTS, FALL TERM, 1926

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, 1926—*Judge Nunn.*

Camden—Sept. 27.
Beaufort—July 26*; Oct. 4† (2); Nov. 22; Dec. 20†.
Gates—Aug. 2; Dec. 13.
Tyrrell—Nov. 29.
Currituck—Sept. 6.
Chowan—Sept. 13; Dec. 6.
Pasquotank—Sept. 20†; Nov. 8‡; Nov. 15†.
Hyde—Oct. 18.
Dare—Oct. 25.
Perquimans—Nov. 1.

SECOND JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Gray.*

Washington—July 12; Oct. 25.
Nash—Aug 23*; Oct. 11†; Nov. 29*; Dec. 6†.
Wilson—Sept. 6; Oct. 4†; Nov. 1† (2); Dec. 20.
Edgecombe—Sept. 13; Oct. 18; Nov. 15† (2).
Martin—Sept. 20 (2); Dec. 13.

THIRD JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Calvert.*

Northampton—Aug. 2‡; Nov. 1 (2).
Hertford—July 26*; Oct. 18 (2); Dec. 13† (2).
Halifax—Aug. 16 (2); Oct. 4† (A) (2); Nov. 29 (2).
Bertie—Aug. 30 (2); Sept. 13†; Nov. 15 (2).
Warren—Sept. 20 (2).
Vance—Oct. 4*; Oct. 11†.

FOURTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Cranmer.*

Lee—July 19 (2); Sept. 20†; Nov. 1; Nov. 8†.
Chatham—Aug. 2† (2); Oct. 25*.
Johnston—Aug. 16*; Sept. 27† (2); Dec. 13 (2).
Wayne—Aug. 23 (2); Oct. 11† (2); Nov. 29 (2).
Harnett—Sept. 6; Sept. 13†; Nov. 15† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Sinclair.*

Pitt—Aug. 23†; Aug. 30; Sept. 13†; Sept. 27†; Oct. 25†; Nov. 1.
Craven—Sept. 6*; Oct. 4† (2); Nov. 22† (2).
Carteret—Oct. 18; Dec. 6†.
Pamlico—Nov. 8 (2).
Jones—Sept. 20.
Greene—Dec. 13 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Devin.*

Onslow—July 19†; Oct. 11; Nov. 22† (2); Dec. 6†.
Duplin—July 12*; Aug. 30† (2); Oct. 4*; Dec. 6; Dec. 13†.
Sampson—Aug. 9 (2); Sept. 13† (2); Oct. 25 (2).
Lenoir—Aug. 23*; Oct. 18; Nov. 8† (2); Dec. 13*

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Bond.*

Wake—July 12*; Sept. 13*; Sept. 20 (2); Oct. 4†; Oct. 11*; Oct. 25† (2); Nov. 8*; Nov. 29† (2); Dec. 13* (2).
Franklin—Aug. 30† (2); Oct. 18*; Nov. 15† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Barnhill.*

New Hanover—July 26*; Sept. 13*; Sept. 20†; Oct. 18† (2); Nov. 15*; Dec. 6† (2).
Pender—Sept. 27; Nov. 1† (2).
Columbus—Aug. 23 (2); Nov. 22† (2).
Brunswick—Sept. 6†; Oct. 4.

NINTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Midyette.*

Robeson—July 12* (2); Sept. 6† (2); Oct. 4† (2); Nov. 8*; Dec. 6† (2).
Bladen—Aug. 9*; Oct. 18†.
Hoke—Aug. 16 (2); Nov. 15.
Cumberland—Aug. 30*; Sept. 20† (2); Oct. 25† (2); Nov. 22*.

TENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Daniels.*

Alamance—Aug. 16*; Sept. 6† (2); Nov. 29*.
Durham—July 19*; Sept. 20† (2); Oct. 11*; Nov. 1† (2); Dec. 6*.
Granville—July 26; Oct. 25†; Nov. 15 (2).
Orange—Aug. 30; Oct. 4†; Dec. 13.
Person—Aug. 9; Oct. 18.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Oglesby.*

Ashe—July 12† (2); Oct. 18*.
Forsyth—July 26* (2); Sept. 13† (2); Oct. 4 (2); Nov. 8† (2); Dec. 6† (A); Dec. 13*.
Rockingham—Aug. 9* (2); Nov. 22† (2).
Caswell—Aug. 23; Dec. 6.
Alleghany—Sept. 27.
Surry—Aug. 30 (2); Oct. 25 (2).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Webb.*

Davidson—July 19† (2); Aug. 23*; Sept. 13†; Nov. 22 (2).
Guilford—Aug. 2*; Aug. 9† (2); Aug. 30† (2); Sept. 20* (2); Oct. 4† (2); Nov. 1† (2); Nov. 15*; Dec. 6† (2); Dec. 20*.
Stokes—July 12†; Oct. 18*; Oct. 25†.

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Finley.*

Stanly—July 12; Oct. 11†; Nov. 22.
Richmond—July 19†; July 26*; Sept. 6†; Oct. 4*; Nov. 8†.
Union—Aug. 2*; Aug. 23† (2); Oct. 18; Oct. 25†.
Anson—Sept. 13*; Sept. 27†; Nov. 15†.
Moore—Aug. 16*; Sept. 20†; Dec. 13†.
Scotland—Nov. 1†; Nov. 29 (2).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Schenck.*

Mecklenburg—July 12* (2); Aug. 30*; Sept. 6† (2); Oct. 4*; Oct. 11† (2); Nov. 1† (2); Nov. 15*; Nov. 22† (2).
Gaston—Aug. 16†; Aug. 23*; Sept. 20† (2); Oct. 25*; Dec. 6† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge McElroy.*

Montgomery—July 12; Sept. 27†; Oct. 4.
Randolph—July 19† (2); Sept. 6*; Dec. 6 (2).
Iredell—Aug. 2 (2); Nov. 8 (2).
Cabarrus—Aug. 16 (3); Oct. 18 (2).
Rowan—Sept. 13 (2); Oct. 11†; Nov. 22 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Harwood.*

Catawba—July 5 (2); Sept. 6† (2); Nov. 15*; Dec. 6†.
Lincoln—July 19; Oct. 18; Oct. 25†.
Cleveland—July 26 (2); Nov. 1 (2).
Burke—Aug. 9 (2); Sept. 27† (3); Dec. 13* (2).
Caldwell—Aug. 23 (2); Nov. 29 (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Lane.*

Alexander—Sept. 20 (2).
Yadkin—Aug. 23*; Dec. 13† (2).
Wilkes—Aug. 9 (2); Oct. 4† (2).
Davie—Aug. 30; Dec. 6†.
Watauga—Sept. 6 (2).
Mitchell—July 26†; Nov. 15 (2).
Avery—July 5† (3); Oct. 18 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Shaw.*

Transylvania—July 26† (2); Dec. 6 (2).
Henderson—Oct. 4 (2); Nov. 15† (2).
Rutherford—Aug. 23† (2); Nov. 1 (2).
McDowell—July 12 (2); Sept. 20 (2).
Yancey—Aug. 2†; Oct. 18 (2).
Polk—Sept. 6 (2).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Stack.*

Buncombe—July 12† (2); July 26; Aug. 2† (2); Aug. 16; Aug. 30; Sept. 6† (2); Sept. 20; Oct. 4† (2); Oct. 18; Nov. 1† (2); Nov. 15; Nov. 29; Dec. 6† (2); Dec. 20.
Madison—Aug. 23; Sept. 27; Oct. 25; Nov. 22.

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1926—*Judge Harding.*

Haywood—July 12 (2); Sept. 20† (2); Nov. 29 (2).
Cherokee—Aug. 9 (2); Nov. 8 (2).
Jackson—Oct. 11 (2).
Swain—July 26 (2); Oct. 25 (2).
Graham—Sept. 6 (2).
Clay—Oct. 4.
Macon—Aug. 23 (2); Nov. 22.

*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 courts 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 courts 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. W. W. LEINSTER, 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. W. W. LEINSTER, 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.
F. C. PATTON, Assistant United States Attorney, Charlotte.
THOS. J. HARKINS, Assistant United States Attorney, Asheville.
K. J. KINDLEY, Assistant United States Attorney, Charlotte.
BROWNLOW JACKSON, United States Marshal, Asheville.
R. L. BLAYLOCK, Clerk United States District Court, Greensboro.

CASES REPORTED

CASES CITED

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1925

T. E. AND E. P. COOK v. THE TOWN OF MEBANE.

(Filed 27 January, 1926.)

1. **Water and Watercourses—Riparian Rights—Mills.**

An upper riparian owner of land on a stream may reasonably use the waters thereof for domestic purposes, and not otherwise diminish its flow to the injury of the lower proprietor, or its substantial use to the injury of a water mill, which has been built on the stream below.

2. **Public Health—Water and Watercourses—Municipal Corporations—Sewage—Cities and Towns—Nuisance—Pollution of Stream.**

The pollution of a stream by a municipality emptying its sewage therein, causing damage to a lower proprietor, affecting the operation of his water mill operated for gain by impairing the health of his employees thereat, subjects the municipality to an action by the lower proprietor for damages by the nuisance thereby caused.

3. **Same—Constitutional Law—State Board of Health—Government.**

Where a municipality empties its sewage into a stream, to the damage of the lower proprietor thereon, directly causing ill health to the lower proprietor and his family, and to those operating his water mill thereon, to the substantial impairment of its value, is the taking of private property for public use inhibited by the organic law, without just compensation, and the municipality is liable to the lower proprietor for damage to his property he has sustained, caused by the nuisance, and the approval of this method by the State Board of Health, as it may affect the public health, is no valid defense to the action.

4. Nuisance—Water and Watercourses—Damages—Health.

Where a municipality discharges its sewage into a stream and pollutes its waters so as to cause it to give off offensive odors to the diminution in value of the lands of the lower proprietor, it is a nuisance for which the lower proprietor may recover his damages.

5. Same—Evidence—Damages.

Where damages are sought in an action against a city alleged to have been caused to plaintiff's water mill by diminishing the flow of and polluting the mill stream, evidence that other mills in the locality had been shut down is incompetent, unless there is evidence that it was from the same cause.

6. Appeal and Error—Evidence—Trials—Harmless Error.

Exclusion of evidence is not reversible error if the evidence ruled out has been thereafter substantially admitted upon the trial.

7. Damages—Loss of Profits.

Where the plaintiff's established business has been impaired by an actionable nuisance of the defendant, evidence of the loss of profits caused by defendant's act is competent upon the question of the plaintiff's damage to his property.

8. Evidence—Damages—Nuisance—Health.

Where the plaintiff's action is for damages for injury to the value of his water mill caused by the emptying of sewage by a city into the mill stream, evidence of the impaired health caused thereby, the defendant's act before and after its commission, is competent.

9. Same—Injury to Lands—Water Mill.

Where the plaintiff has been damaged by the defendant city emptying its sewage into his mill stream, in diminution of the value of the mill long since established, the damages recoverable extend to the injury caused to the entire tract of land, consisting in this case of one hundred and sixty acres.

10. Instructions—Construed as a Whole—Appeal and Error.

A charge will be construed as a whole in its related parts, and an instruction in part that the plaintiff may upon certain evidence recover the entire damage sought in the action will not be held for error if so construed it appears that the plaintiff was required to reasonably reduce the damage or nuisance, or the injury to his property, which the law required under the circumstances.

11. Judgments—Condition—Verdict.

Where the trial judge has intimated he would let the verdict stand if the defendant against whom the verdict was rendered would agree to make certain provisions of the sewage into the mill stream of the plaintiff, causing injury to his property, which the defendant refused to do, the judgment upon the verdict is not objectionable as being conditional.

APPEAL by defendant from *Calvert, J.*, and a jury, at Second May Term, 1925, of ALAMANCE. No error.

The statement of case on appeal is as follows:

"The plaintiffs allege that certain real property, consisting of 160 acres of land and a mill site owned by them had been damaged by the defendant. They allege that the defendant had installed a system of water works and that it took the water from a stream that flowed down to and through the lands of the plaintiffs, and so diminished the flow of said stream that it damaged both the land and mill site of the plaintiffs. They alleged that the defendant had installed a sewerage system and that the sewer outlet for a part of said town emptied into a stream that flowed down to and into the stream that ran through the lands of the plaintiffs and caused them injury and damage.

"The defendant answered and alleged that it owned land situate upon the stream that flowed down to the lands of the plaintiffs, above the lands of plaintiffs, and that it had a right to use the water, and that the amount it took caused the plaintiffs no damage. It admitted that it had installed a sewer system, but averred that it had so installed the same and provided for an outlet for the same as that its system was approved by the health authorities and engineers, and it alleged that the manner in which said sewer system was installed and maintained did not in any way affect the plaintiffs, and it denied all allegations of the plaintiffs that it had endamaged them in any way."

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

"1. Are the plaintiffs the owners of the land described in the complaint? Answer: Yes.

"2. Has the defendant wrongfully and unreasonably diverted and used the water from Mill Creek? Answer: Yes.

"3. What permanent damages are the plaintiffs entitled to recover of the defendant by reason of such use and diversion? Answer: Yes, $4,000.

"4. Have the plaintiffs been damaged by the installation and maintenance of a sewerage system by the defendant as alleged in the complaint? Answer: Yes.

"5. What permanent damages are the plaintiffs entitled to recover of the defendant on account of the installation and maintenance of said sewerage system? Answer: Yes, $6,000."

Defendant made numerous exceptions and assignments of error to the admission and exclusion of evidence, refusal of prayers for instructions and to the charge of the court below, and from the judgment rendered appealed to the Supreme Court.

J. Elmer Long and McLendon & Hedrick for plaintiffs.

T. C. Carter and Brooks, Parker & Smith for defendant.

CLARKSON, J. The complaint of plaintiffs is two-fold: (1) That defendant diverted water from Mill Creek which flowed through their land and damaged their land and mill site; (2) that after taking the water from Mill Creek for municipal purposes that below this intake the defendant emptied its sewerage into Susan Mebane Branch, which flowed into Mill Creek and damaged their land and mill site. Defendant both diverted and polluted the water that ran through plaintiffs' land to their damage.

Defendant denied that there was any appreciable amount of water taken or sewage disposal that emptied into the stream that would be actionable and cause damage to plaintiffs, and alleged that it had a right as a riparian proprietor to divert the water. That the sewage disposal outlet was approved by its engineer and the health authorities.

On these contentions the issues were framed and submitted to the jury.

(1) As to diverting water, the principle is well settled in this State and reiterated in *Smith v. Morganton,* 187 N. C., p. 803: "That a riparian proprietor is entitled to the natural flow of a stream running through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality, except as may be occasioned by the reasonable use of the water by other like proprietors. *Pugh v. Wheeler,* 19 N. C., 50; *S. v. Glen,* 52 N. C., 321; *Walton v. Mills,* 86 N. C., 280; *McLaughlin v. Mfg. Co.,* 103 N. C., 100; *Adams v. R. R.,* 110 N. C., 326; *Durham v. Cotton Mills,* 141 N. C., 615; *Harris v. R. R.,* 153 N. C., 542." *Rouse v. Kinston,* 188 N. C., p. 24. *Ruffin, C. J.,* in *Pugh v. Wheeler, supra,* p. 55, speaking to the subject of diverting water, says: "If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built it he could only recover for the natural uses of the water, as needed for his family, his cattle and irrigation."

(2) As to polluting water, it was said in *Finger v. Spinning Co.,* 190 N. C., p. 78: "The fact that this may call for the expenditure of large sums of money by defendants cannot be considered as justifying the continuance of a trespass upon or a nuisance to the lands of plaintiff by defendants. As said by *Chief Justice Clark,* in *Rhyne v. Mfg. Co., supra* (182 N. C., 489), 'Defendants must attain its ends, advance its interests, or serve its convenience by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others, *sic utere tuo, ut alienum non lædas.*' "

Hoke, J., in *Donnell v. Greensboro,* 164 N. C., 334, speaking to the subject of sewage disposal, says: "The decisions of this State are in approval of the principle that the owner can recover such damage for a

wrong of this character, and that the right is not affected by the fact that the acts complained of were done in the exercise of governmental functions or by express municipal or legislative authority, the position being that the damage arising from the impaired value of the property is to be considered and dealt with to that extent as a 'taking or appropriation,' and brings the claim within the constitutional principle that a man's property may not be taken from him for the public benefit except upon compensation duly made. This decision, announced in *Little v. Lenoir,* 151 N. C., 415, in an opinion by *Associate Justice Manning,* was reaffirmed and applied in the more recent cases of *Moser v. Burlington,* 162 N. C., 141; *Hines v. Rocky Mount,* 162 N. C., 409; and is sustained, we think, by the great weight of authority in this country. *Winchell v. Wauseka,* 110 Wis., 101; *Bohan v. Port Jervis,* 122 N. Y., 18; *Joplin Mfg. Co. v. City of Joplin,* 124 Mo., 129; *Village of Dwight v. Hayes,* 150 Ill., 273; *Mackwordt v. City of Guthrie,* 18 Okla., 32; *Platt v. Waterbury,* 72 Conn., 531." *Rhodes v. Durham,* 165 N. C., 679; *Pennington v. Tarboro,* 184 N. C., 71; *Dayton v. Asheville,* 185 N. C., 14; *Sandlin v. Wilmington,* 185 N. C., 257.

There are certain methods by which the sewage disposal of municipalities can be rendered practically harmless by establishing septic tanks, sewerage filters and contact bed system, etc. There is no evidence that these precautionary methods were pursued by the town of Mebane in the present case. The only treatment the sewage got was that afforded by nature—purification as it flowed down the stream. This method was approved, from the evidence of defendant, by the State Health Department, so far as health goes. This approval did not concern nuisances. Under Eminent Domain, C. S., ch. 33, if the town of Mebane has no charter rights on the subject, the right and remedy is given to condemn necessary land for the purpose. C. S., 1706 (2) "Municipalities operating water systems and sewer systems," etc. *Rouse v. Kinston,* 188 N. C., 1.

It was in evidence that defendant had purchased about an acre of land lying on the waters of Mill Creek. In the deed to the defendant was also conveyed "Right of ingress and egress to lay water mains over the said lands; all of the water rights above the said property and below the said property owned by the said C. F. Cates and other appurtenant easements." This land, purchased by defendant from C. F. Cates, was above plaintiffs' land on Mill Creek.

The judge's charge contained the following: "Has the defendant wrongfully and unreasonably diverted and used the water from Mill Creek? Every riparian owner, that is, every owner of land adjoining a natural stream is entitled to the natural flow of water of a running stream through or along his land in its accustomed channel, undiminished in quantity and unimpaired in quality except as may be occasioned by

reasonable use of the stream by other like proprietors or owners. A riparian owner has the right to make use of water beneficial to himself on riparian land which his situation makes possible, so long as he does not inflict any substantial injury upon those below him, but as all riparian owners have an equal right to use the water each must exercise his rights in a reasonable manner and to a reasonable extent so as not to interfere unnecessarily with the rights of others." This charge on this aspect gave defendant all that it could ask under the law.

In *Harris v. R. R.*, 153 N. C., p. 544, it is said: "They may use the water for any purpose to which it can be beneficially applied, but in doing so they have no right to inflict *material* or substantial injury upon those below them. *Williamson v. Canal Co.*, 78 N. C., 157; Gould on Waters, pp. 394-395; Angell on Water Comrs., pp. 96-97 (7 ed.)."

The court charged what constituted a nuisance: "Now, gentlemen, a nuisance is anything which works hurt, inconvenience or damage, or which essentially interferes with the enjoyment of life or property, and the pollution of water by the discharge into a stream of matters which are offensive in odor or which renders it unfit for such use as it had heretofore been reasonably put to, is a nuisance."

The court's definition is the one generally accepted. 29 Cyc., L. & P., p. 1152. "The term 'nuisance' means literally annoyance; anything which works hurt, inconvenience, or damage, or which essentially interferes with the enjoyment of life or property."

The first six assignments of error.—E. P. Cook, plaintiff, was asked on cross-examination: "(1) Q. When did the Scott Mill stop operation? (2) Q. Is the Vincent Mill now running? (3) Q. How long has it been since the Vincent Mill has been running? (4) Q. Is that mill now running? (5) Q. How long since that mill was stopped? (6) I know the Cooper Mill at Carr, which was moved to Mebane. It was operated by an oil engine and they moved the mill to Mebane and it is now operated in Mebane."

The court below in excluding the evidence "stated that the defendant might be able to lay a foundation which would make the evidence tending to show that other water mills in the vicinity of the plaintiffs' mill had stopped operation competent, but that the court was excluding *it at that time.*"

In the future progress of the trial, there was no evidence tending to show that any of the mills named had shut down or ceased to operate on account of general economic conditions such as would naturally affect plaintiffs' mill, which was run mostly by water power. E. P. Cook, one of the plaintiffs, testified that their mill was shut down because of the diversion and pollution of water by defendant in Mill Creek. That was

the issue before the jury. Witness could not be expected to know why other mills, with which he had no connection, had ceased to operate. But the witness Cook later was asked by defendant two general questions covering the same proposition: "Q. Don't you know that, regardless of any water powers or sewerage systems that the mill business, the kind you were doing in that neighborhood and section, has gone all to pieces and decreased very materially in recent years with everyone about there? Answer: Mill business kept up, I know that our mill business had not. Q. I ask you if just previous to and at the time Mebane installed its water works and sewerage system and since that time, if market conditions have not been such as that mills similar to the one you were operating, located in that vicinity and doing a similar business to that done by you, have not had to cease operations, or have been unable to operate properly? Answer: I will answer that question by saying I do not think there is a mill in that country would have had to close down on account of not having to sell their produce. They have been owned and operated by men who did not give them attention."

Later, defendant's witness, J. E. Sellars, on direct-examination, testified: "I operated this mill of mine since 1913, but do not operate the wheat part of the mill now, because I did not feel able to buy the modern machinery to compete with the older mills, and I could not give it my personal attention and, with the incompetent millers, I could not make anything. I refer, when I say competition of other mills to the mills that are making up-to-date, self-rising flour with mixtures and bleachers. There is one of those mills in Mebane."

If it was error to exclude the specific questions asked, as contended by defendant, it can't complain. A general question was asked by defendant embodying substantially the specific questions and answered without objection.

In *Ledford v. Lumber Co.*, 183 N. C., p. 616, it is said: "The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that, on cross-examination, the witness was asked substantially the same question and gave substantially the same answer." *Hamilton v. Lumber Co.*, 160 N. C., 48; *Gentry v. Utilities Co.*, 185 N. C., 287; *Hanes v. Utilities Co., post*, 13.

By analogy, the erroneous exclusion of evidence on cross-examination is held not to be prejudicial when it appears later, on cross-examination, the witness was asked general questions covering substantially the specific questions and they were answered without objection.

These assignments of error cannot be sustained.

We do not think assignments of error 7, 8, 9, 17, 18 and 21 present any new or novel proposition of law or are prejudicial, and they cannot be sustained.

R. C. Harris, a witness for plaintiffs, was asked "What sort of patronage did you have at the mill during the time you were there?" Tenth assignment of error.

8 R. C. L., p. 649, says: "Where a regular established business is injured, the average profits that the business is then earning and has earned are competent as to the loss of profits." There could be no profit without patronage. The question was competent—the probative force for the jury.

Assignments of error 11, 12, 13, 14 and 15 we think competent on the question of damage. It was competent to show by the witnesses for plaintiffs, R. C. Harris and J. H. Payne, that on account of the offensive odors, the condition of the water and sewer, they could not work at the mill.

J. F. Kenyon, witness for plaintiff, without objection, stated: "I lived at the same house both times I was there. Prior to 1 January, 1923, I had not observed any stagnant pools of water nor observed any mosquitoes. Both times that I was there I lived in the same house. Before 1 January, 1923, I had never observed any stagnant pools of water or observed any mosquitoes there. Q. After 1 January, 1923, state what you observed in that respect? Ans.: We were there all told through three summers and the first two summers previous to 1923, we, of course, spent our evenings on the porch and it was a nice pleasant place to stay, but this summer (1923) by some means the mosquitoes were so bad we could not stay on the porch." The following question was asked witness: "Did you have any sickness there after 1 January, 1923?" The sewerage system was completed prior to that time. In the summer of 1923, he stated he had malaria.

In *Rouse v. Kinston,* 188 N. C., 14, it was said: "The benefit to the health of the people who lived on the plantation is more important than the increased facilities of the land for producing crops, and it is clearly competent in fixing the market value of the land to show before and after the artesian wells were sunk the condition of the health of the inhabitants who lived on the land. Good health can more easily create wealth. It gives strength and vigor to work." The assignment of error in the *Rouse case* was similar to the present. Permitting evidence tending to show condition of farm, "including in this evidence statements as to health conditions on said farm and vicinity, complaints of tenants on account of water and as to health conditions."

This assignment of error, 16, cannot be sustained. Nor can the 17th and 18th, for the same reason.

The 19th assignment of error is as follows:—Prayer for instruction: "I charge you there is no evidence in this case that the defendant has brought about any condition that has resulted in decreasing the value

of that part of plaintiffs' property referred to as containing 100 acres and called the farm property."

The complaint, article 2, alleges that plaintiffs are the owners of the tract of land, describing it, containing 180 acres more or less. The defendant answering says: "That article 2 of the complaint is not denied."

E. P. Cook, testified: "With my brother, T. W. Cook, I own tract of land containing 160 acres described in complaint, which we purchased from L. Banks Holt, 1904. It is watered by a stream known as Mill Creek, and when we purchased it, it had a mill upon it known as the Banks Holt Mill. We bought the land for the mill. We were not farmers especially, we were mill men."

The plaintiffs alleged that at the time of the purchase of the land, there was located thereon and on the waters of Mill Creek a grist and flour mill, operated by water power, and had been in constant use for more than 100 years. In answer, the defendant says: "That as to the facts and allegations set out in article 3 of said complaint, the defendant admits that the plaintiffs run and operate a mill upon their property near the town of Mebane and upon Mill Creek for the purpose of manufacturing flour and grain products." As to the other allegations, they are not sufficiently informed and deny the same.

The tract was bought and treated as a whole. To make arbitrary division in such a case would lead to confusion. The entire evidence of the location of the mill, back water, location of the houses on the farm, etc., was before the jury. Defendant, on cross-examination, brought out the same evidence from E. P. Cook, "We bought 160 acres of land with a mill on it in 1904." True, in estimating the damage, Cook said: "In my opinion the value of the mill, water power, dam and race and stuff like that, was about $25,000 before 1 January, 1923, when the city of Mebane began taking water and putting in sewerage. It is not worth anything now as a mill plant. I believe our land was worth $100 an acre, and we had 160 acres. I would say 100 acres outside of mill site, and that would be $10,000, I doubt whether it would bring $20 an acre now."

H. P. White, in estimating the damage, made the division like Cook. We cannot hold this as prejudicial error. This assignment of error cannot be sustained.

The 20th assignment of error.—Prayer for instruction: "I charge you that there is no evidence that the defendant has caused and brought about any condition that has produced sickness on the part of plaintiffs or to persons residing on plaintiffs' property." This assignment of error cannot be sustained. There was some evidence to go to the jury—the probative force was for them.

This action is not brought to recover damages for sickness, but for injury done to the property—a taking of property. *Hines v. Rocky Mount,* 162 N. C., 409; *Metz v. Asheville,* 150 N. C., 748; *Williams v. Greenville,* 130 N. C., 93, and that line of cases, on this aspect of the case, are not applicable.

In *Rhodes v. Durham,* 165 N. C., p. 681, *Hoke, J.,* speaking to the subject, says: "It is contended for defendant that damages of this character should not be allowed, because the property of plaintiff does not abut directly upon the stream, and there has been no physical invasion of plaintiff's rights in the same; but this position, in our opinion, cannot be sustained. The property injured extends to within 50 yards of the stream, and the evidence tends to show and the jury has established that defendant wrongfully maintains there permanent conditions amounting to a nuisance, bringing plaintiff's property directly within the harmful effects and sensibly impairing its value. In *Donnell v. Greensboro, supra* (164 N. C., 330), the Court, in speaking to a similar suggestion, said: 'In such case, and except as affected by the existence of certain rights peculiar to riparian ownership, a recovery does not seem to depend (at all) on whether the damage is carried through the medium of *polluted water or noxious air;* the injury is considered a taking or appropriation of the property to that extent, and compensation may be awarded.' . . . And 1 Lewis on Eminent Domain (3 ed.), sec. 230, says: 'The owner of land has a right that the air which comes upon his premises shall come in its natural condition, *free from artificial impurities.* This right has its correlative obligation, which is that one must not use his own premises in such a manner as to discharge into the atmosphere of his neighbor *dust, smoke, noxious gases, or other foreign matter which substantially affect its wholesomeness,'* etc." *Moser v. Burlington,* 162 N. C., p. 144.

Defendant says: "The defendant's twenty-second and twenty-seventh assignments of error must be considered together. The issues being tried were two: (a) Alleged damage for diversion of waters; (b) Alleged damage for pollution of waters. The plaintiffs examined sixteen witnesses and defendant examined nineteen witnesses, and among them many professional men and experts. The law provides that the trial judge 'shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.' C. S., 564. On the question of diversion, the trial judge's charge was: 'Now, gentlemen, if the plaintiffs are entitled to recover anything, then they are entitled to recover their past, present and prospective damages, if any, directly attributable to the alleged diversions and use of the water from Mill Creek; that is, as to the measure of damages on this third issue, you will answer it what you find from the evidence, the burden of proof

being upon the plaintiffs, what you find from the evidence is the decrease, if any, in the reasonable market value of the property of plaintiffs directly attributable to the alleged diversion and use of the water from Mill Creek.'" But the charge must be taken as a whole and not disconnectedly. *Hanes v. Utilities Co., supra.* The court goes on and charges: "Now, as to that issue, I charge you that there is a duty on the plaintiffs to diminish, as far as they reasonably can, the damage they allege they suffered from the diversion of the water. Even if you find from the evidence that there was and is a diversion of the water so as to prevent the running of the mill as it was operated before the alleged diversion, yet this would not necessarily justify abandoning the mill. It would still be their duty to do what they reasonably could to diminish the damages by the use of other power to substitute the alleged loss of water power, the damages, if any, recoverable on this issue being limited to the decrease in value of property directly attributable to the alleged diversion of water, taking into consideration the extent, if any, to which the water power to plaintiffs' mill was diminished by the alleged diversion of water. Then as to the fifth issue, gentlemen, if you answer the fourth issue—'have plaintiffs been damaged by the installation and maintenance of the sewerage system by the defendants as alleged in the complaint?'—If you answer that fourth issue 'No,' then you need not consider and answer the fifth issue or question, but if you answer the fourth issue 'Yes,' then you will proceed to answer the fifth issue, which is 'What permanent damages are plaintiffs entitled to recover of defendant on account of the installation and maintenance of said sewerage system?' As to this issue, gentlemen, if you come to answer it at all, you will answer it what you find from the evidence was the decrease, if any, in the reasonable market value of the property of the plaintiffs directly attributable to the alleged pollution of the creek. The burden of proof upon that issue is upon the plaintiffs." We think the charge fully comes within the decisions on the subject of damages in actions of this kind.

In *Moser v. Burlington,* 162 N. C., p. 144, *Hoke, J.,* in speaking to the subject, said: "On the question of defendant's liability, the cause has been properly tried in the light of these principles, and, on the question of damages, his Honor correctly applied the rule as it obtains with us, that the damages are confined to the diminished pecuniary value of the property incident to the wrong, *Metz v. Asheville,* 150 N. C., 748; *Williams v. Greenville,* 130 N. C., 93, the evidence as to specific cases of sickness in plaintiff's family *having been admitted and its consideration allowed only as it tended to establish the existence of the nuisance and the amount of damage done to the property.*"

A simple proposition—damages for diversion and pollution of water. An elaborate charge, more in detail and reiteration, may be often confusing.

In *Davis v. Long,* 189 N. C., p. 136, 137, it was said: "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., 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." *Hauser v. Furniture Co.,* 174 N. C., p. 463. The principle laid down in *Nichols v. Champion Fibre Co.,* 190 N. C., 1, and like cases, are not applicable to the present case.

The other assignments of error relate to what has been passed on or are not prejudicial, and cannot be sustained.

The following appears of record: "Upon the coming in of the verdict, the defendant moved to set aside the verdict and for a new trial. After hearing the argument of counsel, his Honor intimated that he would set aside or materially reduce the verdict on the fifth issue if the defendant would agree to install, within a time to be agreed upon, a sewerage disposal plant of modern and generally approved design so as to abate the nuisance created by the present method of sewage disposal. After the defendant had considered his Honor's suggestion, it was announced that the defendant could not accept the court's offer and thereupon his Honor signed the judgment set out in the record." This matter was in the sound discretion of the court below. The judgment rendered was not conditional.

It may not be amiss, for the benefit of municipalities, to state the position taken by health experts in matters of this kind: "It is agreed by sanitarians that the objects to be attained are, protection from offensive odors and from the danger of infection from the pathogenic bacteria

which are commonly present in raw sewage. Approved artificial disposal of sewage includes: the removal of solids and oxidation, by sedimentation tanks, septic tanks, chemical precipitation plants, broad irrigation, intermittent filtration through sand, and by sprinkling filters. In addition it is often necessary to sterilize the effluent by the application of liquid chlorine or chloride of lime. There are innumerable modifications of these processes in use but each of them requires continuous and competent control. The most elaborate plant will be ineffective if it is neglected."

The whole matter was practically one of fact for the jury. The judge charged the jury to which there was no exception: "You have been permitted by the court to inspect the premises involved in this litigation, and it is my duty to and I do charge you that you are not to consider anything that you saw as substantive evidence, but what you saw upon such visit to the premises is to be considered by you only in enabling you to understand the testimony of the witnesses."

The court below tried this important case with care and caution. We find no prejudicial or reversible error.

No error.

MYRTLE M. HANES, ADMINISTRATRIX OF CHAS. D. HANES, DECEASED, v. SOUTHERN PUBLIC UTILITIES COMPANY AND T. R. WILLIARD.

(Filed 27 January, 1926.)

1. Actions—Negligence—Wrongful Death—Parties—Executors and Administrators.

The personal representative of the deceased, his executor or administrator, etc., can alone maintain an action for damages for his wrongful death under the provisions of our statute. C. S., 160.

2. Evidence—Prejudice—Appeal and Error—Harmless Error.

Where the defendant in an action to recover damages for the wrongful death of plaintiff's intestate has brought out upon cross-examination that the widow and children of the deceased were living in another state, at Mooseheart, it may not sustain its exception to testimony elicited by the plaintiff from the same witness as to what was the "Moose Home" on the ground that it served to prejudice the jury against it, as defendant had also elicited similar facts.

3. Negligence—Contributory Negligence—Proximate Cause.

If any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendants, then the plaintiff, in the absence of any contributory negligence on the part of the plaintiff's intestate, would be entitled to recover,

because the defendants cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others.

4. Instructions—Repetition of Law—Appeal and Error—Prejudice.

The language and method of an instruction rests within the discretion of the trial judge, if he correctly charges the jury upon the law arising from the evidence and the pleadings, and his repetition of the law favorable to the position of one of the parties does not necessarily constitute reversible error to the prejudice of the other party.

5. Instructions—Interpretation—Appeal and Error.

Where a charge of the court to the jury construed conjunctively as to its relative parts are correct as a whole, it will not be held for error that taken disjunctively as to some of its parts, error may be found.

6. Street Railways — Practical Fenders — Statutes — Negligence — Evidence—Questions for Jury.

The requirement of C. S., 3542, that all street cars when operated must have practical fenders on the lead end thereof, applies to the protection of those traveling by vehicles, automobiles, etc., and where the evidence discloses as in the instant case that had a practical or proper fender been used, the injury would not have occurred, and that the fender was not properly braced, etc., it is sufficient to take the case to the jury.

7. Street Railways—Fenders—Statutes—Evidence—Negligence per se.

The violation of our statute by a street car company, in failing to provide a "practical fender" for its car, causing an injury, is evidence of actionable negligence *per se*.

APPEAL by defendants from *Schenck, J.*, and a jury, at May Term, 1925, of FORSYTH. No error.

Civil action to recover damages for alleged negligence that resulted in the death of plaintiff's intestate.

The material facts and assignments of error will be considered in the opinion.

John C. Wallace, Hastings, Booe & DuBose and Raymond G. Parker for plaintiff.

Manly, Hendren & Womble and Swink, Clement & Hutchins for defendants.

CLARKSON, J. This case was tried in the Superior Court of Forsyth County and plaintiff obtained a verdict and the court below set the verdict aside as being contrary to the weight of the evidence. On the next trial, at the close of all the evidence, a judgment as of nonsuit was rendered against plaintiff and an appeal was taken to this Court and the judgment was reversed. 188 N. C., 465. It was again tried, the usual issues of negligence, contributory negligence and damages were submitted

to the jury, and found for the plaintiff. Judgment was rendered on the verdict and the present appeal taken to this Court.

Defendants assign many errors as to the admission of evidence and the charge of the court below. The facts succinctly are:

C. P. Shelton was taking his sister to work in Winston-Salem in a five-passenger Ford automobile, about 7 o'clock a. m., on the morning of 22 November, 1922. He was driving the car and he and his sister were on the front seat—she on the right side. On the way they picked up Chas. D. Hanes, the plaintiff's intestate, a printer, on his way to work—he sat in the rear seat. The top was up, open with no curtains. They started up Salem Hill on Main Street, going north on the east side of the street, this was between Race and Mill streets. There was a line of cars all the way up the street on the east side going north, and the street car track was in the middle of the street, which was about 60 feet wide, from property line to property line. The Shelton car was following a laundry truck going north, which had slowed down and was skipping and running 8 to 10 miles an hour. About the middle of the block, C. P. Shelton attempted to pass the laundry truck and turned to go around the truck and got on the street car track, and, as he was turning back in front of the truck, there was a collision between the street car and auto, the rear door or rear left end of the Ford car coming in contact with the street car, and plaintiff's intestate was so seriously injured that he died next day about 12 o'clock.

Plaintiff's evidence tended to show that the street car was running from 20 to 25 miles an hour down grade, in the business section of the city, giving no alarm by gong or bell or otherwise, and the traffic congested with people going to work. When Shelton turned to go around the truck the street car was 60 to 75 feet away, with nothing to obstruct the view of the motorman—Shelton was going up grade, the street car was going down grade. The grade at the point of collision was 2½ to 3 per cent per 100 feet.

On the other hand, the evidence for defendant tended to show that Shelton was running 20 miles an hour at the time of the collision; the street car was going at a moderate rate of speed, not over 8 miles an hour, down Salem Hill on Main Street—the grade was very slight. The Ford whipped from behind the truck and came upon the track; immediately when Shelton came from behind the laundry truck, the motorman put on the emergency brakes, and threw the car in reverse as soon as he could, and just before it stopped the collision occurred. The bell or gong was ringing. The automobile when it collided had not slackened, but was getting faster. Shelton had passed the laundry truck 10 or 15 feet before he attempted to turn to the right to get off the street car track. That the street car had practically stopped when the Ford

hit it, moved about 7 feet. That the Ford car ran into the street car. The rear left end of the auto struck the front left corner of the street car. The rear wheels of the auto were broken. The collision was in the residential section.

T. R. Williard, the motorman, got out of the street car and said to Shelton: "Jerry, what in the world was you thinking about?" He said: "Williard, I don't know, I didn't see you until my sister hollered. I will take all the blame on myself. I don't blame you a bit. You made a good stop."

These are the material conflicting facts. There was evidence on both sides to sustain the facts *pro* and *con*.

The plaintiff contends: That the defendants' negligence consisted of negligently and carelessly operating its street car at the place of the collision at a dangerous and excessive rate of speed; that the defendants negligently and carelessly failed to keep a proper lookout ahead for vehicles upon said street in a dangerous and perilous position; that the defendants negligently and carelessly operated said street car down an incline or descent at an excessive rate of speed and in violation of the ordinance of the city of Winston-Salem; that the defendants carelessly and negligently operated said street car at the place of collision at an excessive rate of speed, and failed to keep a proper lookout, failed to give timely warning and failed to have said street car under proper control; and in violation of the laws of the city of Winston-Salem; that the defendants carelessly and negligently failed to provide said street car with a suitable and proper fender on the lead end of said street car, which are known and approved and in general use.

The ordinance of the city of Winston-Salem, is as follows: "Rate of speed for Street Cars—It shall be unlawful for any motorman or other person operating any street car in the city of Winston-Salem to run such car at a greater speed than is reasonable and proper, having due regard to the width, traffic and use of the street car, so as to endanger the property, or life or limb of any person: *Provided,* that a rate of speed in excess of fifteen miles per hour in the resident portion of the city and a rate of speed in excess of ten miles per hour in the business portion of the city, and a rate of speed upon approaching any curve, or upon a descent, in excess of six miles per hour, shall be a violation of this section."

The plaintiff contended that defendants were violating the ordinance at the time of the collision: (1) In operating a street car down a descent at a rate in excess of 6 miles an hour; (2) In excess of 10 miles an hour in the business portion of the city; (3) In excess of 15 miles an hour in the residential portion of the city; (4) That the street car was being

operated at a greater speed than is reasonable and proper having due regard to the width, traffic and use of the street, so as to endanger the life, limb or property of a person.

On the other hand, the defendants contended that they were guilty of no negligence whatever. That plaintiff's intestate was guilty of contributory negligence. That C. P. Shelton ran the Ford automobile into the street car, that he suddenly whipped the Ford car around the truck and got in front of the street car; that he did not keep a proper lookout, and Shelton's negligence was the sole and only proximate cause of the collision. That defendants did not violate any of the provisions of the city ordinance. That there was a slight incline and no descent in the street. That the street car was being operated in a careful manner and in a reasonable and proper way and in full compliance with the city ordinance. That the defendant's street car was equipped with a "practical" fender as required by the statute.

These were substantially the conflict of facts and law between the litigants. We will consider only the material assignments of error in the conduct of the case in the court below.

Mrs. Cornelia Hanes, the mother of plaintiff's intestate, was a witness for plaintiff. On cross-examination, over plaintiff's objection, the following questions and answers were propounded by defendants and answered by witness:

"Q. Mrs. Hanes, Mrs. Myrtle Hanes, the administratrix in this case and the widow, is living out in Indiana, in Mooseheart, Indiana, isn't she? A. Illinois.

"Q. How long has she been out there? A. Well, I kept her and the children six months after the accident until they could make arrangements to take her to Mooseheart, Illinois.

"Q. They are all living there now? A. All out there.

"Q. And they have been living there since when? A. Ever since six months after the accident.

"Q. And they were out there in March, 1924? A. Yes, sir, I suppose so. They went there in six months after his death.

"Q. So far as you know she is not married again, is she, Mrs. Hanes? A. No, sir, she is not married.

"Q. You say she stayed here for six months after the accident? A. Yes, sir, I kept her and the children and provided for them six months after his death.

"Q. They moved to what place in Illinois, did you say? A. Mooseheart, Illinois.

"Q. They have been there all the time since except one time when she came back here on a visit? She was back here on a visit one time? A. Yes, sir, she was back here on a visit but the children wasn't.

"Q. In fact, she hasn't been back here now in how long—a year, or longer than that? A. I don't really remember the month she left here in, but she was back here on a visit.

"Q. They all live out there and the children are in school out there? A. Yes, sir."

On redirect-examination the witness was asked the following questions, the answers to which defendants objected and exception taken:

"Q. What is the Moose Home? A. It is a home where they take the orphan children and provide for them. (Defendants objected to answer and asked that it be stricken out. The court: 'Yes, sir, it is stricken out.')

"Q. Where are Mrs. Hanes' children? (Objection by counsel for defendants, overruled, exception. Mr. Womble: 'May I ask the witness whether she knows or not?' The court: 'I will instruct her if she knows to say, if she doesn't, she must not say.')

"Q. What is the Moose Home? A. It is where they take wives and orphans of the Moose members."

On recross-examination by defendants, the witness stated: "I was here at the former trial in the courthouse when Mrs. Myrtle Hanes was here. She is making Mooseheart her home. She has no other home to stay at."

To sustain their position, the defendants, in their able brief, say: "Section 160 of the Consolidated Statutes, which gives a right of action for a wrongful death, provides that the said action shall be brought (within one year after such death) by the 'executor, administrator or collector of the decedent.' "

In *Hood v. Tel. Co.*, 162 N. C., 71, *Brown, J.*, speaking to the subject says: "Under the statute the only person who can sue is the personal representative of the deceased. *Howell v. Comrs.*, 121 N. C., 362. The right conferred by statute is plainly given to the representative only. The statute confers a new right of action, which did not exist before and must be strictly followed. The parent cannot maintain it even when the statute expressly provides that the recovery shall be for his or her benefit. In such cases only the executor or administrator can sue. *Killian v. R. R.*, 128 N. C., 263; *Hood v. Tel. Co., post*, 92." *Hinnant v. Power Co.*, 189 N. C., 121. Defendants contend that this evidence was prejudicial, the pecuniary circumstances of the family, the number of children left by deceased, was calculated to incite sympathy and influence the jury. Defendants cannot complain.

It seems that the whole purpose of this examination on the part of defendants, was to show that the plaintiff in the case, Myrtle M. Hanes, although administratrix of her husband, was taking so little interest in the case that she was not attending the trial. This evidence was let in

over the objection of plaintiff. Defendants brought out the fact that she and the children were living at Mooseheart, Ill. The plaintiff, to break the force of this testimony, over defendants' objection, asked "What is the Moose Home?" for the purpose of showing the reason why she was not at the trial and that her indigent circumstances after the death of her husband was such as to make it necessary for her to be with her children at an orphanage. In fact defendants brought it out later that "she is making Mooseheart her home." "She has no other home to stay at."

In *Ledford v. Lumber Co.*, 183 N. C., p. 616, it is said: " 'The erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that, on cross-examination, the witness was asked substantially the same question and gave substantially the same answer.' *Hamilton v. Lumber Co.*, 160 N. C., 48." *Gentry v. Utilities Co.*, 185 N. C., 287. This assignment of error cannot be sustained.

The plaintiff's intestate was an invited guest in Shelton's Ford automobile, sitting in the rear seat, when the collision occurred.

The court below charged the jury as follows: "But, furthermore, if in any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendants, then the plaintiff, in the absence of any contributory negligence on the part of the plaintiff's intestate, would be entitled to recover, because the defendants cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others." This charge is in the very language of *White v. Realty Co.*, 182, N. C., 538, cited on another aspect in the present case when here before (188 N. C., p. 468); approved in *Hinnant v. Power Co.*, 187 N. C., 295; *Mangum v. R. R.*, 188 N. C., 696. The charge is admitted by defendants to be correct—the vice complained of was that it was repeated twice by the court below and that this was prejudicial. The court below had just prior charged the jury: "If the negligence of the owner or driver of the Ford car was the sole and only proximate cause of the plaintiff's injury, the defendant would not be liable, for in that event the defendants' negligence would not have been one of the proximate causes of the plaintiff's injury." This is repeated twice by the court below, in language (1) "I want you to get that," and repeated (2) "In other words," and repeated substantially. The court below charged favorably for defendants three times as to the "sole and only proximate cause" prior to the repeated charge above that is complained of. Matters of this kind must be, to a great extent, left to the sound discretion of the court below. We cannot hold it prejudicial or reversible error. The assignment of error cannot be sustained.

In the measure of damages, the court below charged the jury in the language approved in *Mendenhall v. R. R.*, 123 N. C., 278, and other cases. *Speight v. R. R.*, 161 N. C., 86; *Ward, Admr., v. R. R.*, 161 N. C., 186; *Lynch v. Mfg. Co.*, 167 N. C., 102; *R. R. v. Armfield*, 167 N. C., 464; *Ingle v. R. R., ibid.*, 637; *Massey v. R. R.*, 169 N. C., 246; *Gurley v. Power Co.*, 172 N. C., 695; *Comer v. Winston-Salem*, 178 N. C., 387; *Purnell v. R. R.*, 190 N. C., 575. See, also, *Carpenter v. Power Co., post*, 130.

This assignment of error cannot be sustained.

The assignment of error (19) with reference to the measure of damages in a subsequent part of the charge, cannot be sustained. The charge must be construed conjunctively, as a whole, and not disjunctively, or in parts. Taken as a whole, the charge is not conflicting. *S. v. Exum*, 138 N. C., 599; *White v. Realty Co., supra; Gentry v. Utilities Co.*, 185 N. C., 287; *Exum v. Lynch*, 188 N. C., 392; *Cobia v. R. R.*, 188 N. C., 487; *Mangum v. R. R., supra*, 701.

Assignment of error was made by defendants to the following charge of the court below: "If by the greater weight of evidence you find that a proper fender would have saved the life of plaintiff's intestate, and that the car of the defendant, Southern Public Utilities Co., was not equipped with a proper fender, and that the absence of a proper fender was the proximate cause of the death of the plaintiff's intestate, then you will answer the first issue, 'Yes.'" The evidence in the record in regard to the fender was: Lola Shelton, for plaintiff, testified: "The fender was an iron pipe about the size of a table with a rope netting in the middle of it."

T. R. Williard, motorman for defendant, testified: "The fender on the car was a standard fender, the regular fender used on all of the main line cars. The frame of the fender was an iron pipe, extending about three feet in front of the car, with a rope web to fill up the open spaces and a chain from the bottom of the window up to the top of the fender to support it. The purpose of those fenders is to protect humans, children, dogs, by tripping up anything walking on the track; the fender catching it is the intention. It drops into the webbed part or basket part which is made of rope webbing. It is webbed up I guess 2½ feet high. . . . The fender on the street car was made of wrought pipe, wrought iron pipe as a rim and extended about 2½ or 3 feet in front of the body of the street car. That was the only metal between that and the street car. There were no wood braces of any kind between that iron rim and the street car. The iron pipe that I have just described was broken in the collision and I guess the first part of the street car that came in contact with the automobile was that fender. The fender broke

and then the automobile came in contact with the body of the street car. . . . I do not know how old this street car was. I had been working for the company six years at that time and it was in service then."

I. W. Worrell, conductor, testified: "The fender was made of iron pipe and rope netting the same as is used today. They had two classes of fenders, one on the main line and the other kind on the other line. The kind on the other line was a little drop fender underneath the car, doesn't come out in front of the car at all. These kinds are on the new cars. I don't know whether you would call the one on the car that had the collision the old type or not; it is like all the rest except what they call the safety cars operated by one man. I had been working for the company at that time about six years, but I can't say that this fender was in service at that time, the fenders being often changed on those cars. The best I remember, the left-end side of the fender was broken after the impact but I didn't see it when it was broken, it was down when I went around there. I couldn't say whether the fender struck the left hind wheels before any part of the body of the car struck the automobile or not; the fender was broken on that side and reached out something like three feet in front of the car. . . . Speaking about those fenders on the cars running east and west, I wouldn't call them a fender myself. I don't know what they call them. It is just a little drop under there that you touch, outside it falls down on the rail; there is nothing out in front of the car at all. The fenders on this particular car extended out in front. As to whether or not the front of the new cars forms almost a cow catcher in front of it, they may be a little different shape from the others, not much. The other cars do not go straight across; there was not any bumper on the lead end of the new cars."

This is the most serious assignment of error presented on the appeal.

C. S., 3542, in part, is as follows: "All street passenger railway companies shall use practical fenders in front of all passenger cars run by them."

In *Smith v. Electric R. R.*, 173 N. C., 492, *Clark, C. J.*, speaking to the subject, says: "In *Powers v. R. R.*, 166 N. C., 599, the Court said: 'This Court has always held that any act of a common carrier which is a violation of law is negligence *per se*.' In requiring 'practical fenders' in front of all passenger cars the statute intended that they should be 'efficient' for the purpose intended. . . . The motorman of a street car must be more diligent and careful for the safety of pedestrians than a locomotive engineer, for, as said recently in *Ingle v. Power Co.*, 172 N. C., 751, the locomotive has exclusive right of way and is traveling on its own property where, as a rule, pedestrians have no right

to be, unless crossing a track or by recognized custom, while the street railways are using the streets to which the public have the same right."

What is the definition of "practical fender?"—practical means "fit for doing." Webster's New International Dictionary. Proper is synonymous with fit. Webster, *supra.*

Fenders are for the purpose, and the evidence shows, to protect the life and limb of men, women and children; protect all classes of animals, and should be "practical" and proper to protect persons in vehicles, etc., all of whom have equal rights upon the streets, that the street car has. *Moore v. R. R.*, 128 N. C., 458. Was the fender a practical one, fit or proper one? It failed to have proper braces, supports of sufficient strength to meet the emergency in the present case. It failed to have sufficient strength to push a 5-passenger Ford car off the track, striking it in the rear, as contended by plaintiff. Defendant did not construct the fender with braces or supports. The fender had been in service six years. We think there was sufficient evidence, more than a scintilla, to go to the jury to determine under the statute if the fender was "practical" and proper, under all the facts and circumstances of this case. This assignment of error cannot be sustained.

We have carefully examined the record and find no new or novel proposition of law in the other assignments of error, and they cannot be sustained. From a review of the entire charge by the court below, it is clear and explicit and explains the law arising on the facts. It appears that the charge followed the language and substance of the decisions of this Court on the different aspects of the law as presented by the facts. After the charge, the record shows: "The defendants have asked the court to give these contentions—which the court now does." The instructions asked for and contentions were given. The court in conclusion said: "Those are the contentions, gentlemen of the jury, of the defendants. The court endeavored to give the contentions of the parties as the trial progressed, but it is the province of counsel to put in writing the contentions and to ask that they be given. The court thinks they are proper to be given under the law and the court gives them." We think the court below was generous in giving the contentions of defendants again and in the language suggested by defendants.

The contest between the litigants was mostly one of facts in the province of the jury to determine. They have found the issues in favor of plaintiff. We find no prejudicial or reversible error in law.

No error.

DOUGLASS STEPHENS, ADMINISTRATOR OF OTTO STEPHENS, v. BLACKWOOD LUMBER COMPANY AND CANEY FORK LOGGING RAILWAY COMPANY.

(Filed 27 January, 1926.)

1. Negligence—Explosives—Commensurate Care.

Those who use high explosives in the conduct of their business are held to a degree of care in its handling, storage or use, commensurate with the danger of such use, and upon failure thereof, are liable in damages for an injury inflicted on trespassers or licensees when the proximate cause thereof.

2. Same—Evidence—Children—Nonsuit.

Held, evidence that the defendant stored large quantities of blasting powder on its own premises in an old mill used for the grinding of flour, where children frequently went, to be used in the construction of a lumber railroad in connection with its business, and that the mill with the powder stored therein was left at intervals unlocked and the powder accessible, defendant is presumed to have anticipated that an injury might thereby be inflicted upon one of the children visiting the mill; evidence is sufficient to be submitted to the jury to sustain allegation of negligence, and recovery may be had.

3. Same—Trespasser—Licensee.

Where an owner of an old mill has stored therein blasting powder, for the purposes of its lawful business, and the mill was accessible to children who frequently went there, it is liable in damages for an injury to one of these children, whether a licensee or trespasser, proximately caused by its negligent act.

4. Same—Nuisance.

It is not a nuisance for one to store blasting powder in quantity on its own premises to be used in prosecuting its business; liability for an injury caused by the explosion of powder thus stored is to be determined upon the doctrine of negligence, and not of nuisance.

5. Same—Intervening Cause—Proximate Cause.

Where the defendant has stored blasting powder in quantity at an old mill used for grinding flour for the public, on its premises, for its lawful business, where children frequently came, and one of them has taken some of the powder several miles from the premises and several hours later has playfully ignited the powder, knowing its explosive quality when exposed to fire, the negligence of the defendant in leaving the powder accessible on its own premises is not the proximate cause of the injury, the act of the boy being an independent, intervening cause, for which the defendant may not be held responsible.

6. Negligence—Questions for Jury—Instructions—Courts.

In an action to recover damages arising from the negligence of the defendant, the question presented is usually a mixed one of law and fact for the jury to determine as to the facts, under a proper instruction from the court.

STEPHENS *v.* LUMBER CO.

APPEAL by plaintiff from *Finley, J.*, at May Term, 1925, of JACKSON. Affirmed.

Civil action to recover damages for wrongful death. From judgment as in case of nonsuit, upon motion of defendants, at close of plaintiff's evidence, plaintiff appealed.

W. R. Sherrill, A. W. Horn, Geo. B. Patton and G. C. Poindexter for plaintiff.

A. Hall Johnston and Alley & Alley for defendants.

CONNOR, J. Plaintiff's only assignment of error, upon this appeal, is based upon his exception to the order allowing defendant's motion, at the close of plaintiff's evidence, for judgment as in case of nonsuit. C. S., 567.

Evidence offered by plaintiff in support of the allegations of his complaint, tends to show that Otto Stephens, son and intestate of plaintiff, was returning home from services at John's Creek Church in Jackson County about 9 o'clock, on the night of 18 August, 1921, accompanied by several boys of about his age; that while walking along the road, with these boys, he took some powder from his pocket, and placed it in an envelope; that one of his companions struck a match, and attempted to ignite the powder but failed to do so, because the match did not burn; that thereupon he procured from another of his companions a match, saying that he would light the powder himself; he struck the match and ignited the envelope, which he was holding in his hand; there was a flash of the powder in the envelope; his clothing caught fire; the flames spread quickly over his body, causing the powder in his pocket to explode, with the result that he was so badly burned that he died the next day at 5 p. m. from his injuries.

Several of his companions, as witnesses for plaintiff, testified, without objection by defendants, that Otto Stephens told them that he got the powder at the mill. There was evidence that he left his home, alone, during the afternoon, about 4 o'clock, to go to a neighbor's house to ask his older brother who was visiting there to go with him to the services at the church that night; that he stopped for a few moments at the mill on the land of defendant, Blackwood Lumber Company, and that soon after leaving the mill, he told his cousin, George Stephens, whom he met a short distance from the mill, that he had some powder. George, who was 14 years of age at the time, accompanied Otto to the church, which was three miles from the mill, and was with him at the time he was fatally injured.

There was evidence that defendants, in 1921, were conducting a lumber and logging business in Jackson County; that in the conduct of their

business, they operated a railroad which ran about 75 yards from plaintiff's residence; that during August, 1921, defendants were engaged in the construction of logging roads to enable them to get logs from the mountains to their railroad, and thence to their sawmills; that in the construction of said logging roads, they used dynamite caps and blasting powder; an old mill was located on the land of defendant, Blackwood Lumber Company, about a quarter of a mile from the home of plaintiff, where his son, Otto, lived; there was a waterfall at this old mill, and children of the community were in the habit of going there to play. This mill had been maintained for many years, and was used by the people residing in its vicinity to grind corn and wheat. If the miller was present, he would grind for the people; if not, they would grind for themselves. The only means of closing the door to the millhouse was a button, with a nail through it, on the inside of the door, which anyone could turn; there was no lock on the door. There was evidence that blasting powder was stored in the millhouse by defendants. This mill was about three miles from John's Creek Church, near which plaintiff's intestate was injured by the explosion of the powder, which he took from his pocket and placed in the envelope and then ignited with a match.

Plaintiff's intestate was about 14 years of age at the time of his injury and death, but there was evidence that he was the size and had the mental development of a boy of 8 or 10 years of age; that he sought the company of children younger than himself and preferred to play with them rather than with children of his own age. He had attended school and was in the third or fourth grade. He sometimes accompanied his father, when hunting with a gun; had himself shot a gun several times, when with his father, and knew that powder would burn.

From this evidence the jury would have been justified in finding that defendants had stored blasting powder, to be used in the construction of logging roads, in the old millhouse, that the door to this mill was not locked or securely fastened on the afternoon when plaintiff's intestate went there; that he entered the millhouse and procured there some of the powder which defendants had stored therein and that this was the powder by the explosion of which he was fatally injured, when he ignited the envelope with a match, while returning from the church three miles distant from the mill. There was evidence also that children, including plaintiff's intestate, were in the habit of going to the mill to play about the premises and in the old millhouse; that plaintiff's intestate was about 14 years of age and smaller in size than most boys of that age; that he knew that the powder which he got at the mill would, when brought in contact with fire, explode. There was no evidence, however, as alleged in the complaint, that the powder in the mill was in cans

which were open and exposed or that plaintiff's intestate went to the mill, on the afternoon of 18 August, 1921, to play. He went alone, and remained there only a short time.

The court was of opinion, that upon all the evidence, the jury would not be justified in finding that the death of plaintiff's intestate was caused by the negligence of defendants, and therefore sustained their motion for judgment as in case of nonsuit, and dismissed the action. Plaintiff contends that in this there was error.

Two questions are presented by this contention. First, do the facts which the jury would have been justified in finding from the evidence, constitute negligence on the part of defendants? Second, if so, was such negligence the proximate cause of the death of plaintiff's intestate?

The essential elements of actionable negligence are—(a) failure to exercise commensurate care, involving (b) a breach of duty, resulting in (c) damage to the plaintiff. Joggard on Torts, ch. 12, sec. 246. The duty, the violation of which gives rise to a cause of action, is to exercise due care under the circumstances. There is no allegation or evidence in the instant case of the existence of any relation between defendants and plaintiff, out of which any peculiar duty—as in the case of master and servant—arose with respect to the conditions at the place where the powder was stored. Defendants had stored blasting powder, a legitimate agency for the prosecution of a lawful purpose, in a building on their own land. This blasting powder was of a highly explosive nature, when exposed to fire; unless so exposed, it was harmless. The building in which the powder was stored, was often visited by the people residing in its vicinity for the purpose of having corn and wheat ground there into meal and flour. Children of the community frequently went there to play. Defendants had the right to store their powder in a house upon their land, but in view of the explosive nature of the powder, defendants owed a duty to those who might go into the mill for the usual and customary purposes with respect to the manner in which said powder was stored, to the end that those who might go into the mill should not suffer harm, by reason of the explosive nature of the powder. This duty was to exercise for the protection of such persons, whether adults who went there to have corn or wheat ground, or children who went there to play, a degree of care commensurate with the dangerous character of the powder, such dangerous character being due to the very great probability, if not certainty, that it would explode, if brought in contact with fire, and injure persons nearby.

This Court in *Brittingham v. Stadiem,* 151 N. C., 299, has approved the doctrine stated in *Mattson v. R. R.,* 95 Minn., 477, 70 L. R. A., 503, as follows: "The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of

the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article." The doctrine was applied to the facts in that case, and defendant was held liable to plaintiff for injuries sustained by plaintiff, while in defendant's store as a customer, caused by the careless handling of a pistol by defendant's son, a boy 12 years of age who was at work in the store for defendant. The negligence of defendant's employee, a boy 12 years of age, in carelessly handling a loaded pistol was imputed to defendant, upon the principle of *respondeat superior*. It will be noted that the injury occurred in the store, to plaintiff who was present as an invitee.

In *Wood v. McCabe,* 151 N. C., 457, *Justice Brown,* writing for the Court, says: "All courts and writers agree that the degree of care required of persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what would be reasonable care in respect to grown persons of experience would be negligence as applied to youths and children," citing 7 A. & E., 411, and *Mattson v. R. R., supra.* In this case defendants were held liable for damages sustained by plaintiff, a boy of 16 years of age, resulting from injuries caused by the explosion of dynamite which he had picked up from the ground, where it had been left by employees of defendant who had been using dynamite in the construction of a railroad. Plaintiff in this case was an employee of defendants, and was engaged in the performance of duties incident to his employment when he was injured. Defendants were held to have been negligent because they employed plaintiff to do dangerous work, without instructing him as to the danger in handling dynamite as he was required to do by defendants.

In *Barnett v. Mills,* 167 N. C., 576, *Justice Allen,* writing for the Court, says: "Where there is evidence from which the jury is justified in finding that dynamite was left by employees of defendant on the ground, or in an uncovered box at a place not enclosed and much used by the public, including children, this would be negligence." Plaintiff, a boy 11 years of age, picked up a dynamite cap, which he found in an open box, or on the ground, near a well, which defendant's employees had been blasting out with dynamite. These employees had left dynamite caps in an open box or on the ground, near the post office in the village of Cliffside. Plaintiff took a dynamite cap home with him, and sometime thereafter, while at play, struck it with a hammer, thus causing it to explode; he was injured by the explosion, and defendant was held liable for damages resulting from the injuries. It was held to be negligence for defendant's employees to leave dynamite in an open box or lying on the ground in a public place, where children were accustomed to play.

Plaintiff, a child, went to the place where the dynamite was negligently left, because other children were there. He did not know what it was. He thought it was an electric wire about 6 inches long.

The principle stated and approved in *Barnett v. Mills, supra,* is cited in *Krachanake v. Mfg. Co.,* 175 N. C., 435, and upon its application to the facts in that case defendant was held liable to plaintiff. There defendant had stored dynamite, to be used by it in blasting, in a small house located within 75 or 100 yards of a main road, running through the village of Acme; this house was visible from the road, and there was a path leading from the road to the house; the house was not enclosed, and the door to it was not locked or nailed up; the dynamite was in two boxes, one of which was open, so that the dynamite was exposed; plaintiff, a boy of 7 years, returning home from school, left the road, went up the path to the house, and finding the door open, entered the house, and took five dynamite caps from the open box, which he carried home with him; upon arriving at his home, he went to the fire to warm, with the dynamite caps in his hand; while standing before the fire, the dynamite caps exploded, injuring his eye. This Court held that defendant was negligent in leaving the dynamite exposed in the open box, in an unenclosed house near the public road. In this case plaintiff did not know the dangerous character of the dynamite cap, never having seen one before. It was held that there was no error in the refusal to allow the motion for nonsuit, upon all the evidence in this case.

In *Fanning v. White,* 148 N. C., 541, this Court held that "To store dynamite, being used for a legitimate purpose necessary for the construction of a railroad, on its own right of way, in a shanty with the door open, and the window torn out, affording any person ample opportunity to see the danger, with the warning written or printed on the boxes, cannot violate any duty owing to a person going upon the premises without a license, either express or implied." In that case this Court affirmed a judgment of nonsuit, holding that one storing dynamite on his own premises for legitimate purposes, in boxes, with the word "Dynamite" written or printed on the box containing it, placed in a shanty with the door open, and window torn out, thus affording ample opportunity to see the danger, owes no further duty to a person going upon the premises, without either an express or implied license, and is not liable to him for damages caused by his companions shooting into the shanty and exploding the dynamite, not knowing it was there. *Chief Justice Clark* dissented from the opinion of the Court, emphasizing the facts, however, that defendants had stored in said shanty 1,600 pounds of dynamite, and that there was nothing about the shanty to indicate to the person who shot into the shanty the presence of the dynamite. He

says further that the shanty was located within the corporate limits of the town of Bridgeton, with a population of 300 to 400 inhabitants. He was of the opinion that defendant, upon the facts in that case, was guilty of maintaining a nuisance on its premises and therefore liable for injuries resulting therefrom.

In the instant case, plaintiff's intestate, although a boy 14 years of age, did not go into the millhouse, where the powder was stored, to play as children sometimes did, or to grind corn or wheat, as the people in the community were accustomed to do. However, whether he was an invitee or at least a licensee and not a trespasser was for the jury to determine upon the evidence. There was evidence that the door was not locked or securely fastened, as was the case in *Fanning v. White, supra;* there was no evidence that the powder was in an open box or can, as was the case in *Krachanake v. Mfg. Co., supra,* and as plaintiff in this case alleged in his complaint; plaintiff's intestate knew that the article which he took and put in his pocket was powder, and knew that it would burn or explode, when fire was brought in contact with it. He was not ignorant of the explosive nature of the powder which rendered it dangerous, as was the case with the plaintiff in *Barnett v. Mills, supra,* and in *Krachanake v. Mfg. Co., supra.* He was not an employee of defendant as was the plaintiff in *Wood v. McCabe, supra,* nor a customer of defendant, as was the plaintiff in *Brittingham v. Stadiem, supra.*

Defendants, however, owed a duty to plaintiff's intestate, even if he was technically a trespasser on their premises, of a higher degree than not to wilfully harm him. This is true although he knew that the powder was stored in the mill when he went there and knew its dangerous nature. This duty was to exercise care with respect to the manner in which the powder was stored, commensurate with its known dangerous nature and the probability of an explosion under circumstances which defendants must necessarily have foreseen. As to whether a prudent man, exercising due care, commensurate with the circumstances, would have stored powder, which was of a sufficiently explosive nature to make it a useful instrumentality for blasting purposes, in a quantity sufficient to be used in the work in which defendants were engaged, in an old mill, located as was the mill of defendants, where people of the community, and especially children were accustomed to go, with no means of locking or otherwise securely fastening the door to the mill, so that access could be easily had to the powder, is a question, which, under our decisions, was proper to be submitted to a jury, for them to determine whether or not defendants were negligent upon the facts in this case. In *Jones v. Warehouse,* 138 N. C., 546, it is said: "This Court has long since abandoned the theory that negligence is a question of law, and adopted the only rational and workable theory, that it is a mixed question of law

and fact. It is impracticable, if not impossible for the Court, as a matter of law, to say whether or not there is negligence, except where the facts are admitted and no reasonable controversy can arise in regard to the inferences to be drawn therefrom. We have so frequently repeated this proposition that it is unnecessary to cite authority." While upon a motion for judgment of nonsuit, the facts as the evidence tends to show them to be favorable to the contentions of plaintiff, are admitted, inferences to be drawn from these facts are usually for the jury and not for the court. We must hold in the instant case that there was evidence sufficient to be submitted to the jury upon the first question presented by plaintiff's contention upon this appeal.

"One who stores and keeps gunpowder, dynamite or other explosives upon his premises, under circumstances rendering him guilty of maintaining a nuisance, is liable for all damages resulting from an explosion of such explosives, whether he is chargeable with negligence or not." 25 C. J., 183. There is no evidence in the instant case of any facts or circumstances which make the storing of powder by defendants in their mill a nuisance, rendering defendants liable for all damages resulting from the presence of the powder in the mill.

"One who negligently handles or stores explosives upon his premises is liable for injuries resulting to others by reason of such negligence, and this without regard to the question of whether the storing or handling without negligence under the circumstances would constitute a nuisance." 25 C. J., 185. There is evidence of negligence in this case, but such negligence is not actionable, unless it was the proximate cause of the death of plaintiff's intestate. We are thus brought to a consideration of the second question presented by plaintiff's contention that there was error in sustaining defendant's motion for judgment of nonsuit, to wit: "If so, was such negligence the proximate cause of the death of plaintiff's intestate?"

The injuries to plaintiff's intestate, resulting in his death, did not occur at the mill, or on or near defendant's premises; they occurred near the church, three miles distant from the mill. They did not occur while plaintiff's intestate was in the act of taking the powder and putting it in his pocket at the mill; they occurred at least four hours after plaintiff's intestate had left the mill, and the premises of defendants; plaintiff's intestate did not go to the mill to play or to grind corn or wheat, on the afternoon when he got the powder; the explosion of the powder was not caused by any act of omission or commission of defendants. It was the explosion of the powder and not its presence at the mill or the manner in which it was stored that caused the death of deceased. If the powder had remained at the mill, where defendants had stored it and where they reasonably contemplated it would remain, no harm

would have come to plaintiff's intestate. If plaintiff's intestate had been an adult, no contention could or would be made that his death was caused by the act of defendants, and that defendants are liable to plaintiff for the death of his son and intestate. His death was due to his own wrongful act in taking the powder and carrying it away and to his own carelessness in igniting the envelope in which he had placed the powder while holding same in his hand. The connection between defendant's negligence in storing the powder in the mill, if upon the evidence the jury should find that defendants were negligent as alleged, and the death of plaintiff's intestate was broken by an intervening cause, to wit, the acts of deceased. Unless it can be held that plaintiff's intestate, by reason of his age, cannot be held in law responsible for his acts, in taking the powder and igniting it, plaintiff's contention that the negligence of defendants was the proximate cause of the death of his son and intestate, cannot be sustained.

Otto Stephens, at the date of his death, was 14 years of age; he knew that the powder which he placed in the envelope would explode when fire was brought in contact with it; he struck a match for the purpose of igniting the powder, and ignited it. If one of his companions had been injured by the explosion of the powder, the act of said Otto Stephens, and not the negligence of defendants in storing the powder in the mill, would have been the proximate cause of the injury. In *Lineberry v. R. R.,* 187 N. C., 786, this Court held that where a boy 9 years old was pushed by a companion of about his age, so that he fell beneath a moving train, which was exceeding the speed limit fixed by an ordinance of the town through which the train was passing, and was injured by said train, the proximate cause of the injury was the act of his companion and not the negligence of the railroad company. The railroad company was not liable for damages resulting from the injuries. The opinion in that case, written for the Court by *Justice Clarkson,* is well supported by authority cited therein.

"Notwithstanding the fact that the person injured is a child, nevertheless to impose liability, defendant's act must have been the proximate cause of the injury. So where explosives are wrongfully carried away from the place in which they are stored by children capable of understanding the wrongful nature of their act, the negligence in keeping or storing cannot be regarded as the proximate cause of a subsequent injury to the child or other children by their use, where defendant has done nothing to invite or provoke the act of the child and there is nothing in the circumstances which would cause it to be foreseen." 25 C. J., 187. *Horan v. Watertown* (Mass.), 104 N. E., 464; *Hale v. Tel. & Tel. Co.* (Cal.), 183 Pac., 280; *Perry v. Rochester Lime Co.* (N. Y.), 113 N. E., 529; *Bottorff v. South Const. Co.* (Ind.), 110 N. E., 977;

Nicolosi v. Clark (Cal.), 147 Pac., 970; *Jacobs v. R. R.* (N. Y.), 98 N. E., 688; *Carter Coal Co. v. Smith* (Ky.), 191 S. W., 631; *Carpenter v. Miller* (Penn.), 81 Atl., 438.

There is no evidence in this case from which the jury could find that plaintiff's intestate, 14 years of age, although of the size and mental development of a boy 8 to 10 years of age, did not, because of his age or lack of understanding, appreciate the probable effect of his act in taking the powder away from the mill and igniting it, while returning home from the church with his companions. All the evidence is to the effect that he knew and appreciated the inherent qualities of the powder, and that he went to the mill, during the afternoon of 18 August, 1924, for the purpose of getting powder, and not to play; and that he struck the match and ignited the powder in the envelope with full knowledge that it would burn and explode. Herein is the distinction between the instant case and *Barnett v. Mills, supra,* and *Krachanake v. Mfg. Co., supra,* in both of which cases plaintiffs did not know that the articles which they took was dynamite, and explosive. Defendants, while they may have been negligent in the manner of storing the powder in the mill, could not have foreseen that plaintiff's intestate or any other boy in the community would go to the mill, take the powder to a distance of three miles and then ignite it with a match. Their negligence cannot be held the proximate cause of the injury and we must hold that there was no error in sustaining the motion for judgment of nonsuit. The judgment is

Affirmed.

WICKES WAMBOLDT v. RESERVE LOAN LIFE INSURANCE COMPANY.

(Filed 27 January, 1926.)

1. Insurance—Accident—Contracts—Incontestability—Actions—Defenses.

Under the provisions of an accident policy of insurance that the policy shall be incontestable after it has been renewed beyond the first year, except for the nonpayment of premiums, the insurance company may not successfully defend upon the ground of misrepresentations of the insured in its procurement, as to material facts which would have governed the company in not issuing the policy sued on, after the expiration of one year.

2. Same—Permanent Disability.

Where a policy of insurance specifically provides that the permanent loss of the sight of both eyes shall constitute a total disability, it cannot set up a defense that the plaintiff in the action was not totally disabled, but had some earning capacity, after his eyesight had completely and permanently failed him.

3. Same—"Riders"—Supplemental Contracts.

Where riders are afterwards attached to the original policy of insurance as supplemental contracts, relating to the date of the original policy contract, the latter of which contains an incontestable clause after the renewal payment after the first year has been paid, and the insured has thereafter by one of these renewal contracts or riders increased the insurer's risk and paid the additional premium charge therefor, the clause of incontestability in the policy originally issued remains in force unless otherwise agreed upon, and does not relate to statements made at the time of the issuance of the rider attached to the policy so as to invalidate the contract for material representations the insured may have then made.

APPEAL by defendant from *Webb, J.*, at September Term, 1925, of BUNCOMBE. No error.

In 1915 defendant issued to plaintiff two policies of insurance, in accordance with applications therefor, one dated 1 June, the other 29 October. Both policies were on the ordinary life, double indemnity and total disability plan. By each policy, defendant promised and agreed to pay to Alice May Wamboldt, wife of plaintiff, at his death, subject to the terms and conditions set out therein, the sum of $5,000. To each policy were attached riders, forming a part thereof, providing, upon certain contingencies, for double indemnity and total disability. Each policy contained a clause, in words as follows: "If the premiums are duly paid as required, this policy shall be incontestable after it has been renewed beyond the first year." All premiums required to renew these policies and to keep them in full force have been duly paid.

On 23 May, 1921, plaintiff inquired by letter if defendant issued, and, if so, if it would then substitute for the riders attached to and forming a part of the policies as originally issued, riders providing for double indemnity, total disability and premium waiver. On 26 May, 1921, defendant, replying to plaintiff's inquiry, advised him that it issued a double indemnity, total disability and premium waiver certificate, as per sample enclosed, and that upon evidence of present insurability it would grant the additional benefit on the policies then held by plaintiff, issued in 1915. Pursuant to this correspondence, plaintiff, on 3 June, 1921, signed the formal applications sent to him by defendant for the additional protection, and forwarded same, by mail, to defendant. Each of the applications contained the following representations made to defendant by plaintiff: "I have no impairment of sight or hearing; am near-sighted, with astigmatism." "I have made no application for life, accident or health insurance in any company or association upon which I have not been notified of the action thereon. No application ever made by me for life, accident or health insurance has ever been declined." On 6 June, 1921, defendant acknowledged receipt of the application,

and of check sent therewith to pay the sum required by defendant for the additional protection. The check, however, was not for a sufficient amount to pay the sum required for the issuance of the certificate applied for on both policies, due to plaintiff's misapprehension of defendant's letter. This and other matters involved in the transaction were adjusted by further correspondence, and on 14 July, 1921, defendant returned the policies to plaintiff, with the certificate for double indemnity, total disability and premium waiver attached to each policy, in substitution for the rider which was attached to the policy at the time same was issued in 1915 and which had been canceled when the substituted rider was attached.

These certificates or riders are described as supplemental contracts; each bears the date of the policy to which it is attached, and not the date on which it was attached to the policy. Each rider recites that it is a component part of the contract, and that it is attached to and forms a part of the policy, which is referred to and called the principal contract. It is provided in each rider that "none of the conditions named in this supplemental contract shall be deemed to waive, modify or affect in any manner any of the conditions contained in the principal contract to which this supplemental contract is attached." The amount charged by defendant and paid by plaintiff, for the additional protection provided by the riders substituted for those attached originally to the policies, includes the reserve on each policy from the date of its issue to the date of the substitution, which would have been accumulated from additional premiums paid, had these riders been attached to and formed part of the policies from 1915, when they were issued, to 1921, when the riders were substituted for those which were canceled.

The rider, attached to each policy, includes the following clause: "The entire and irrecoverable loss of sight of both eyes will be considered as total and permanent disability within the meaning of this provision," *i. e.*, the provision for payment to the insured, upon his permanent disability, of an annual income of five hundred dollars, and the further provision that upon the death of insured the principal contract shall be payable, in accordance with its terms, without deduction for any income payments. It is also provided that upon the insured's becoming permanently disabled, defendant will waive payment of further premiums on both the principal and the supplemental contracts.

Plaintiff alleges, in his complaint, "that on or about 1 January, 1922, while the said contract of insurance was in full force and effect, the plaintiff suffered the entire and irrecoverable loss of sight of both eyes and became entitled to all of the payments and benefits provided in said contract of insurance, in case of such loss of sight of both eyes." He further alleges that defendant has denied its liability to him under his

said policies, and has declined and refused to waive payment of premiums on his policies, since the date of his permanent disability, due to loss of sight of both eyes; that plaintiff has paid under protest to defendant the amount of said premiums. Plaintiff demands judgment that he recover of defendant the sum of $1,790.80, which includes the amount alleged to be due as annual income for a year and a half, and the amount paid under protest as premiums on both policies since the date of the permanent disability.

Defendant, in its answer, alleges that the supplemental contracts as evidenced by the riders attached to the policies did not become effective until the date on which they were attached, to wit, 14 July, 1921; that on said date, plaintiff was blind, having theretofore, to wit, on 9 June, 1921, suffered the entire and irrecoverable loss of sight of both eyes; that he was permanently disabled at the time the contract was made and that by reason of this fact, the said supplemental contract was and is null and void; and that defendant, immediately upon discovering the fact, tendered to plaintiff the sums paid as premiums for the said supplemental contracts, which plaintiff refused to accept.

Defendant, in its amended answer and counterclaim, verified on 3 October, 1923, alleges that it was induced to issue the supplemental contracts by false and fraudulent representations made by plaintiff in his applications therefor, to wit, that at the date of said applications plaintiff had no impairment of sight, and that at said date he had made no application for insurance on which he had not been notified of the action thereon, and that no application made by him for insurance had ever been declined. Defendant prays judgment directing the surrender by plaintiff of said supplemental contracts, and that same be declared null and void.

Plaintiff, in his reply to the answer and amended answer and counterclaim, denies the allegations contained therein, and renews his prayer for the relief demanded in his complaint.

On the trial, plaintiff testified that he became totally and permanently disabled by the total and irrecoverable loss of sight of both eyes on or about 1 January, 1922. He further testified that at the time of his correspondence with the defendant, resulting in the substitution of the riders, in accordance with his application dated 3 June, 1921, he was residing in the city of Atlanta, in the State of Georgia. He said, "I went home after lunch on 9 June, 1921, and, at the direction of my oculist, went to bed. He told me to go to bed, and to rest my eyes. I received calls from my oculist, in my room, on and after 9 June, 1921. I was in bed a good part of the time in a room with the shades to the windows pulled down. I was told that I would not have to remain in my room more than a week, but I was kept there from day to day, for nearly

a month. During this time I carried on my correspondence. I was in this room, with my shades down, when my policies were returned to me by defendant on 14 July, 1921, with the substituted riders attached. The trouble with my eyes was discovered suddenly, on 9 June, 1921. This was after I had signed the application on 3 June for the substituted riders. The trouble was caused, so I was informed, by the sudden detachment of the retina in each eye. I was told that if I would remain in bed, with my feet raised above my head, the retina would reattach. I did not communicate with the defendant company, and inform it of my condition. I made my application on 3 June and the trouble began on the 9th. I paid my premiums in December following, and again in June, 1922. I did not inform the defendant at either time of my trouble. I thought it was temporary and made no claim for permanent disability. As soon as I gave up hope of recovery—in the fall of 1922—I notified the company of my condition, and on 8 September, 1922, made claim under my policies. I was then living in West Asheville, N. C. My attorney, who lived in Atlanta, filled out the form required for proof of my claim for total disability. It is stated therein that the date of the injury was 9 June, 1921. That is true, if it refers to the first trouble with my eyes; I subsequently got well, or got better. It is not true, if it refers to the date of my second trouble, which resulted in my total disability from loss of sight. I could not read the proof of claim under my policies, prepared by my attorney, who sent it to me for my signature. I could not read it because I could not see. They had to guide my hand to the line for the signature. I do not recall that it was read to me. I assume that it was, but I was in a rather upset frame of mind at that time. I recovered from the attack on 9 June, 1921. I could see very well after that time up until some time in December. My oculist in Atlanta told me that with a good rest of about two months, the retina in each eye would reattach. It did reattach apparently, so that I could walk about. I went to Florida, and there met friends and recognized them. I did not read, although I had reading glasses, given me by my oculist. I did not read because I wanted to make sure that the retina had reattached before I used my eyes. The doctor said I had sufficient vision for practical purposes, and that he thought I would retain that vision. While I was resting in Atlanta, I had conferences and negotiations about my work, as director of campaigns for contributions to colleges. As near as I can figure now, it was on or about 1 January, 1922, that I completely lost my sight. The second attack came after 1 December. I noticed a little dark shadow at the top of my eyes, and then it came on slowly and steadily, just like pulling down a curtain over a window. I could not tell you exactly when it commenced, but I noticed that there was a darkness over my eyes up here, and it

began to pull down, day by day, and about 1 January, 1922, I figure it went past the vision, so that I could not see. I had very good vision after my first attack in June, 1921, and Dr. Briggs said I had enough vision for practical purposes, enough so I was planning to go back into my campaign work again. I never dreamed, I never thought I was going blind when I had the correspondence with defendant in May, 1921, or when I applied for a change in my policies. I was improving right along. I had no reason to know that I was going blind; there is no blindness in our family, on either side, so far as I know. The company has not paid me a cent under the provisions of my policies."

There was evidence tending to show that at the time plaintiff applied to defendant for the supplemental contracts to be attached to his policies, he had applications pending with other companies for insurance; plaintiff made no statement to defendant company with reference to said applications.

There was also evidence tending to show that since his loss of sight, plaintiff had been writing articles for daily newspapers. Plaintiff testified that while he received pay for these articles, his expenses for stenographic services exceeded the amount received for this work; that the work was not remunerative, and was done solely for the purpose of keeping his mind occupied; that plaintiff had done no other work, and had been employed in no other business.

It was admitted, in response to a question by the court, that there was no controversy as to the amount which plaintiff was entitled to recover, if defendant was liable, as plaintiff alleged and contended.

At the close of plaintiff's evidence, defendant moved for judgment as of nonsuit. To the refusal of the court to allow this motion, defendant excepted.

The issue submitted to the jury was as follows:

"In what amount, if any, is defendant indebted to plaintiff? Answer: ....."

The court was of opinion that the riders attached to the policies, and designated as supplemental contracts, were parts of the policies issued by defendant to plaintiff, and that the incontestable clause, contained in each policy, applies to the rider or supplemental contract as well as to the original contract; that the policy is made up of and includes both the original and supplemental contract; that defendant is barred by said clause from setting up in defense of plaintiff's action, or in support of its prayer that the supplemental contracts be declared null and void and be surrendered by plaintiff, the facts relied upon by defendant to defeat plaintiff's recovery in this action.

The court instructed the jury that if they believed all the evidence, and found the facts to be as testified, they should answer the issue, "Yes, $1,790.80." Defendant excepted to this instruction.

From the judgment rendered upon the verdict, defendant appealed to the Supreme Court, assigning errors based upon its exceptions.

Jones, Williams & Jones and Mark W. Brown for plaintiff.

Bourne, Parker & Jones, Brooks, Parker & Smith, Guilford A. Deitch and Frank G. West for defendant.

CONNOR, J. Defendant's principal contentions, in support of its appeal to this Court, as stated in its brief, are "(1) that since blindness antedated the making of the disability contract, there could have been no valid contract as against that hazard, under the rule that continued existence of the subject-matter is necessary to sustain a contract; (2) that the failure of plaintiff to disclose his condition pending the negotiations constituted a concealment of material facts which avoided the contracts in their entirety; (3) that said contracts were, also, avoided by plaintiff's misrepresentations as to the pending of applications for insurance in other companies; and (4) that the insured did not show total disability within the terms of the contract sued on." These contentions are presented by defendant's assignments of error, and are fully discussed in the brief filed by its counsel in this Court.

Plaintiff, in support of the judgment of the Superior Court, insofar as same is attacked by the first three of defendant's contentions, relies upon the clause in each policy, which provides that "if the premiums are duly paid as required, this policy shall be incontestable after it has been renewed beyond the first year." Plaintiff contends, that by reason of this clause, all the premiums required having been duly paid, and each policy having been renewed beyond the first year, these contentions are not available to defendant for the purpose of contesting the validity of the policies.

By paragraph 3 of article II of the supplemental contract, which is attached to and forms a part of each policy, it is provided that "the entire and irrecoverable loss of sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles, or of one entire hand and one entire foot, resulting from one accident, will of themselves be considered as total and permanent disability within the meaning of this provision." By the provision referred to, defendant agrees that if the insured becomes physically or mentally incapacitated to such an extent that he is and will be presumably permanently unable to engage in any occupation or perform any work for compensation of financial value, defendant will waive payment of any premium payable upon the principal contract and the supplemental contract, and will pay to the insured an annual income of five hundred dollars. All the evidence tends to show that plaintiff has suffered an

entire and irrecoverable loss of sight of both eyes. This is a permanent disability, which by the terms of the contract, entitles plaintiff to the benefits provided therein. It is immaterial whether or not plaintiff has since the loss of his sight been able to engage in any occupation or to perform any work for compensation of financial value. It is only when the disability is not one of those included within paragraph 3 that the benefits of the provision are dependent upon the inability of the insured by reason of such disability, mental or physical, to engage in such occupation or to perform such work. Plaintiff having suffered the loss of sight of both eyes, which is entire and irrecoverable, it is immaterial whether or not he has since been able to engage in an occupation, or to perform work for compensation of financial value. Defendant's fourth contention cannot be sustained. There was no error in refusing to allow defendant's motion for judgment as of nonsuit, or in the instructions of the court to the jury, insofar as defendant's assignments of error involve this contention.

It must be conceded that if plaintiff's action is founded upon the policies, issued to him by defendant, without the distinction as contended by defendant, between the principal contract and the supplemental contracts, neither of the first three contentions of defendant can be sustained as supporting defendant's assignments of error upon this appeal. It is expressly provided in each of said policies that the policy shall be incontestable after it has been renewed beyond the first year, if the premiums are duly paid as required. The payment of all premiums on both policies, from 1915, when they were issued, to the date of the commencement of this action in 1923, is admitted. The policies are therefore incontestable upon either ground relied upon by defendant in said contentions; defendant will not be permitted, because of its express agreement to the contrary, to contest in this action the validity of the policies.

In *Trust Co. v. Ins. Co.*, 173 N. C., 558, *Justice Allen,* writing the opinion for the Court, says: "The modern rule is that a life insurance policy containing a provision that it shall be incontestable after a specified time cannot be contested by the insurer on any ground not excepted in that provision." Many authorities are cited in support of his statement of the law. In that case, this Court held that defendant could not avail itself of the plea that the insured was not in good health at the time of the delivery of the policy, and that for that reason under the terms of the policy, the contract never became operative. The incontestable clause was held to cover the defense of the bad health of the insured at the time of the delivery of the policy. It was also held that a defense based upon the allegation that the issuance and delivery of the policy was procured by false and fraudulent representations in the

application, would not be heard, if the policy contained an incontestable clause, which upon the facts admitted or established by evidence, was applicable. *Justice Allen* further says: "The authorities are practically uniform in holding that an incontestable clause, which gives a reasonable time for the insurance company to make investigation, is valid, and that it means what it says, that is, that after the time named in the clause has expired no defense can be set up against the collection of the policy, unless it comes within the excepted classes, named in the clause itself." The incontestable clause in a policy of life insurance was held valid in *Hardy v. Ins. Co.*, 180 N. C., 180, where *Justice Allen* says that the clause is contractual and is sufficiently pleaded when the policy containing the clause is made a part of the complaint. See 35 A. L. R., 1492n; 31 A. L. R., 109n; 13 A. L. R., 675; 6 A. L. R., 452.

In *Indiana National Life Ins. Co. v. McGinnia* (Ind.), 101 N. E., 289, 45 L. R. A. (N. S.), 192, *Spencer, J.*, says: "It seems to be a well-recognized principle of insurance law that a provision in a contract of insurance limiting the time in which the insurer may take advantage of certain facts that might otherwise constitute a good defense to its liability on such contract is valid, and precludes every defense to the policy other than the defenses excepted in the provision itself. It also seems to be generally held that such a clause precludes the defense of fraud, as well as other defenses, and that it is not invalid on the theory that it is against public policy, provided the time in which the defenses must be made is not unreasonably short." Many authorities are cited in the opinion to support this statement of the law. See *Mass. Ben. Life Ins. Co. v. Robinson* (Ga.), 42 L. R. A., 261.

Defendant, however, contends that in this action plaintiff seeks to enforce liability, not under the policies, which were issued in 1915, and are the principal contracts between the parties, each of which contains the incontestable clause relied upon by plaintiff, but under the supplemental contracts, which were entered into and attached to the policies on 14 July, 1921; no incontestable clause is contained in these supplemental contracts. The question, therefore, presented is whether the incontestable clause, contained in the policies, applies to the supplemental contracts attached thereto on 14 July, 1921.

These supplemental contracts were substituted for provisions in the principal contracts, which were parts of the policies as originally issued; each bears the same date as the principal contract to which it is attached; a sum was charged by defendant and paid by plaintiff sufficient to cover the reserve which the defendant would have accumulated against the additional liability if the contracts had been made on the dates, upon which the policies were respectively issued and the additional premium paid by plaintiff from the date on which the policies were is-

sued; it is specifically recited in each supplemental contract that it is a component part of the policy to which it is attached, and that none of the conditions named in the supplemental contract shall be deemed to waive, modify or affect in any manner any of the conditions contained in the principal contract to which the supplemental contract is attached.

"In the conduct of insurance business it often becomes necessary to add a new term to a policy, or to modify or waive an existing term. For this purpose insurers are accustomed to use little printed slips containing the desired writing, which are attached to the policy with mucilage and are termed 'riders.' By reason of being annexed to the policy these riders are equally binding on the parties as if written in the face of the policy." Vance on Insurance, p. 185. "The contract of insurance, as usually made, contains the following elements: (a) all terms legally set forth on the face of the policy, or on the back thereof, if properly referred to; (b) all separate papers expressly designated and made part of the contract by the terms of the policy; (c) all riders attached to the policy with the consent of both parties." Vance on Insurance, p. 181. *Lancaster v. Ins. Co.*, 153 N. C., 286.

"It is well settled that a rider attached to the policy is a part of the contract, to the same extent and with like effect as if embodied therein." 1 Joyce on Insurance (2 ed.), p. 516.

The supplemental contract attached to each policy on 14 July, 1921, by reason of the recitals therein became a part of the policy, and was subject to all the conditions applicable thereto contained in the policy to which it was attached; the incontestable clause, contained in the policy, is applicable to said supplemental contract, in an action to enforce liability thereunder, and no defense is available to defendant in such action after said policy, including as one of the elements of the contract the provisions of said supplemental contract, has become incontestable, except for the nonpayment of premiums.

The date upon which said supplemental contract became effective was not the date upon which it was attached to the policy, but the date of the policy; this was fixed by the defendant and accepted by plaintiff. As a result of this agreement as to the date from which it became effective, defendant collected the sums required for the reserve; having received a benefit from the agreement as to the date, it must accept the burden. In *Mutual Life Ins. Co. v. Hurni*, 263 U. S., 167, 64 L. Ed., 235, it was held that where a clause in a life insurance policy provides that it shall be incontestable after a specified time "from its date of issue," the word "date" refers to the date of issue appearing on the face of the policy which was antedated by mutual consent of the parties and premiums paid from that date, and not to the time of actual execution of the policy or the time of its delivery. See 31 A. L. R., 112.

We must hold that the supplemental contract, attached on 14 July, 1921, to each policy issued by defendant to plaintiff, in 1915, was a part of the policy to which it was attached, and was subject to the incontestable clause contained in such policy; that by express agreement of the parties such supplemental contract became effective from the date appearing therein, and not from the date on which it was actually attached to the policy; that upon all the evidence submitted to the jury in this action no defense was available to defendant upon the supplemental contract which was not available in an action on the policy. The validity of the policy, including both the principal contract and the supplemental contract, cannot be contested by defendant in this action.

The assignments of error presenting the first three contentions of defendant cannot be sustained. The judgment is affirmed. There is

No error.

W. T. FOWLER, ADMINISTRATOR OF RALPH FOWLER, DECEASED, v. CHAMPION FIBRE CO., THE ABERTHAW CONSTRUCTION CO., AND C. A. HILDEBRAND.

(Filed 27 January, 1926.)

1. Negligence—Evidence—Contracts—Master and Servant—Independent Contractor—Safe Place to Work—Hearsay Evidence.

Evidence in this case held sufficient of the actionable negligence of defendants under the plea of independent contractor to go to the jury, that the witnesses heard the alleged vice principal of the alleged independent contractor give instructions to the plaintiff's intestate, a water carrier for many employees of all the defendants, as to carrying cooled water to the employees just before the expiration of the noon interval for dinner, upon the question as to whether the intestate was at the time of his injury acting within the scope of his duties, or pursued an unsafe and dangerous way when a proper and safe one had been provided for him nearby, and not objectionable as hearsay.

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

Upon defendants' motion as of nonsuit, the evidence and every reasonable inference therefrom is to be construed in the light most favorable to the plaintiff, and held in this case, sufficient to be submitted to the jury upon the issue of defendants' actionable negligence proximately causing the death of plaintiff's intestate.

3. Instructions—Evidence—Statutes.

In an action to recover damages for the negligent killing of plaintiff's intestate: *Held*, the charge of the judge to the jury upon the law of negligence, proximate cause and contributory negligence met the requirements of C. S., 564, that the court state in a plain and correct manner the evidence in the case, and declare and explain the law arising thereon.

FOWLER *v.* FIBRE CO.

APPEAL from *Finley, J.*, and a jury, at May Term, 1925, of HAYWOOD. No error.

W. T. Fowler was duly appointed administrator of Ralph Fowler, deceased. He contends that the defendant, Champion Fibre Company, is a corporation and owned and operated a large pulp and paper mill at Canton, N. C. In the conduct of its business and the operation of its plant, it used and maintained certain steam engines, steam pipes, etc. The defendant, Aberthaw Construction Company, a corporation, was engaged in constructing plants, buildings and other structures and was assisting the Champion Fibre Company in making an addition to what is known as a "finishing plant" for it. That C. A. Hildebrand, before and at the time of the injury and death of Ralph Fowler, was employed by the Champion Fibre Company as foreman and superintendent of what is known as the "pipe fitters" department of the Champion Fibre Company's plant, and had control and supervision of the water system and pipe lines used in the operation of the plant. It was his duty to install the necessary pipes used in conveying water and steam in and around the plant and to use due care to keep same in a proper and safe condition. That on and prior to 24 July, 1924, Ralph Fowler was in the employment of the two defendant corporations as a "water boy" or carrier. It was his duty to carry water from certain parts of the plant to divers other points to the employees for drinking purposes. That in the performance of this duty, Ralph Fowler was injured, which resulted in his death, by the negligence of the defendant. That in the operation of the paper and pulp mill and in constructing the addition, the finishing plant, the defendants had employed a large number of laborers, engaged in divers work in and around the plant, among them Ralph Fowler, the "water boy" to carry them water. That some time prior to the injury of said Fowler, on 24 July, 1924, the Champion Fibre Company had caused to be dug in the ground a pit, basin or vat, some 12 feet in circumference, about 5 or 6 feet deep, at or near where the laborers and Ralph Fowler were employed. That for some time the Champion Fibre Company had carelessly and negligently permitted water to run into and accumulate in the pit some 3 or 4 feet deep. The defendants had carelessly and negligently placed a plank, some 12 inches wide and from 12 to 15 feet long, across the top of the pit and ordered and permitted the employees to go over this plank in the prosecution of their duties. That before the injury and death of Ralph Fowler, the Champion Fibre Company and C. A. Hildebrand had maintained a pipe leading from the main engine in said plant to a suitable place on the side of the building to carry the exhaust steam from the engine. When it exhausted it would go up into the air. Shortly prior to the injury to Ralph Fowler, C. A. Hildebrand, with the knowledge, ac-

quiescence and consent of the Champion Fibre Company, carelessly and negligently changed the steam pipe so that the exhaust would go into the pit before mentioned, and the exhaust steam and water were permitted to accumulate and remain in the pit, and it became and remained in a hot and boiling condition. That the plank for the employees to walk across this pit, in the prosecution of their duties, defendant carelessly and negligently failed to nail or otherwise fasten down the ends so as to prevent it from turning over or the ends from sliding from the bank into the pit. No guard or railing was provided on the side of the plank. That the place was dangerous—the narrow plank across the pit of boiling water. That Ralph Fowler, an inexperienced youth of 15 years of age, while engaged in the performance of his duty as a "water boy" was required to cross the narrow plank over the hot and boiling water in the pit. "That on 24 July, 1924, while the plaintiff's intestate was lawfully engaged in the performance of the duties of his said employment, and while he was walking across the aforesaid plank extended over and across the aforesaid pit, basin or vat of boiling water, as aforesaid, as he had been directed, ordered, required, permitted, suffered and allowed to do by the said defendants, and each of them, and without any fault or negligence on the part of the plaintiff's said intestate, but solely by reason of each, all and every of the aforesaid careless, tortious, negligent and reckless acts, conduct and omissions of the said defendants, and each of them, the aforesaid plank tilted or turned over, thereby throwing the plaintiff's intestate down and into the aforesaid hot, scalding and boiling water, and by reason thereof the plaintiff's intestate was so badly and fearfully scalded and burned that he was caused to endure great and indescribable pain, anguish, torture and distress of body and mind so that he suffered, languished and died in the evening of the following day, to wit, 25 July, 1924, to the great damage of the plaintiff," etc.

The defendants deny the material allegations of the complaint and say, in part: "It is admitted that the plaintiff's intestate, Ralph Fowler, was in the employ of the Aberthaw Construction Company, as water carrier and sustained injuries while in its employ resulting in his death, but the defendants aver that his said death was caused and contributed to by his own carelessness and negligence in attempting to cross or use a plank across the ditch of boiling water without any orders or instructions from the defendants and at a time when he was not engaged in the performance of his duties as water carrier, and in failing and neglecting to use the usual path or route prepared by the Aberthaw Construction Company for the use of the plaintiff's intestate and other employees. The defendants aver that the said Ralph Fowler was a boy sixteen years of age, the usual and ordinary age of water carrier boys, and knew, or should have known that it was unsafe and dangerous to attempt to walk

across a plank over the ditch of boiling water, and knew, or should have known that it was his duty to cross the ditch a few feet west of where he was injured at the place prepared by the Aberthaw Construction Company for the use of its employees in crossing said ditch of water. . . . The defendants aver and allege that the said Ralph Fowler was not in the line of his duty at the time of the accident and was attempting to cross the ditch at the place not provided for that purpose and voluntarily selected a dangerous route when the defendant Aberthaw Construction Company had provided a proper and safe place for crossing said ditch of boiling water at a place only a few feet distant from where the plaintiff was injured. . . . And defendants aver that the death of the said Ralph Fowler was caused and contributed to by his own negligence in failing to exercise reasonable and ordinary care for his own safety, and especially in failing to use the usual route and pathway provided for the water boys and others, and in negligently attempting to cross the ditch containing the boiling water at an improper place, without the knowledge, orders or directions of the defendants or either of them. The defendants aver that the work of constructing the addition to the paper plant of the Champion Fibre Company was being done by the Aberthaw Construction Company as an independent contractor which employed its own employees and had exclusive authority and control over them. And the defendants aver that the said Ralph Fowler was not in the employ of the Champion Fibre Company, or C. A. Hildebrand, and that they had absolutely no control or authority over him whatever."

The issues submitted to the jury and their answers thereto, are as follows:

"1. Was the plaintiff's intestate, Ralph Fowler, killed by the negligence of the defendants; and if so, which one, as alleged in the complaint? Answer: Yes, by all the defendants.

"2. Did plaintiff's intestate, Ralph Fowler, by his negligence contribute to his death as alleged in the answer? Answer: No.

"3. What amount, if any, is plaintiff entitled to recover? Answer: $6,250."

The court rendered judgment on the verdict. Defendants made several exceptions and assignments of error. The material ones and necessary facts will be considered in the opinion.

A. Hall Johnston and Alley & Alley for plaintiff.
Martin, Rollins & Wright for defendants.

CLARKSON, J. The first assignment of error of defendants: "The plaintiff asked the witness, Oscar Ferguson, the following question: 'Do you know whether these boys were instructed to have a bucket of water

ready cooled and all by the time the whistle blew so they could have it ready to deliver?' The witness then stated that 'they were instructed by George Vaincourt to have fresh water there on the job when the whistle blew; that they were instructed to have their water ready when the whistle blew.' The defendants contended that this evidence was hearsay and was incompetent against Champion Fibre Company and C. A. Hildebrand, as George Vaincourt was not in their employ. It was not only incompetent, but was extremely prejudicial to the defendants." The balance of the testimony of this witness was: "That just before the whistle blew on this occasion, witness saw the boys start; that he did not see them after they got on the plank; that they were right close to the end of the plank, to the best of his knowledge they were about three or four feet of the plank when witness saw them last; that he heard the boy holler; that just before he heard him holler he saw the exhaust steam; that when the steam gushed out it would blind one and hit one until he couldn't see or realize where he was going; that the plank was not fastened down." It was in evidence that the Fowler boy, a few minutes before one o'clock, with another boy also a "water boy," was going to get the buckets to have the water ready for the workmen.

The contention of defendants was that Ralph Fowler had a stick and was playing with it in the water, that he was not in the line of duty; that the plank was not used as a walkway—other ways were provided; that the pit had planks around it which prevented anyone from getting in there unless they climbed under or over. Walter Price, testified: That no way was left to walk across the steam; "that there was a bank on one side and building on the other; that the planks prevented anyone from getting in there unless they climbed under or over; that Mr. Hildebrand and witness (Price) and George Vaincourt and Owens were present when this was done; that witness does not know if the planks were put back, and that he did not see the rails after they were torn down." George Vaincourt was the foreman of the whole concrete crew. Witness for defendant, Walter Price's evidence showed Vaincourt was with the head men in putting up railings around the pit. This evidence tended to show that Vaincourt and Hildebrand were in a common employment, Hildebrand was foreman and superintendent of Champion Fibre Company pipe fitters department. W. E. Miller testified for plaintiff, in part, that the Fowler boy had a stick in his hand "He walked up in ten feet of the pond and he threw his stick down and walked out on the board; and witness saw a gush of steam come and the boy hollered; that he had gone about four or five feet out on the board before the steam gushed up; that the next witness saw was when they got him pulled out on the other side; and it was two minutes to one. . . . That witness did not see them any more after the steam came up until he

was pulled out of the pool, that when they pulled his clothes off the hide rolled down with them, just torn all to pieces; that witness knew of the instructions given the boys about having water at one o'clock, that George Vaincourt gave them these instructions, that he told the boys to always have their water cold for one o'clock ready to start out when the whistle blew, and he told the boys to go to the ice plant and get ice through the noon hour if they had time; that the order was given the boys four or five days before Ralph was injured. On cross-examination, brought out by defendants, witness testified: "That he heard Vaincourt tell Fowler and the other boy to always have the water ready by one; that they were water carriers and went on duty at one. . . . That the plank would shake up and down; that the boy was as big as witness; that witness went across in perfect safety; that witness doesn't know what caused the plank to turn when they went on it, but supposed the steam gushed out and they couldn't see; that witness saw Fowler with a stick, but threw it down before he went out there; that witness did not see him play in the water with a stick after he got on the plank; that witness saw him with a stick but he threw it down before he went on the plank, and didn't see him pick it up again."

The defendants, on cross-examination, elicited the same evidence as plaintiff on direct examination. There were numerous witnesses who testified that the plank was used as a walkway across the pit. We think the evidence competent, and we cannot, under the facts, hold it prejudicial. The assignment of error cannot be sustained.

The next assignment of error is to the refusal of the court below to grant motion for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. "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. *Lindsey v. Lumber Co.,* 189 N. C., 119; and cases cited; *Barnes v. Utility Co., ante,* 382." *Fleming v. Holleman,* 190 N. C., 452.

From a careful review there was abundant evidence to go to the jury to sustain plaintiff's contentions. This assignment of error cannot be sustained.

The main contention and assignment of error by defendants is to the failure of the court "to state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon," as required by C. S., 564.

In *Nichols v. Fibre Co.,* 190 N. C., 1, this Court in granting a new trial, said: "It is of course, elementary that while the jury must determine the facts from the evidence, it is both the function and duty of the judge to instruct them as to the law applicable to the facts. The

answers to the issues submitted in this case are not to be determined altogether by the facts; each issue involved matters of law, and the jury should have been instructed by the judge as to the law. While counsel may argue the law of the case to the jury, both plaintiff and defendant are entitled, as a matter of right, to have the judge declare and explain the law arising on the evidence. A failure to comply with the statute must be held as error. The error was not waived in this case by failure of defendant to request special instructions. An answer to an issue, not supported by evidence or contrary to the evidence is objectionable; an answer determined by the jury, without instructions by the judge as to the law involved, is no less objectionable. Liability for negligence arises from the application of well-settled general principles of law to the facts of specific cases; it is not to be determined solely by the jury; the judge has his function and his duty; actionable negligence is a mixed question of law and fact—no less of law, to be determined by the judge, than of fact, to be determined by the jury."

We have critically examined the charge of the court below. The court defined burden of proof and was correct as to the burden in reference to the issues submitted. The court defined actionable negligence, proximate cause and contributory negligence. We think the court complied with the statute and stated in a plain and correct manner the evidence in the case and declared and explained the law arising thereon. *Davis v. Long,* 189 N. C., 129. As to the issues of damages, the court below gave the very prayers asked for by defendants and fully sustained by the decisions of this Court.

It seems in this case, the charge of the court below and the contentions were given very favorably for the defendants. We can see no prejudicial or reversible error from the record.

No error.

MRS. OKLA INGRAM v. THE CITY OF HICKORY.

(Filed 27 January, 1926.)

Municipal Corporations—Condemnation — Sewerage—Statutes—Arbitration—Award—Negligence—Nuisance—Damages.

Where in conformity with the provisions of its charter a city has condemned lands for the laying of its sewer pipe and the taking off of its sewage, and accordingly an arbitration has been had from which no appeal was taken, and the city has conformed to the award in all respects and paid the amount of permanent compensation for the taking of the land found by the arbitration: *Held,* it is conclusively presumed that all elements of the damages sought in an independent action were in-

cluded in the award, and no recovery can be had except for damages caused by negligent construction, or such negligent acts on the city's part that would amount to a nuisance.

APPEAL by defendant from *Stack, J.*, at May Term, 1925, of CATAWBA. New trial.

Civil action to recover damages upon three causes of action, as set out in the complaint; such damages are alleged to have been caused (1) by conditions created and maintained by defendant on or near plaintiff's land, prior to the construction of its sewer line across said land, (2) by the taking of a portion of said land for the construction across the same of a sewer line, and by the negligence of defendant in the construction of the same; and (3) by conditions created and maintained by defendant on or near plaintiff's land, since the construction of said sewer line across the same. Plaintiff alleged that her land has been permanently damaged by the acts of defendant, and demanded compensation therefor. Defendant denied that plaintiff had been damaged, as alleged in the complaint. In its answer, defendant alleged that it had acquired a right of way over and across plaintiff's land for its sewer line, by a condemnation proceeding in which full compensation for all damages sustained by plaintiff by reason of the taking of her land and the construction of the sewer line across same had been assessed; defendant further alleged that the sewer over and through said right of way had been constructed by an independent contractor for whose negligence, if any, defendant was not liable.

The issues submitted to the jury were as follows:

"1. Did the defendant pipe the sewage and effete matter near to plaintiff's land and there throw it out on the open ground during three years or thereabouts, and did fumes and smells arising therefrom contaminate the air and permanently lessen and impair the value of plaintiff's land, as alleged in the complaint? Answer: .....

"2. Did the defendant in its blasting operations on plaintiff's land cast stones upon her dwelling-house, shake, jar, crack and injure its chimney and the plastering, and thereby permanently injure said house, as alleged? Answer: .....

"3. Did the defendant, in the fall of 1923, after laying two sewers across plaintiff's land, connect them together on her land, and cast out all their contents on the ground near her land, and did fumes and stinking smells arise therefrom which were carried over her land, enveloping her residence and filling it with unbearable and sickening odors, thus permanently impairing and lessening the value of her house and land, as alleged in the complaint? Answer: .....

"4. What permanent damage, if any, is the plaintiff entitled to recover of the defendant? Answer: ....."

Defendant objected to these issues, and excepted to their submission. Defendant tendered other issues, and excepted to the refusal of the court to submit them to the jury. The jury answered the 1st, 2d and 3rd issues, "Yes," and the 4th issue, $1,350. From the judgment upon this verdict, defendant appealed.

C. L. Whitener and E. B. Cline for plaintiff.
J. L. Murphy and Self & Bagby for defendant.

CONNOR, J. Plaintiff owns a lot of land containing about 4 acres, situate partly within and partly without the corporate limits of the city of Hickory. A dwelling-house containing 8 rooms is located on this lot which has been occupied by plaintiff as a residence for about 13 years. The lot is situate near the southern limits of the city at the end of Eighth Street. About three years prior to the commencement of this action, on 22 September, 1923, defendant, a municipal corporation, constructed two sewers within its corporate limits, both of which emptied some distance from plaintiff's lot, one on the west and one on the northeast side. The sewage discharged from the sewer on the northeast side of plaintiff's lot came from the South Graded School section and spread out over the ground into a branch which flowed across plaintiff's land within four feet of a spring. The sewer on the west side of plaintiff's land came down Eighth Street, upon which were located many homes connected therewith and emptied into a basin constructed by defendant, six feet deep and about two feet wide, with an iron lid over it. The sewage discharged from this sewer filled the basin and then poured out through a hole in the lid upon the ground. It was washed by rains from the ground about the basin upon plaintiff's land. As a result of these conditions, plaintiff was forced to abandon the springs on her land from which she had procured water for domestic use; the odors arising from the sewage were very offensive and plaintiff was forced to keep the windows of her house closed during the evening; flies and mosquitoes, attracted by the sewage, swarmed into plaintiff's home. These conditions and these results continued for about three years but had ceased to exist at the time of the trial of the action.

In June, 1923, defendant decided to extend these sewer lines beyond the corporate limits of the city; in order to construct the extension it became necessary for defendant to acquire a right of way for same over plaintiff's land. On 13 June, 1923, defendant, by letter, notified plaintiff that the city council, acting under and in accordance with the provisions of its charter, had condemned a right of way over her land for the

Eighth Street and South School sewer lines and had appointed Mr. George R. Wooten, a disinterested freeholder of the city, to act for the city in assessing the sum to be paid by the city to plaintiff as compensation for said right of way; defendant requested plaintiff to select a representative to act for her in the matter. On 18 June, 1923, plaintiff, by letter, notified the city council that she had appointed Mr. W. A. Carpenter to represent her in the condemnation proceedings. On 10 July, 1923, George R. Wooten and W. A. Carpenter reported to the city that having been first duly sworn and having heard the allegations and proofs and having examined the property, they found that "if the sewer pipe is laid through the premises of the said Mrs. Okla Ingram according to profile made by Cyrus C. Babb, engineer, 48 feet of cast iron pipe should be put in line to best advantage, and said pipe should run 22 feet south of spring and 2 feet 9 inches below level of water in spring; that if this is done Mrs. Okla Ingram will be damaged in the sum of $60 and we direct that said amount be paid in event sewer pipe is laid." This report was accepted and approved by the city council and check for $60, with a copy of the report, was sent by mail to plaintiff. Plaintiff did not appeal from the award made by the commissioners and approved by the city council. In September, 1923, defendant entered upon plaintiff's land and began the construction of the sewer line over and across same. The right of way for said line was located, and the sewer was constructed thereon in accordance with the report of the commissioners. The sewer pipe was laid in a ditch dug through rock across plaintiff's land. This rock had a commercial value; some of it had been used locally in the construction of buildings. Since the sewer line was constructed, plaintiff has been unable to get the rock out because to do so would endanger the sewer pipe. It is hard rock and extends deep into the ground. In order to dig the ditch it was necessary to blast out the rock with dynamite. These blasts were very heavy. Rock and dirt were thrown by the blasts upon plaintiff's house and other buildings on her land. The blasting caused the chimney in the house to settle and crack and this injured the plastering in seven rooms of the house. Every blast shook the house. The damage was done chiefly on the east side of the house because the ditch on that side was very deep and the rock very hard. The blasting continued for about thirty days. It was done under the supervision of the foreman of the contractor who constructed the sewer line for defendant. He came to the house each time and notified plaintiff that he was about to set off a blast. The damage done to the house has not been repaired.

The sewer line as constructed by defendant across plaintiff's land crosses a vein therein above the spring; the amount of water in the spring is very much less now than it was before the sewer line was con-

structed. The two sewer pipes were brought together upon plaintiff's land directly south of her residence; a ten-inch pipe takes the sewage from this point and discharges it just south of plaintiff's land about 150 feet from her line into a branch which is about 50 feet from the mouth of the sewer. There is an offensive odor from this sewage and flies and mosquitoes breed there. When the wind is from that direction the odor, flies and mosquitoes are blown into plaintiff's house. The house is located on a hill just where a ravine comes from the south. The wind is usually from the south. Defendant has constructed a septic basin, the dimensions of which are about five feet by eight feet, into which the sewer empties. This basin is covered up. This is the present condition.

Plaintiff admitted upon the trial that defendant had acquired the right of way over her land upon which the sewer line was constructed, as alleged in the answer.

Upon plaintiff's right to recover in this action, the court instructed the jury, that the condemnation of the right of way over plaintiff's land, for the extension of the sewer across the same, and the assessment of the sum to be paid to plaintiff by defendant as compensation for the land taken for such right of way, gave defendant the right to enter upon said land, and to construct the sewer across the same on the right of way, thus acquired; but that plaintiff was not barred by the condemnation proceeding from recovering in this action damages to her property, caused by the offensive odors arising from the sewage deposited on or near her land, both before and after the construction of the extension of the sewer line; or damages to her property caused by the blasting operations carried on in the construction of said sewer line. The court further instructed the jury that the measure of damages in this action was the difference between the reasonable market value of the land, at the time of the commencement of the action, as the land would have been without the sewer and as it was with the sewer. "In other words, if you reach the fourth issue, you will arrive at a conclusion as to what the property would have been worth without any alleged damages and what it would have been worth as it was with the sewage and operation of blasting, and take one from the other, and that would be your answer to the fourth issue." Defendant excepted to these instructions and assign same as error.

The condemnation proceeding barred all claims by plaintiff in this action for damages resulting from the taking of her property by defendant under the power of Eminent Domain, conferred upon defendant, as a municipal corporation, by the State. It was the duty of the commissioners appointed in accordance with the provisions of defendant's charter—one of whom was appointed by defendant, and one by plaintiff—in assessing the sum to be paid as compensation for the property

taken as a right of way for the extension of the sewer line, to include therein every element of damages to which plaintiff was entitled under the law, to the end that she should be fully and completely compensated, not only for the land actually taken, but for all injuries to the remaining property, incidental to and necessarily resulting from the taking. Plaintiff did not appeal, as she was authorized to do by the provisions of defendant's charter, from the report or award of the commissioners. It must be presumed, in the absence of allegations and proof of fraud, oppression, collusion or other misconduct, by the commissioners, that they acted properly and made the assessment in accordance with the law. Plaintiff cannot in this action recover damages which, upon this record, are conclusively presumed to have been included within the sum which the commissioners direct shall be paid to her as compensation for the taking of her property, and which defendant has tendered to plaintiff. She is estopped from claiming such damages by the condemnation proceedings to which she was a party.

The damages for the permanent taking of plaintiff's land for a right of way, and for the easement acquired by defendant over the said land were assessed in the condemnation proceeding; defendant does not seek, and is not entitled to any further easement over plaintiff's land, for the sewer line now constructed across the same, and cannot therefore be required to pay any other or further sum for permanent damages than that assessed by the commissioners in said proceeding. It was held in *Allen v. R. R.,* 102 N. C., 382, that a deed for a right of way to a railroad company bars all claim for damages incidental to or necessary, incurred in the exercise of the power conferred by the deed. In *R. R. v. Mfg. Co.,* 169 N. C., 156, it was held that where there has been a taking of private property, under the power of Eminent Domain, not only the direct but the incidental injury resulting in a diminution of the value may be considered in fixing the amount to be paid as compensation. In *Lumber Co. v. Drainage Comrs.,* 174 N. C., 647, it was held that the assessment of damages to be paid to the owner of land, taken under the power of Eminent Domain, is conclusive upon such owner, although in proper instances the owner may recover by independent action substantial damages sustained by the negligent exercise of the power. *Spencer v. Wills,* 179 N. C., 175.

We must hold that plaintiff is not entitled to recover of defendant, in this action, any sum for permanent damage by reason of the taking of her land and the construction across it of the sewer line; such sum was assessed in the condemnation proceeding; nor is she entitled to recover of defendant damages for any annoyance, inconvenience, discomfort, or injury suffered or sustained by her, or for any diminution in the value

of her land resulting from the construction of the sewer line, unless such line was negligently constructed, or unless such construction resulted in a nuisance.

If plaintiff is entitled to recover for damages sustained by conditions created and maintained by defendant on or near her land, prior to the condemnation proceedings, such recovery must be founded upon negligence, or upon liability for maintaining a nuisance. No permanent damages, which would result in conferring upon defendant the right to continue to damage plaintiff by negligence or by the nuisance created and maintained by it permanently, can be assessed against defendant. The conditions complained of have ceased to exist. Defendant does not ask and is not entitled to restore or maintain such conditions.

As there must be a new trial, we do not consider now or pass upon defendant's contention that it cannot be held liable upon the first cause of action set out in plaintiff's complaint, because the conditions complained of resulted from acts done by it in the exercise of its governmental powers. This case has been tried upon plaintiff's contention that she was entitled to recover permanent damages upon the three causes of action alleged. The distinction between the governmental powers of a municipal corporation and its administrative powers is not easily drawn. Nor do we pass upon defendant's contention that it is not liable for any damages caused by the construction of the sewer, for that same was constructed by an independent contractor, for whose negligence, if any, defendant is not liable. Upon a new trial, doubtless these contentions can be more clearly presented by amendments of the pleadings, and by evidence offered by both plaintiff and defendant, upon the trial on appropriate issues.

The judgment herein must be reversed. There must be a

New trial.

D. W. PLYLER, TRADING AS PLYLER GROCERY COMPANY, v. R. L. ELLIOTT, A. L. ELLIOTT AND C. R. ELLIOTT, TRADING AS R. L. ELLIOTT & SONS, AND MARYLAND CASUALTY COMPANY.

(Filed 27 January, 1926.)

1. Public Highways—Contracts—Principal and Surety—Bonds—Board and Provisions for Laborers and Livestock—Material and Labor.

Under the provisions of a surety bond given to the State Highway Commission by a contractor for a public highway, that the contractor would pay every person furnishing material or performing any labor in and about the construction of said highway, the board furnished by the contractor to the laborers or workmen, and the hay, etc., furnished

to the livestock, come within the meaning of the language employed when necessary to the prosecution of the work contracted for, and the surety is liable for this payment.

2. New Trials—Appeal and Error—Principal and Surety—State Highways.

Where it does not appear of record on defendant surety company's appeal that the board of laborers and the provisions for livestock were necessary for the construction of a state highway, under the provisions of a contractor's bond, a new trial will be granted for the ascertainment of the fact.

APPEAL from *Shaw, J.*, and a jury, at May Term, 1925, of ROWAN. New trial.

This is a civil action to recover the sum of $2,836.92 and interest alleged to be due for feedstuffs, provisions, etc., used and consumed in the construction of Project No. 525. Defendants, Elliotts and R. E. Boggs, made a contract on 14 December, 1921, with the State Highway Commission of North Carolina, to improve the road between Lexington and Rowan County line in Davidson County, N. C., being approximately 10.24 miles, estimated cost $293,080. The defendant, Maryland Casualty Company, was surety for the Elliotts and Boggs. The bond to the State Highway Commission was for the sum of $146,540. A provision in the bond was as follows: "And shall well and truly pay all and every person furnishing material or performing any 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."

Plaintiff contends: "In order to carry on said project, it was necessary to erect and operate a commissary to properly feed the hands and animals at work on said project. This camp was located about five miles from Linwood, and two miles from Yadkin. Yadkin was on the opposite side of the river, and to reach Yadkin it was necessary to cross a toll bridge. The plaintiff furnished feed and groceries aggregating $2,836.92, which were necessary to and wholly consumed in prosecution of the work provided for in the contract and bond. The feedstuffs were fed to the mules and all of the groceries and other items were used in feeding the hands, and none others, being given to the hands at actual cost and deducted from their wages. The items of tobacco, cigarettes and candy included in the grocery account were given to the hands and deducted from their wages. It was necessary to allot to the hands tobacco and candy, and to feed them in order to keep them in the camp and on the job."

The total of plaintiff's bill was $4,254.08 on which has been paid $1,417.16 leaving a balance of $2,836.92. The feedstuffs and provisions

were furnished the contractors on Project 525 from 4 January, 1923, to 30 June, 1923—$1,572.39 it is alleged was for actual feedstuffs. The plaintiff filed his claim with the State Highway Commission on 26 June, 1923, and the same was acknowledged by it on 28 June, 1923. The work was completed on 4 September, 1923.

Sam Elliott, testified: "I was a foreman with Elliott & Sons from the time the road began in 1922, until we finished the work. My principal work was looking after the feed and supplies. With reference to feeding the hands, we built a camp, hired a cook and fed them, and on Saturdays, we would deduct their board from the amount we owed them. We fed no one except the hands. We charged the hands four dollars a week; later we raised it fifty cents as we were not coming out. We did not make anything on the board. It was necessary to feed the hands; that is the only way we could keep them in the camp. The few items of tobacco, cigarettes and candy included in the account sued on here were deducted from their wages. I guess they had to have these things. The feed went to the mules. We used all of it. It was put in the troughs. The mules did hard work. All the groceries outside the feed was used for the hands. It all went for the hands and mules. I came under that same head myself. I paid for my board every week. All the supplies were used in connection with the camp and wholly consumed there. I bought most of the supplies. A good part of the time I came with the truck. That was mostly my duty. I bought from other wholesale groceries, $1,000 from Overman & Company, some out of Lexington. It was necessary to buy in large quantities. We had something over 100 mules for a while. I suppose from 50 to 100 hands. It was necessary to carry on the work this way to get the work done. We had to do it. This camp was located about a mile and a half yon side of the toll bridge, probably two miles. It was on the National Highway. The toll bridge was between the camp and the village of Yadkin. It was four or five miles to Linwood. We did not make anything out of boarding the hands. That bridge was a toll bridge. People that came to Yadkin had to pay fare."

The charge of the court below was as follows: "The first rule is: 'Is the defendant, Elliott & Sons, indebted to the plaintiff, and if so, in what amount?' The court instructs the jury that if they find the facts to be as testified to by the witnesses, they would answer the issue, 'Yes, $2,836.92, with interest from 1 July, 1923.' Is the plaintiff's claim barred against its recovery from the defendant, Maryland Casualty Company? The court instructs the jury if they find the facts to be as testified to by the witnesses, to answer this issue 'No.' Is the defendant, Maryland Casualty Company, indebted to plaintiff, and if so, in what amount? The court instructs the jury that if they find the facts to be as

testified to by the witnesses, they would answer the issue 'No.' To that portion of the judge's charge, to wit, 'Is the defendant, Maryland Casualty Company, indebted to the plaintiff, and if so, in what amount?' The court instructs the jury that if they find the facts to be as testified by the witnesses, they will answer the issue 'No,' " the plaintiff excepted and assigned error.

Judgment was rendered in accordance with the verdict, exceptions and assignments of error were made to the charge above and the judgment as rendered, and an appeal taken to the Supreme Court.

Rendleman & Rendleman for plaintiff.
Craige & Craige for Maryland Casualty Co.

CLARKSON, J. The material provision of the bond to be construed is as follows: "And shall well and truly pay all and every person furnishing material or performing any labor in and about the construction of said roadway," etc.

In *Town of Cornelius v. Lampton,* 189 N. C., p. 718, under a similar provision in the bond, it was said: "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 was 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."

This appeal presents the question as to whether or not the bond covers provisions used to feed the hands, who worked in and about the construction of the roadway, and feedstuffs to feed the mules that worked in and about the construction of the roadway.

The leading case dealing with furnishing provisions is *Brogan v. National Surety Co.,* 246 U. S., p. 257 (62 Law Ed., p. 703). At p. 260, it is said: "The facts undisputed, or as found by the lower court and accepted by the court of appeals, were these: The Standard Contracting Company undertook to deepen the channel in a portion of St. Mary's River, Michigan, located 'in a comparative wilderness at some distance from any settlement. There were no hotels or boarding houses,' and the contractor 'was compelled to provide board and lodging for its laborers.' Groceries and provisions of the value of $4,613.87, furnished it by Brogan, were used by the contractor in its boarding house, and were supplied 'in the prosecution of the work provided for in the contract and the bond

upon which this suit is based. They were necessary to and wholly consumed in such work.' The number of men employed averaged eighty. They were 'boarded' partly on the dredges, partly in tents supplied by the contractor; all under an arrangement made with the labor unions by which the contractor was to board the men and deduct therefor $22.50 a month from their wages. The contract and the bond executed by the National Surety Company bound the contractor to 'make full payment to all persons supplying him with labor or materials in the prosecution of the work provided for in' the contract. The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate." At p. 262, it is said: "A boarding house might be conducted by the contractor (like some company stores concerning which states have legislated—*Koekee Consol. Coke Co. v. Taylor,* 234 U. S., 224, 58 L. Ed., 1288, 34 Sup. Ct. Rep., 856) as an independent enterprise, undertaken solely in order to utilize the opportunity for separate and additional profit afforded by the congregation of many laborers in the particular locality where the public work is being performed. The laborers might resort to such a boarding house in the exercise of individual choice in the selection of an eating place. Under such circumstances the furnishing of supplies would clearly be a matter independent of the work provided for in the contract, and would not entitle him who had furnished the groceries used in the boarding house to recover on the bond. 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 on the 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."

Construing a bond of contractor (for constructing levee along Mississippi River) required under act of Congress, for prompt payment "to all persons supplying labor and materials, in the prosecution of the work," it was held in the case of *U. S., for use of Samuel Hastings Co. v. Laurance,* 252 Fed. Rep., p. 122, that the bond covered bill for feed furnished for mules used in hauling on and about the work, as material used in the work.

In *Taylor et al. v. Connett et al.,* 277 Fed. Rep., 945, affirming the decision of *Judge H. G. Connor,* District Judge for Eastern District of N. C., under similar bond, the circuit court held: In an action on the bond of a contractor, who agreed to construct a breakwater at Cape

Lookout, N. C., the court may take judicial notice that scows (flat bottom boats) of the kind required to transport a large quantity of stone needed for the work could not be obtained in the vicinity of the work. Government contractor and the surety on his bond are liable for a rental of scows hired by a subcontractor to transport materials to the place of work, where such scows were necessary and could not otherwise be obtained.

"Blasting powder, drills, and lumber used up in scaffolds and forms for concrete constructions, are within the protection of a bond given under the Federal statute requiring it to protect persons who furnish labor or materials used in construction or repair of the work. *National Surety Co. v. U. S. Use of Pittsburgh & B. Co.,* L. R. A. (1917 A), 336, 143 C. C. A., 99, 228 Fed., 577." 1 L. R. A. Digest, 984. *Aderholt v. Condon,* 189 N. C., 756.

It may be noted that in the *National Surety Co. v. U. S., supra,* the Circuit Court discusses the Brogan claim, one among many in that controversy, and says: "But it is said they stand on the same basis as the coal for the engine, as they provide the energy which makes the machine—in this case, the human machines—do the work. The District Court, while regarding the question as very close, thought this final step in the reasoning could not be avoided. We find a sufficient distinction in the difference between labor and materials. Coal has been allowed as a material; it is expended as a material; it never is and never can be transformed and merged into that labor which is the 'labor performed,' as distinguished from the 'material furnished,' for each of which the statute gives a right of recovery. The logic of the coal cases—regardless of its persuasiveness—is that the word 'materials' in the statute should be thought to include coal, because the latent energy of the coal was developed into a mere substitute for that human labor which is expressly included in the law, and unless this energy thus put into the work is protected in this way it is not protected at all. On the other hand, the food for the men never contributes to the work, except after it is transmuted into the form of that labor which, as labor, is protected. It is not to be thought that the statute gives twice a claim for the one thing." This reasoning was not followed by the Supreme Court of the United States, the Circuit Court was reversed. *Brogan v. National Surety Co., supra.*

It is almost the unanimous holding of the courts that coal for the engine, which is necessary to aid in making power, comes under "material." The engine would be useless without the coal. By parity of reasoning, the mules would be useless without the feed. We can see no difference in principle between the two. *U. S. for use Samuel Hastings v. Laurance, supra; U. S. Fid. & G. Co. v. Henderson County,* 253 S. W., 835 (Texas).

The record shows that the actual amount for feedstuffs furnished for about 100 mules was $1,572.39. We think the plaintiff entitled to recover for the foodstuffs furnished for the mules. The question arises—how about the provisions for the 50 to 100 men? The District Judge in the *National Surety Co. case, supra,* thought the same reasoning applied to the human machinery—the men. We are inclined to the same conclusion, but base our opinion on the *Brogan case.*

The contract which we are construing was dated 4 December, 1921. The *Brogan case, supra,* was decided 4 March, 1918. The *Taylor case, supra,* was decided by *Judge H. G. Connor,* 25 October, 1920. The bond was made after these decisions, and it is presumed that the Surety Company fixed its premiums to meet the holding of these decisions—especially the *Brogan case,* which was against a Surety Company and a well known opinion.

We can see no material difference between the language of the bond required by the U. S., and construed in the *Brogan case,* and the bond in the present case. The distinction is without a difference. In the *Brogan case, supra,* it was said, at 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. . . ."

It is contended by plaintiff that, on account of the location of the work to be done, it became necessary for the contractors to furnish board for the employees. This does not appear as a fact from the record, but appears from the testimony of witness for plaintiff, Sam Elliott. The amount of the feedstuffs is shown by the testimony of plaintiff. The decision in the *Brogan case* was based on the undisputed facts—on the present record there is no findings of fact. For this reason, the question of the liability of defendant Surety Company, as to provisions furnished to the hands, the necessity, and the amount due for feedstuffs must be submitted to a jury to determine the facts, unless the facts can be agreed upon.

We have carefully examined the able brief of defendant's counsel. We can see no hardship in construing the contract as we have done, following the leading U. S. case on the subject, which defendant Surety Company knew, or ought to have known, was the law when the surety contract was made. There are decisions to the contrary, but the weight of the more recent decisions and reasoning are with plaintiff. There must be a

New trial.

CHARLES R. BAILEY v. JACKSON-CAMPBELL COMPANY AND L. B. JACKSON.

(Filed 27 January, 1926.)

1. Deeds and Conveyances — Covenants — Restrictions — Notice—Mesne Conveyances.

Where a tract of land has been platted and lots laid off and sold to purchasers under a general development scheme, containing covenants in the original deeds restricting the character of dwellings to be thereon erected, and excluding stores, hospitals, etc., and the original plats and conveyances have been duly registered, subsequent purchasers or grantees of these lots take with notice of the covenants in the original deeds, and are bound by them, though they may claim title through a mesne conveyance in which these covenants were omitted.

2. Same—Omission of Covenant in Some of the Deeds.

The fact that in a general land development scheme of the sale of a tract of land into lots, one of the original deeds omits certain covenants restricting the character of the buildings, etc., to be erected thereon, does not affect the covenants in respect thereto contained generally in the deeds to other lots embraced in the general plan of development.

3. Same—Parties—Privies—Injunction—Actions.

Where a grantee of lands laid off and sold into lots in a land development scheme, is bound by covenants in his deed as to the character of dwellings to be erected on the lots, general to those of other purchasers, he may restrain other grantees from breaching like covenants likewise contained in their deeds.

4. Same—Perpetual Restrictions—Public Policy.

Where a deed in a division of land into lots under a general residential scheme, contains covenants running perpetually with the lands as to the character of residences to be erected thereon, the covenant will not be declared invalid as being against public policy unless and until conditions arise which would render the covenants objectionable for that reason.

5. Same—Residences—Apartment Houses—Words and Phrases.

Where lands are platted and conveyed to purchasers as lots, restricting the buildings to residential purposes, and excluding those for business, hospital and the like: *Held*, the use of the word "residence" does not necessarily include "apartment houses."

APPEAL by defendants from *Lane, J.*, at Chambers in Asheville, 14 November, 1925, continuing a restraining order to the final hearing.

The plaintiff is the owner of the two lots numbered 15 and 16. E. W. Grove and wife conveyed No. 15 to W. L. Jenkins by a deed dated 18 April, 1923, and No. 16 to Jane Banks Amiss by a deed of the same date. Each deed recites a consideration of $7,500 and is duly registered. The plaintiff acquired title to these two lots by mesne conveyances from

the respective grantees. Except as to the pronouns indicating the gender of the grantees, the *habendum* and restrictive covenants in the two deeds above recited are as follows:

"To have and to hold, the above described land and premises, together with all the privileges and appurtenances thereunto belonging or in any wise appertaining, unto the said party of the second part, his heirs and assigns, forever, subject to the following restrictions, conditions and stipulations, that is to say:

Whereas, the lot or parcel of land hereinbefore described, is a part of a block or boundary of land, as shown on the plat hereinbefore specifically referred to, the property of the parties of the first part, and their assigns, which said land within said block or specific boundary has been divided into parcels or lots, and laid off and designed to be used exclusively for residential purposes, and,

Whereas, the parties hereunto desire, for the benefit of their own property, and for the benefit of future purchasers and owners of the land shown within the lines of said block, that the same shall be developed, and for a time hereafter used exclusively for private residential purposes:

Now, therefore, the said party of the second part, for himself, his heirs, executors, administrators and assigns, doth covenant to and with the said parties of the first part, their heirs, executors, administrators and assigns, as follows:

1. That they will not erect, license or suffer to be erected, or maintained, on the above described land, or any part thereof, any commercial or manufacturing establishment, or factory, or tenement, or apartment house, or house designed for use by more than one family, or house or building to be used as a sanitarium or hospital of any kind, or, at any time use or suffer to be used, any house or building erected thereon, for any such purpose, or any purpose whatsoever, which may be in any way noxious or offensive to the neighboring inhabitants; that said premises shall not, during the term of twenty-one (21) years, be used for any purpose other than the construction and maintenance of private residences thereon, and during said term, shall be kept, used and maintained in good condition, and in general harmony with the surrounding property within said block. . . .

2. Subject also, as to that part of said lot within the boundaries of what is known as Norwood Park, to all the restrictions, conditions and stipulations, contained and set forth in the deed of the Central Development Company, conveying the same, reference to which said deed, and record thereof, being hereby made for a full recital of said restrictions, conditions and stipulations.

3. That the foregoing covenants shall be covenants running with the land, and shall be kept by the party of the second part, his heirs and assigns, forever."

As we understand, subsection 2 was inserted because the plaintiff derived title to the western portion of his lots from the Central Development Company and to the eastern portion thereof from E. W. Grove.

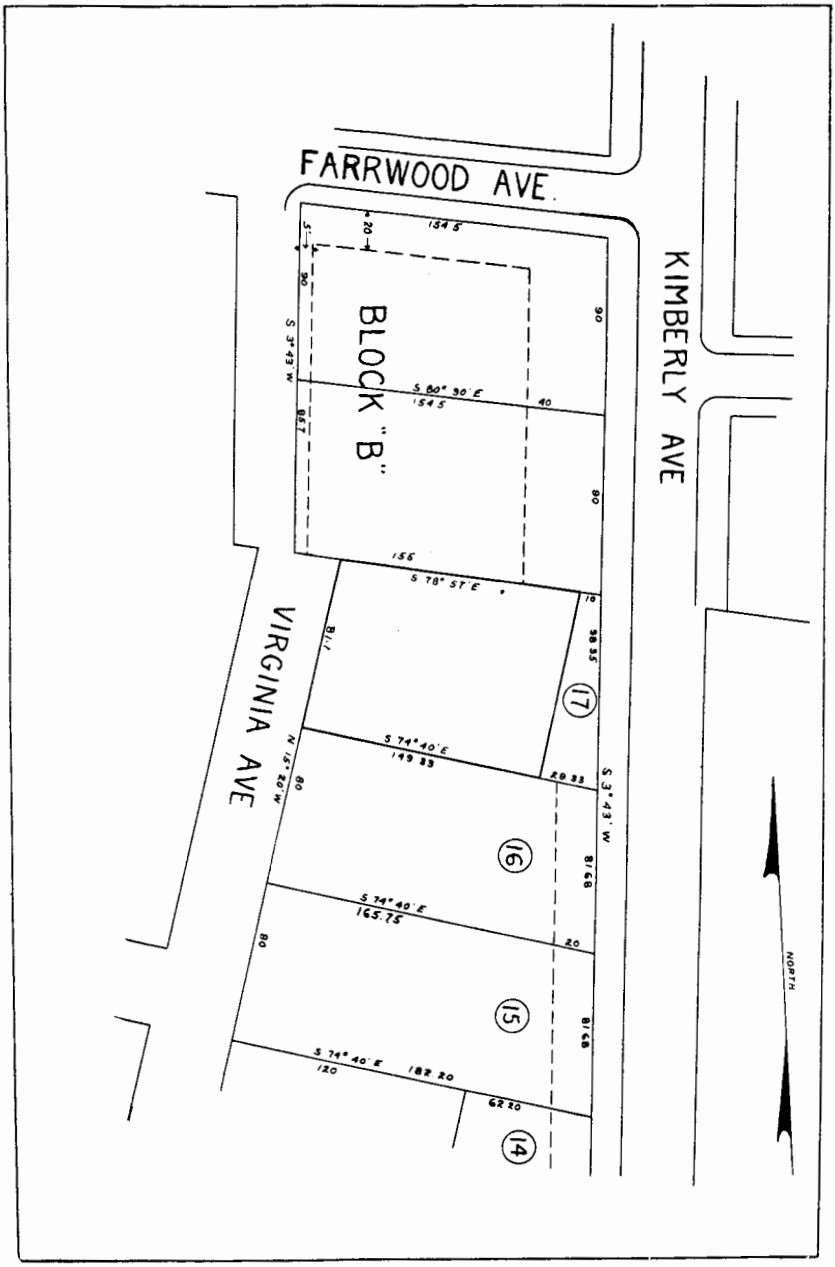
The plaintiff alleges that the defendants have accepted deeds from said Grove for lots 1, 2, 8, 9, and 10, containing similar covenants and are barred thereby.

On 21 February, 1916, the Central Development Company conveyed to Herbert W. Pelton and his wife, Sarah B. Pelton, the lot adjoining the lands of the plaintiff on the north, facing about 96 feet on Virginia Avenue and running back 120 feet to lot 17; and on 11 February, 1924, said Herbert W. Pelton conveyed his interest therein to Sarah B. Pelton. It is alleged that Sarah B. Pelton holds her title to said lot subject to the *habendum* and restrictive covenants in the deed from the Central Development Company to Herbert W. Pelton and wife, which are as follows:

"To have and to hold the above described land and premises, together with all the rights and appurtenances thereunto belonging, or in any wise appertaining, unto the said party of the second part, her heirs and assigns, forever, subject to the restrictions, conditions and stipulations hereinafter set out, to wit:

The said party of the second part, for herself and her heirs, executors, administrators and assigns, does hereby covenant and agree with the said party of the first part, its successors and assigns, as follows:

1. That she will not erect or suffer to or license to be erected on the land above described, any commercial or manufacturing establishment or factory, or house or building to be used as a sanitarium or hospital of any kind, or at any time use or suffer to be used any building or buildings erected thereon for any such purpose; that she will not erect or suffer to be erected on said land any residence to cost less than $2,500; that in building on said land she will build on the building line 20 feet from the street, as shown and indicated on the said plat hereinbefore referred to, and face or front said house on Virginia Avenue; that she will not build more than one residence on either lot of said land, but may build thereon a garage or stable, in keeping with the premises and residence built thereon, and of sightly appearance; that she will not during the term of twenty years from the date thereof sell or convey said land or any part thereof to a negro or person of any degree of negro blood, or any person of bad character.


FARRWOOD AVE.
KIMBERLY AVE
VIRGINIA AVE
BLOCK "B"
134.5
20
5
90
S 3°43' W
S 80° 90' E
154.5
40
87
90
155
S 78° 57' E
18
98.55
17
S 3°43' W
S 74° 40' E
149.33
29.33
N 15° 20' W
80
16
81.68
S 74° 40' E
165.75
20
80
15
81.68
S 74° 40' E
120
182.20
62.20
14
NORTH

2. That the foregoing covenants shall be covenants running with the land and shall be kept by the party of the second part, her heirs and assigns, forever."

The plaintiff alleges that these restrictive covenants in substance and effect are the same as those which affect the title of the plaintiff to that portion of lots 15 and 16 which was originally in the boundaries of Norwood Park, under the second subdivision above referred to, and conveyed by the Central Development Company.

L. B. Jackson on behalf of the Jackson-Campbell Company entered into a contract with Mrs. Pelton to purchase from her the lot conveyed by the development company to herself and her husband. The Jackson-Campbell Company acquired title to lot 17 from E. W. Grove, but in his deed the only restriction is that no building shall be built thereon within 20 feet of Kimberly Avenue.

The plaintiff and the defendants derive title to a part of their lots from E. W. Grove and to a part from the Central Development Company and the plaintiff alleges that the covenants in the deed from the development company to Herbert W. Pelton and his wife equally affect the plaintiff and the defendant as to that part of their holdings derived from said company.

Upon the pleadings, affidavits, and evidence his Honor continued the restraining order to the hearing and the defendants excepted and appealed.

Carter, Shuford, Hartshorn & Hughes for plaintiff.
Lee, Ford & Coxe and Merrimon, Adams & Adams for defendant.

ADAMS, J. The vital question is whether the defendants are prohibited by the restrictions in the deed from the Central Development Company to Sarah B. Pelton and in the deeds from E. W. Grove to the plaintiff and other purchasers from building the described apartment house on the lot known as the Pelton property. The plaintiff admits that he derives title to the western portion of his lots from the Central Development Company and to the eastern portion from E. W. Grove. There is a marked difference in the phraseology of the restrictions embraced in the deeds of these respective grantors. The grantees in the deeds from Grove covenant not to erect, license, or suffer to be erected or maintained on the conveyed property any commercial or manufacturing establishment, or factory, or tenement, or apartment house; but as to the grantees in the deeds from the other source there is no direct reference to an apartment house. The restrictive covenants which equally affect the plaintiff and the defendants as to that part of their holdings derived from the Central Development Company include the following: the grantee shall not erect or suffer or license to be erected on his lot any

commercial or manufacturing establishment or factory or a house or building to be used as a sanitarium or hospital of any kind, or at any time use or suffer to be used any building or buildings erected thereon for any such purpose . . . will not build more than one residence on either lot of said land, . . . and will not during the term of twenty years sell or convey the lot or any part thereof to a negro or to a person of any degree of negro blood, or any person of bad character. It is stipulated that these shall be covenants running with the land and shall be kept by the grantee and his heirs and assigns forever.

The deed from the Central Development Company to Herbert W. Pelton and Sarah B. Pelton, his wife, is dated 21 February, 1916, and the deeds from Grove to W. L. Jenkins and Jane Banks Amiss, under whom in part the plaintiff claims title, were executed 18 April, 1923. The date at which the plaintiff acquired title to the western portion of his lots from the Central Development Company does not distinctly appear. Lot 17 conveyed by Grove is not subject to all the restrictive covenants set out in the other deeds, but it is to be used only as a frontage or approach to Kimberly Avenue.

In *Homes Company v. Falls,* 184 N. C., 426, 439, *Stacy, J.,* citing other authorities quotes with approval the following general statements taken from 18 C. J., 394: "Where the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions upon its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either upon the theory that there is a mutuality of covenant and consideration or upon the ground that mutual negative equitable easements are created. Where parcels are sold with reference to such a uniform plan to persons having notice thereof, the grantees may enforce the restrictions within this rule irrespective of the order of the several conveyances, and irrespective of whether the covenants run with the land, and without regard to whether the restriction is expressed in the separate conveyances, or whether the person against whom it is sought to enforce the restriction derived title from the same grantor." And in *Davis v. Robinson,* 189 N. C., 589, *Varser, J.,* quoted with approval from *Donahoe v. Turner,* 204 Mass., 274: "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."

With the exception of No. 17, so far as the record discloses all the lots in Block A, known as "E. W. Grove's Kimberly Lands," have been sold subject to the restrictive covenants in the deeds to W. L. Jenkins

and Jane Banks Amiss; and the plaintiff contends that in the sale of all this property Groves adopted a general plan or scheme to be uniformly observed and enforced for the benefit of all purchasers. He says, moreover, that he and the defendants are alike affected with the covenants in the deeds executed by the Central Development Company, as heretofore pointed out.

In the sale of the Grove or Kimberly Avenue property in Block A, a general plan or scheme seems to have been devised and enforced for the promotion of a residential section and the development of the lots therein at least for a specified period by the building of residences or homes; and in our opinion this general scheme is not annulled or defeated by the omission of a restrictive covenant in the deed conveying lot 17, particularly as it appears from its location and topography to be incapable of beneficial use except for the purpose of connecting the Pelton lot with Kimberly Avenue and not to be adaptable or suitable as a lot on which to erect a residence or other building. In fact, the defendant, Jackson-Campbell Company, admits its purpose to be to use this lot as a lawn and entrance to the apartment house to be built on the Pelton property. The restrictive covenants in the Grove conveyances were intended and by by their terms were expressed to be for the benefit of future purchasers and owners of the lots within the designated lines of the block; and the use of lot 17 (not large enough for a building if the restriction limiting the site to twenty feet from Kimberly Avenue be observed) as an entrance to a building, if its erection is prohibited by other restrictive covenants, would not be in keeping with the general scheme under which the lots were sold.

The controversy in reference to the restrictions in the deeds executed by the Central Development Company is dependent principally upon the interpretation of the covenant on the part of the grantee not to "build more than one residence on either lot of said land," though authorized to build a garage or stable in keeping with the premises and residence built thereon. It will be noted that the restrictions in the deed from the Central Development Company to Pelton apply also to the plaintiff's property, a part of which was acquired by Grove from the development company. In the deeds made by Grove to the parties under whom the plaintiff claims these restrictions and others more stringent were included—the Grove deeds expressly prohibiting the erection of an apartment house or any house to be occupied by more than one family. It appears, then, that the plaintiff is undertaking as grantee to enforce a restrictive covenant against another grantee claiming under the development company, a common source, whose deeds contained the same restrictions—thereby presenting the question which was disinguished because not raised in *Homes Company v. Falls, supra,* p. 431.

The covenants in the deeds executed both by Grove and by the development company indicate a common purpose to use the lots as sites for residences and to prevent the erection of more than one residence on either lot. So the point in controversy is whether the restrictions in the deed to Pelton, under whom the Jackson-Campbell Company holds a contract or deed without a repetition of the restrictions will prevent the erection of the proposed apartment house on the Pelton property, a part of the contract being that the covenants shall run with the land and be kept by the grantee, his heirs and assigns forever.

By a critical examination of the record and the authorities we are satisfied that an apartment house is not a residence in contemplation of the several restrictive covenants set out in the various deeds. We have not overlooked the reasoning in *Hutchinson v. Ulrich,* 21 L. R. A. (Ill.), 391, but do not regard it as controlling in our interpretation of the restrictions in the present case. These covenants the plaintiff has a right to enforce unless precluded by their omission from the deed executed by Pelton to the defendant company, and this omission, we think, does not antagonize the plaintiff's position. The defendants acquired title with notice of the covenants and are barred thereby. 18 C. J., 394, 397. It has been suggested that the restrictions, having no limitation, are void as against public policy. There is highly respectable authority for the position that a restriction of this kind is not necessarily void because it purports to be perpetual, though it is not impossible that conditions may arise which would impel a relaxation of the rule. 18 C. J., 401.

The judgment of the Superior Court is

Affirmed.

J. E. COBURN, A TAXPAYER OF FORNEY'S CREEK TOWNSHIP, FOR HIMSELF AND SUCH OTHER TAXPAYERS OF SAID TOWNSHIP AS MAY JOIN WITH HIM IN THIS ACTION, v. THE BOARD OF COUNTY COMMISSIONERS OF SWAIN COUNTY AND THE BOARD OF HIGHWAY COMMISSIONERS OF FORNEY'S CREEK TOWNSHIP.

(Filed 27 January, 1926.)

1. Judgments by Consent.

A consent judgment is the agreement of the parties entered as a judgment with the consent of the court, and is binding upon them when they have authority and their consent has been properly given.

2. Same—Taxpayers—Township Commissioners—Highways.

The commissioners of a township are without authority to bind the taxpayers of a township by a consent judgment as to the building of a township highway, subject to the will of the officials of another state, and what their honest belief was is immaterial.

3. Township Commissioners—Delegation of Power—Principal and Agent.

The township commissioners may not delegate their judicial or discretionary duties to others.

4. Township Commissioners—Highways—Discretionary Powers—Consent Judgments.

The location of a township highway is within the discretionary powers of the township commissioners, and it may not be restrained from exercising this power by reason of a consent judgment formerly entered, retaining the cause for further orders, whereunder it had issued bonds and had the money on hand from the sale thereof, for the construction of an interstate highway that had not received legal sanction for its construction from the adjoining state, though it had reasonable assurance that such sanction would ultimately be given.

5. Same—Courts—"Cause Retained."

Where a consent judgment reserves the cause for further orders, the court may thereafter modify the order or judgment as conditions may be made to appear, to make such change or modification in conformity with justice and the legal rights of the parties.

6. Courts—Township Commissioners—Powers—Ultra Vires Acts.

The courts have the power to restrain the *ultra vires* act of the board of township commissioners.

APPEAL from *Finley, J.*, dissolving restraining order heard 22 April, 1925. From SWAIN. Affirmed.

The findings of the court below are as follows: "This cause again coming on to be heard before his Honor, T. B. Finley, judge holding the courts of the Twentieth Judicial District at Franklin, North Carolina, in pursuance to the continuance of said hearing from Bryson City. Plaintiff and defendant being represented by counsel, upon motion of the defendant, highway commissioners, for a modification of the restraining order heretofore granted and set forth in the decree in this cause, and the same being heard, the court finds the following:

"First. That since the date the original decree and injunction was signed, that the highway described in said decree has been practically completed to Hazel Creek, the point named in said decree.

"Second. That there is no evidence before the court that the highway officials of the State of Tennessee or Blount County, which is the county in Tennessee adjoining Forney's Creek Township, have made any location for a road connecting with the highway through said township, or that any agreement has been made between any of the highway officials of Tennessee or Blount County and the highway officials of Forney's Creek Township, or State of North Carolina, providing for a connection with said road, or that any definite assurance has been given by the road authorities of Tennessee that such a road will be built, or that any

funds are available or appropriated by the State of Tennessee, or any county, township or road district in said state for the building of such road.

"Third. That while there is no evidence that any money has been appropriated by the Tennessee authorities to build a highway in Tennessee connecting with Forney's Creek Township highway, and there is no evidence that an agreement has been entered into between the two states in regard to the building of said road, yet the court finds as a fact that the Tennessee authorities have suggested their willingness to connect with the Forney's Creek highway if same was constructed.

"Fourth. That the North Carolina Highway Commission has approved the location suggested by the highway commissioners of Forney's Creek Township as a State highway to the Tennessee line.

"Fifth. That the highway commissioners of Forney's Creek Township have requested the court that they be permitted to proceed with the construction of the highway of the Tennessee line through the Forney's Creek Township, and now have on hand in the bank at Bryson City money from bonds sold, sufficient for the construction of said highway.

"Sixth. That the highway commissioners of Forney's Creek Township have not abused their discretion, either as to the location or construction of said road.

"Seventh. That the contractor who has had a contract for constructing the road to Hazel Creek is now completing the work, and if the highway commissioners of Forney's Creek Township are permitted to let the contract for the balance of the highway at this time, and before the contractor moves his equipment out of said township, the said commissioners in all probability can save the township a considerable amount by allowing him to bid on the contract.

"Upon the foregoing facts, it is now ordered and adjudged that the restraining order as heretofore set forth and entered in the former decree in this cause be and the same is hereby modified to the extent that the road commissioners of Forney's Creek Township be and they are hereby permitted, without reference to said former order, to proceed with the location and construction of the highway through Forney's Creek Township to the Tennessee line, and the said restraining order, in so far as it affects the construction of said road, be and the same is hereby dissolved."

Plaintiff's assignments of error were as follows:

"1. That the court erred in finding as a fact that Tennessee authorities have suggested their willingness to connect with the Forney's Creek highway if same was constructed, for that there was no evidence to support said finding.

"2. That the court erred in finding as a fact that the North Carolina Highway Commission has approved the location suggested by the highway commissioners of Forney's Creek Township as a State highway to the Tennessee line, for that there was no sufficient evidence to support said finding.

"3. That the court erred in signing the judgment and order dissolving the injunction, for that the same is contrary to the findings of fact and not warranted thereby.

"4. That the court erred in signing any order or judgment vacating or nullifying the original decree, for that under the evidence offered the court had no legal authority to modify or vacate any of the provisions of the same."

The assignments of error and other necessary facts will be considered in the opinion.

S. W. Black and R. L. Smith & Son for plaintiff.

Merrimon, Adams & Adams, A. S. Patterson and Bourne, Parker & Jones for defendant.

CLARKSON, J. A temporary restraining order was issued by Judge Lane, and the case came on for hearing at the July-August Term, 1923, of Swain County Superior Court before his Honor, Judge Bryson. "When and where it was agreed by counsel for all the parties that the court should hear all the allegations and proofs made and offered, and determine the rights of all the respective parties to this litigation." . . . And being heard, when and where by consent of counsel representing all of the parties the court adjudges as follows: "It is ordered by the court that construction work on the highway now being built in Forney's Creek Township, and fully described in the pleadings herein be suspended at its present terminus at Hazel Creek until route from that point to the Tennessee line shall be selected and approved by the State Highway Commission of North Carolina, so that said road, when completed, shall become a part of an interstate road connecting the highway system of North Carolina with the highway system of the State of Tennessee. . . . This cause is retained upon the civil issue docket of Swain County to the end that the court may make such further orders or decrees as may become necessary for the protection of the rights of all parties."

In March, 1925, the defendants gave notice that they would move before his Honor, T. B. Finley, judge, at the March Term of Swain Superior Court, to vacate the restraining order provided for in the original decree insofar as it restrained the defendants, highway commissioners, from going forward with the construction of the highway

from Hazel Creek to the State line. Upon the hearing of this motion the defendants, by consent, offered in evidence letters set out in the record which were treated as affidavits. They also offered oral testimony and petitions. The plaintiff offered oral testimony to the effect that beyond Hazel Creek to the Tennessee line there were only three or four families owning property of their own; that there were quite a number of people residing between Hazel Creek and the Tennessee line, but these were practically all employees of the Kitchen Lumber Company, whose lumbering operations would be completed in two or three years. Upon this testimony the defendants asked the court to dissolve the original injunction restraining the building of said road beyond Hazel Creek.

Plaintiff contends that the court erred in finding as a fact "that Tennessee authorities have suggested their willingness to connect with the Forney's Creek highway if same was constructed." That there was no evidence to support the finding—we think the finding immaterial. It is well settled law that ordinarily a consent judgment is a binding contract. *Walker v. Walker,* 185 N. C., 380; *Distributing Co. v. Carraway,* 189 N. C., 423; *Smith v. Smith,* 190 N. C., 764.

One of the parties to the consent judgment was a governmental agency —the board of highway commissioners of Forney's Creek Township. *Bank v. Comrs.,* 119 N. C., 226 (cited in the *Distributing Co. case, supra*), says: "Consent judgments are in effect merely contracts of parties, acknowledged in open court and ordered to be recorded. As such they bind the parties themselves thereto as fully as other judgments, but when parties act in a representative capacity such judgments do not bind the *cestuis que trustent* unless the trustees had authority to act, and when (as in the present case) the parties to the action, the town authorities, had, as appears above, no authority to issue the bonds, their honest belief, however great, that they had such power would not authorize them to acquire such power and bind the town by consenting to a judgment. It is not a question of fraudulent judgment but a void judgment from want of authority to consent to a decree to bind principals—the taxpayers—for whom they had no authority to create an indebtedness by consenting to a judgment, any more than they would have had by issuing bonds. If authorized to create the indebtedness, either the bonds or the consent judgment would be equally an estoppel, but as they had no such authority neither bonds nor judgment is binding on the taxpayers. It is not their bond or judgment." *Brown v. R. R.,* 188 N. C., p. 52.

In *Murphy v. Greensboro,* 190 N. C., 277, it was held: "In the next place, it is alleged and admitted by the demurrers that after the bids were opened and before the contract was awarded a committee of three was appointed to determine the award under an agreement that the members of the council would let the contract as the committee should

recommend. In substance this is an allegation that the councilmen attempted to abdicate their trust by a delegation of their authority. That they were acting in a fiduciary capacity seems not to have been controverted. 'The principle is a plain one,' says Dillon, 'that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others.' Sec. 244. This principle may not prevent the delegation of duties which are ministerial; but here the trust committed to the city council involved the exercise of functions which partake of a judicial character and may not be delegated. 2 Dillon on Mun. Corp., sec. 811." *Provision Co. v. Daves,* 190 N. C., p. 7.

In *S. v. Scott,* 182 N. C., 880, it was said: "In *Glenn v. Comrs.,* 139 N. C., 421, our Court said: 'If an *ultra vires* act were being threatened, the courts would enjoin it.' In the following cases it is said when a discretionary power is exercised wrongfully, or transcends the authority of the officers, or is *ultra vires,* or when there is a manifest abuse of discretion, the courts will enforce or enjoin the act, as the case may be, at the suit of a citizen, or taxpayer, and whenever the court has declined to intervene it has been on the ground that the act complained of was *infra vires,*" citing a wealth of authorities. The facts in the above case approbate: Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine upon examination whether applicants for license therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts *ultra vires* in holding an examination beyond the boundaries of the State upon the request of nonresidents desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question."

This consent judgment was agreed to at July-August Term, 1923. This motion to dissolve the injunction was finally passed on 22 April, 1925. The bonds were sold and the money is now in the bank—sufficient to build this road. Is it possible that the board of highway commissioners of Forney's Creek Township could sell the bonds and perhaps at a lower rate of interest, put the money in the bank, as it has done, and keep it there until the State of Tennessee saw fit to build the connecting link? If this could be done, the fund might be tied up for all time. True the road from Hazel Creek may be a *dead end against the mountains at the Tennessee line*—the location of the road is a matter in the sound discretion of the board of highway commissioners of Forney's

Creek Township. The board of highway commissioners of Forney's Creek Township cannot delegate its discretion, stop its work and subject its will to the Tennessee highway officials. Such an attempted act on its part would have been void, *ultra vires* and beyond its power. But from a liberal construction of the judgment or agreement, it would appear that such was not intended as a finality. We find the concluding clause of the judgment (other than cost agreement), as follows: "This cause is retained upon the civil docket of Swain County to the end that the court may make such further orders or decrees as may become necessary for the protection of the rights of all parties."

This consent judgment left a discretionary power in the court to make such orders or decrees *for the protection of the rights of all parties.* It is well settled that for abuse of discretion the courts will control the action of highway commissioners, boards of county commissioners and like governmental agencies, but this is seldom exercised unless conduct, so unreasonable as to amount to an oppressive and manifest abuse, is shown. The court below found as a fact that the highway commissioners have not abused its discretion as to location of the road. The attempted discretion that we here discuss is that which would make illegal and void so much of the consent judgment that requires the suspension of work on the highway in this State until an agreement can be had with the highway officials of the State of Tennessee making a connecting link—an interstate road. We have no doubt that the highway officials of Tennessee will in time make this important connecting link, but the board of highway commissioners of Forney's Creek Township cannot tie up the taxpayers' money in this State until the Tennessee road officials come to an agreement—they most likely will, but suppose they should not?

In *Lassiter v. Comrs.,* 188 N. C., 383, it is said: "Granted the power, it is fully established that its discretionary exercise is for the commissioners, and the courts are not permitted to interfere unless their action is so unreasonable as to amount to an oppressive and manifest abuse. *Peters v. Highway Commission,* 184 N. C., p. 30; *Lee v. Waynesville,* 184 N. C., p. 565; *Newton v. School Committee,* 158 N. C., p. 186-188; *Ward v. Comrs.,* 146 N. C., p. 534; *Brodnax v. Groom,* 64 N. C., p. 244." *Parks v. Board of Comrs.,* 186 N. C., p. 490.

The plaintiff contends that the court erred in finding as a fact: "That the North Carolina Highway Commission has approved the location suggested by the highway commissioners of Forney's Creek Township as a State highway to the Tennessee line." We think this also immaterial from the view we take. This entire matter as to the location of the road in North Carolina was a discretionary power in the board of highway commissioners of Forney's Creek Township. It was not a State

road, and the State Highway Commission had nothing to do with the location of the road. As a matter of policy, it is wise to have mutual coöperation, but this discretionary power of the board of highway commissioners of Forney's Creek Township cannot be delegated. The other assignments of error of plaintiff are covered by the discussion under the first assignment of error.

From the entire record, the judgment below is

Affirmed.

R. W. JOHNSON v. C. C. & O. RAILWAY COMPANY.

(Filed 27 January, 1926.)

1. **Statutes—Conflict of Laws—Comity—Common Law—Workman's Compensation Act.**

Where a citizen of this State enters into a contract of employment with a railroad company in another state having a workman's compensation statute, and is injured there while engaged in temporary employment, by the actionable negligence of the railroad company in intrastate commerce, he may maintain a common-law action here for the recovery of his damages unaffected by the existence of the privisions of the Workman's Compensation Act of such other state. C. S., 970.

2. **Pleadings — Actions — Common Law — Contributory Negligence — Statutes.**

Where a common-law action for negligence is brought in the courts of this State to recover damages for the defendant railroad company's negligence as an employer in intrastate commerce incurred in another state, under a contract made there, the defendant must plead contributory negligence in order to avail itself of this defense. C. S., 523.

3. **Master and Servant—Safe Place to Work—Sufficient Help—Negligence.**

It is the duty of the employer in the use of ordinary care to furnish his employee sufficient help in performing a service which may otherwise result in the injury of his employee engaged within the scope of his employment.

4. **Courts — Jurisdiction — Actions — Common Law—Commerce—Master and Servant.**

The courts of this State have jurisdiction over an action at common law to recover damages for a negligent injury upon its citizen and resident, incurred while engaged in intrastate commerce, under a contract of employment made there, though such other state had a workman's compensation statute that would bar the plaintiff's right of recovery.

5. **Actions—Conflict of Laws—Rights and Remedies—Courts—Jurisdiction.**

Where an action is brought in one state to recover for a personal injury sustained in another state, the law of the latter ordinarily governs as to the rights of the litigants, and the former as to the remedy.

JOHNSON *v.* R. R.

APPEAL by defendant from *Harding, J.*, and a jury, at April Term, 1925, of AVERY. New trial.

This was a civil action to recover damages, brought by plaintiff against defendant, for alleged negligence that resulted in permanent injury to plaintiff.

The material allegations upon which the complaint is founded, answer of defendant, facts and assignments of error, will be considered in the opinion. From a judgment in favor of plaintiff, defendant appealed to the Supreme Court.

Harrison Baird, Chas. Hughes, W. C. Newland, S. J. Ervin and S. J. Ervin, Jr., for plaintiff.

J. J. McLaughlin, Morgan & Ragland, F. A. Linney, Murray Allen and Pless, Winborne & Pless for defendant.

CLARKSON, J. The plaintiff's allegation of negligence in the amended complaint was that plaintiff, on 4 October, 1922, while in the employ of defendant, at Erwin, Tennessee, was permanently injured. "That it was the duty of the defendant (in the exercise of ordinary or reasonable care) to furnish the plaintiff and other employees working with him a reasonably safe place in which to perform the duties required of him and them in their labor, and to furnish a sufficient number of competent men to safely do said work. . . . That by the wrongful, careless and negligent acts on the part of defendant in not furnishing sufficient men to perform the labor aforesaid, and in furnishing an inexperienced and incompetent man to assist in doing said heavy work, and on account of the carelessness and negligence of said inexperienced and incompetent colaborer or fellow-servant of the plaintiff who was assisting him in doing said work in the manner hereinbefore alleged by and under the directions and command of the defendant, the plaintiff has been permanently injured and incapacitated for doing any work," etc.

Plaintiff set forth two causes of action: (1) Defendant was engaged in intrastate commerce at the time of the alleged injury; (2) Interstate commerce. It is conceded on both sides that the plaintiff was not employed at the time of the injury in interstate commerce.

The defendant denied that it was engaged in interstate commerce and alleges that it was engaged in intrastate commerce and sets up the defenses: "That at the time of the injury complained of, the defendant was engaged in intrastate commerce, entirely within the State of Tennessee, and the plaintiff was employed by the defendant in said intrastate commerce, and any action which plaintiff has against the defendant is governed by the acts of the Tennessee Legislature of 1919, chap. 123, and amendments thereof, known as the Tennessee Workman's Compen-

sation Act, which defendant here pleads and relies upon. . . . And that plaintiff's action should have been brought before the Tennessee tribunal provided for in said act, and that this Court has no jurisdiction in this action. And if plaintiff has any cause of action against the defendant, which defendant denies, his said action is governed exclusively by said Tennessee Workman's Compensation Act. That, as defendant is informed and believes, the injury complained of was caused or directly contributed to by the negligence and want of care on the part of the plaintiff, who was in charge of, and directing, the work on said car at the time said injury is alleged to have been received or by the negligence or want of care on the part of the fellow-servant; and defendant pleads said negligence of plaintiff and his fellow-servant in bar of any recovery herein. And especially pleads that under the law of Tennessee contributory negligence and negligence of a fellow-servant are bars to recovery in a common-law action and pleads and relies upon said law. . . . That the plaintiff failed to give to the defendant written notice of the injury within thirty days after the occurrence of the accident, and the plaintiff failed to file with the tribunal having jurisdiction to hear and determine the matter, a claim for compensation under the provisions of the act of the Tennessee Legislature of 1919, chap. 123, and amendments thereof, within one year after said accident, and failed to commence this action within one year after the alleged injury as required by the statute of limitations of the State of Tennessee, and the defendant especially pleads said failure and neglect on the part of the plaintiff as a bar to his right to recover in this action. That the plaintiff by accepting employment, accepted the provisions of said statute and is bound thereby in this action."

Summons in the action was issued 6 January, 1923, and served on defendant 8 January, 1923. Original complaint was filed 29 January, 1923. At July Term, 1924, plaintiff, over objection of defendant, was allowed to amend his complaint which was filed 12 September, 1924.

Plaintiff's evidence showed that he was and had been a resident of Avery County, North Carolina, for about 40 years. He was 52 years old. The contract was made in Erwin, Tennessee. Henry Davis came to see him and in consequence of what he said, plaintiff went to Erwin, Tennessee. He was a carpenter and was put to work on the repair yard. He did the woodwork on freight cars. He commenced work for defendant on 6 September, 1922, and was injured 4 October, 1922. Did general repair work on the cars.

Plaintiff, testified, in part: "Before starting at this work, I had spoken to the foreman about it. I had asked him to furnish some more hands. He went to start away when he gave us these instructions, and I called to him and said, 'Mr. Broyles, can't you give us two more men;

we have only two men and two of our men are gone, and this is pretty hard work and unhandy work.' And he just dropped his head for a moment and said, 'Well, do the best you can, boys.' This is the first work of that kind I had done and three men had been working with us up to the present. The three men included myself. We commenced with four and the four only worked a few days, and they cut one off. When I told Mr. Broyles we needed more men, there was just Mr. Woody and myself, and we went ahead with the work the best we could. I was down under this car on the ground and Mr. Woody was up on the car, and there was a bench there and he had to get up on this bench, up high to let this rod down through the top plate. We had jacked the car. The jack worked by lever. The size of the piece of timber that we had from the roof of the car down to the top of the jack was four by six, yellow pine, perfectly square on each end, and somewhere from four to five feet long. The base of a twenty top jack is about twenty inches. The top of this ratchet had a foot on it. I suppose would set up something like six inches up above the top of the jack, and then it would run up something like the length of the jack. That would bring the bottom end of the piece of timber up something like 3½ to 4 feet up above the floor of the car. I was on the ground. It was about five feet from the floor of the car down to the ground—down to the top of the track. I had gotten down to take this rod, and Mr. Woody let the rod down, and so we needed a hand. He could not attend to both jobs at one time. I had taken this iron rod and placed it down through the sill, and had stooped down to start a nut in the rod, and as I went to start this nut, I looked and discovered that Mr. Woody had his hand on the lever of that jack. I took my eyes from him and started this nut on the rod and I don't remember if I had got the nut started on the rod or not, but not more than two seconds from the time I took my eyes off of him, this timber all of a sudden struck me on the top of the head," etc. It was further alleged in the complaint that only one man was furnished to assist in doing the heavy work. "The said young man so furnished being young, inexperienced and incompetent to assist in doing said work." The evidence showed that Eli Woody, the young man, was about 20 years of age.

The following appears of record: "After the jury had been empaneled and the pleadings read, the court inquired of counsel for plaintiff and defendant as to their contentions in regard to the law under which this case should be tried. Counsel for plaintiff contended that the common law applied or that the case should be tried under the Federal Employers' Liability Act. Counsel for defendant contended that the common law did not apply and that the Federal Employers' Liability Act did not apply, but that this cause, if tried at all under any act, should be

tried under the Tennessee Compensation Act, and further contended that if tried under that act that it appears upon the pleadings as now read before the court that the plaintiff's cause of action was barred by the statute of limitations and could not be tried at all in this court for that reason. And for the further reason that the cause of action set up in the complaint is not under the Tennessee Compensation Act, and is set up only in the answer filed by the defendants as therein shown. The court, after hearing argument as to plaintiff's and defendant's contentions in regard to the theory under which this cause should be tried, reserved its ruling until the plaintiff rested." The cause was tried under the Tennessee Compensation Act.

Plaintiff, in apt time, tendered the following issue: "What damages, if any, is plaintiff entitled to recover of the defendant by reason of the negligence of the defendant, as alleged?"

The action brought by plaintiff was a common-law action for negligence. Our statute on the subject is C. S., 970, which is as follows: "All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State."

Under a liberal construction of defendant's answer, the plea of contributory negligence is set up, on the common-law action of plaintiff for negligence. C. S., 523, is as follows: "In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial."

In *Hairston v. Cotton Mills,* 188 N. C., p. 559, *Hoke, C. J.,* speaking to the subject, says: "Our decisions on the subject being to the effect that where the negligence of an employer and a fellow-servant concur in producing an injury, an action lies, the claimant himself being free from blame. *Harmon v. Contracting Co.,* 159 N. C., p. 28; *Wade v. Contracting Co.,* 149 N. C., p. 177." *Wooten v. Holleman,* 171 N. C., p. 461.

Justice Walker, in *Pigford v. R. R.,* 160 N. C., p. 99, said: "The defendant contended that when the plaintiff's request for more help was refused, and he was directed to go on with the work and do the best he could without it, he should have quit the service and not have exposed himself to the danger which resulted in his injury. This would be a harsh rule to apply in such a case. There are many reasons, some humane, why it should not prevail. The master should be fair and just

to his servant. It is best for both that he should be so. The latter is entitled to fair treatment, just compensation, proper facilities for doing his work and reasonable care and protection while engaged in it. The servant is not required to retire from the service or to refuse to go on with his work, unless, as we have said, the danger is obvious, or he knows and appreciates it. He may know of the risk without fully appreciating the danger. Whether such a situation was presented to him at the time of the injury is a question for the jury, to be decided generally upon the rule of the prudent man." *Brown v. Foundry Co.,* 170 N. C., 38; *Crisp v. Thread Mills,* 189 N. C., 89; *Bradford v. English,* 190 N. C., 742.

In 18 R. C. L., p. 722, it is said: "The employer's obligation to his employees with regard to the selection of competent coemployees is substantially the same as his duty in respect of the tools, machines and appliances with which the work is performed. He is bound to see that those admitted to and retained in his service are fitted for the duties imposed upon them, the measure of responsibility being the exercise of ordinary or reasonable care."

"On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom." *Lindsey v. Lumber Co.,* 189 N. C., 118, and cases cited; *Barnes v. Utility Co.,* 190 N. C., 382; *Fleming v. Holleman,* 190 N. C., 452.

We think from the evidence of plaintiff there was sufficient evidence to be submitted to the jury as to right of plaintiff to recover at common law for negligence. The probative force is for the jury.

The defendant sets up as a defense to the action that defendant was engaged in intrastate commerce. The injury occurred in the State of Tennessee, and the action was governed by the Tennessee Workman's Compensation Act. That defendant company accepted the provisions of the act when the law went into effect and has continued under the act ever since.

Plaintiff admits that he signed the contract of employment with defendant at Erwin, Tennessee. It is contended by defendant, and set up in the answer, that plaintiff failed under the Tennessee Workman's Compensation Act to give to the defendant (1) written notice of the injury within 30 days after the occurrence of the accident; (2) to file with the tribunal having jurisdiction to hear and determine the claim for compensation under the act within one year after the accident; (3) failed to commence his action within one year after the alleged injury. This is plead in bar of recovery. Defendant cites *Graham v. J. W. Wells Brick Co.* (13 December, 1924), 150 Tenn., 660. The Court holds

that the "petitioner was bound to make application for compensation for his injury within one year from the date of the accident," etc. The headnote is: "Petitioner's right to compensation for total loss of eye, resulting from accident which immediately and consciously impaired his vision, which was compensable under Workman's Compensation Act, section 28c, subject to increase under section 38, held barred under sections 24, 31, construed in harmony with section 47, where petitioner did not apply for compensation within one year from occurrence of accident; 'injury,' as used in section 31, being synonymous with 'accident,' as used in section 24."

The court below tried the case out on the theory that the Tennessee Workman's Compensation Act applied, and submitted 8 issues. The court charged the jury as follows:

"The first issue is: 'Did the plaintiff enter into a contract of employment with the defendant in the State of Tennessee, and was he injured in said State?' That has been answered by consent 'Yes,' that is, he entered into the contract, and while carrying out the contract, he was injured in Tennessee.

"The second issue is: 'Did the plaintiff give written notice within thirty days after he received his injury, as required by the provisions of the Workman's Compensation Act of Tennessee?' This second issue has been answered by consent, 'No'—so you need not bother yourselves about this issue.

"The third issue, is: 'Did the plaintiff file a claim for compensation under the provisions of said act with the tribunal having jurisdiction to hear and determine the matter within one year after the accident resulting in the injury?' By consent this third issue has been answered 'No,' except the issuing of the summons and filing of this case as set out in the record, so you need not bother yourselves about this third issue.

"The fourth issue is: 'Was the plaintiff injured by an accident arising out of and in the course of his employment?' By consent, this issue has been answered 'Yes.'

"The fifth issue is: 'Is the plaintiff's cause of action barred by the statute of limitations?'

"The summons has been issued in this court in less than a year after the time of the injury—evidence tending to show that the plaintiff was injured on 4 October, the summons was issued on 30 December, 1922 (6 January, 1923), a little less than three months, and that is the date of the summons in this action. The court charges you, gentlemen of the jury, if you should find by the greater weight of the evidence that the plaintiff was injured, that is, the injury upon which this cause of action is based, on 4 October, 1922, and that the summons was issued 30

December, 1922 (6 January, 1923), if you find that to be true, by the greater weight of the evidence, then the court charges you that the plaintiff's cause of action is not barred by the statute of limitations, and it will be your duty to answer the fifth issue 'No.'

"The sixth issue—'Did the plaintiff commence his action or proceeding to determine or recover compensation within one year after the occurrence of the injury?' This action having been commenced when the summons was issued, and the summons having been offered in evidence, tending to show that it was issued on 30 December, 1922 (6 January, 1923), and evidence tending to show that he was injured on 4 October, 1922—the court charges you, if you find from the greater weight of the evidence tending to show those facts, that he was injured on 4 October, 1922, by the greater weight of the evidence, and find that the summons was issued on 30 December, 1922 (6 January, 1923), if you find that to be true by the greater weight of the evidence, then the plaintiff commenced his action within one year after the occurrence of the injury, and it will be your duty to answer the sixth issue 'Yes.'"

The seventh issue is: "What damages, if any, is the plaintiff entitled to recover of defendant?" The charge was full and explicit, but the ascertainment of damage was left to the jury to be determined under the Tennessee Workman's Compensation Act. Under this law the jury found for plaintiff and answered: '$4,300.'"

We are of the opinion that the suit should have been tried under the common law as now administered in the courts of this State in an action of this kind—actionable negligence for an injury that resulted in damage. The verdict as rendered is not sufficient to support a judgment for damages based on the common-law action for negligence. The law is woefully in conflict in relation to extra-territorial jurisdiction of the Workman's Compensation acts. The plaintiff, under the facts in the present case, never submitted his claim of compensation to the jurisdiction of Tennessee, under the Tennessee Workman's Compensation Act, other than making the contract in Tennessee. He was a resident of North Carolina and was induced to go to Tennessee to work in an emergency for defendant. He was injured shortly after he began to work and after the injury immediately returned to his home in this State and in a few months instituted this action, based on a common-law right. The defendant set up the Tennessee Workman's Compensation Act and contended that it was jurisdictional—and then plead the sections of the Tennessee Workman's Compensation Act that defendant contended would bar plaintiff's recovery. Defendant further contended that the plaintiff, by accepting employment without electing not to be bound by giving notice in accordance with the act became bound by the provisions of the Tennessee act and cannot maintain this action. The contentions of de-

fendant, under the facts and circumstances of this case, cannot be upheld. When an action is brought in one State to recover for a personal injury sustained in another State, the law of the latter ordinarily governs as to the rights of the litigant and the former as to the remedy. *Ledford v. Tel. Co.*, 179 N. C., p. 63. So far the public policy of this State has never expressed itself by legislative enactment of a Workman's Compensation Act.

There has been much conflict in the decisions of the different states and no marked uniformity; consequently, the decisions of one state have had very little controlling influence on another state. This State has never adopted a Workman's Compensation Act, and there is no provision in this State for the enforcement of a Workman's Compensation Act similar to that in Tennessee. The contention of defendant is that by the very language of the Tennessee act it can only be enforced in that State—exclusive remedy. That being so, Tennessee is the *lex loci contractus* and the *lex fori*—there can be no comity. Black's Law Dic. (2 ed.), p. 219, citing numerous cases, speaking to the subject of Judicial Comity, says: "The principle in accordance with which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect."

To hold that a citizen of this State, under such circumstances, had no remedy, except that provided by the Tennessee Compensation Act in force in the state in which he was injured, having been induced to go there to work in an emergency, would be a denial of any remedy in the courts of this State. This Court cannot so hold.

We have held in *Farr v. Lumber Co.*, 182 N. C., p. 725, that where the contract of employment was made in Tennessee and the employee was injured while working in North Carolina, the Tennessee Compensation Act did not interfere with the jurisdiction of the Superior Court in North Carolina, where the injury occurred, to entertain actions for the employer's failure to keep a physician at the camp to attend the employee after he was injured, or for its employment of an incompetent physician, or for its negligent failure to provide the employee transportation to his home. 18 A. L. R., 294. For contrariety of decisions on Workman's Compensation acts, see annotations—*State ex rel Chambers v. District Court*, 3 A. L. R., 1351; see annotations—*Kennerson v. Thames Towboat Co.*, 59 A. L. R., 443.

For the reasons given, there must be a

New trial.

E. C. GRIFFITH v. SOUTHERN RAILWAY COMPANY.

(Filed 27 January, 1926.)

1. Railroads — Rights of Way — Easements—Actual Occupation—Width of Right of Way.

A railroad company acquires by condemnation a right of way over the lands of the owner, within the limits of its charter or other pertinent statutes, when not otherwise specified extending to that portion not actually occupied by its roadbed.

2. Same—Acquisition—Statutes.

A railroad company ordinarily may acquire a right of way over or an easement in the lands of the owner for the purposes of its railroad, by purchase or grant, condemnation, or statutory presumption.

3. Same—Width of Right of Way—Statutes—Presumptions.

Where the charter of a railroad company prescribes the maximum or minimum width of the right of way that the company may acquire over the lands of the owner, it confines such acquisition strictly to the width prescribed; and if no width is prescribed therein, then that prescribed by C. S., 1733(1), applies, subject to the right of the owner for compensation. C. S., 440 (1), (2).

4. Railroads—Rights of Way — Easements — Statutes—Strict Construction.

Statutes giving railroad companies the right to condemn lands of the owner for railroad purposes, will be strictly construed, and the rights will not be extended beyond those expressly granted or arising by necessary implication.

5. Same—Statutes—Presumptions.

Where the Legislature of this State confers upon a railroad corporation of another state the same right to acquire land herein as given by its act of incorporation in another state, there can be no presumption, under our statutes, as to the width of the right of way acquired here, when the method of its acquisition, under its charter, has not been followed here.

CLARKSON, J., took no part in the consideration or decision of this case.

CIVIL ACTION to remove a cloud from title, tried before *Webb, J.*, at October Term, 1925, of MECKLENBURG.

From judgment in favor of plaintiff, defendant appealed. Affirmed.

The facts essential to the determination of the controversy are substantially as follows:

Plaintiff is the owner in fee simple and in possession of a certain lot of land in the city of Charlotte under mesne conveyances and canons of descent from one William Elms who was the owner thereof on 1 January, 1852. Plaintiff's land has been within the corporate limits of the city of Charlotte since 1852. On 26 February, 1852, the General

Assembly of the State of Tennessee incorporated the Atlantic, Tennessee & Ohio Railroad Company referred to in the record as the A. T. & O. R. R. Company. Section 8 of said Tennessee charter provides "that said Atlantic, Tennessee & Ohio Railroad should have perpetual succession of members, sue and be sued, plead and be impleaded in any court of law or equity in the states of Kentucky, Virginia, Tennessee and North Carolina, and make all such regulations, rules and by-laws as are necessary for the government of the corporation or affecting the objects for which it was created; provided such rules and by-laws shall not be repugnant to the laws or Constitution of said states or of the United States.

Section 14 thereof provides "that the board of directors shall have power to construct as speedily as their means will permit a railroad with one or more tracks to be used with steam, animal or other power between Charlotte, North Carolina, and some point on the East Tennessee and Virginia Railroad."

Section 28 provides "that the said company may purchase, have and hold in fee or for a term of years any lands, tenements or hereditaments which may be necessary for the said road."

Section 31 provides in substance that the president and directors of said company or their authorized agents may agree with the owner of any land, earth, timber or stone, or any other materials or improvements which may be wanted for the construction or repair of any of said road or any of their works, and if such authorities could not agree with the owner of such land or material wanted, application may be made to any justice of the peace, who shall issue a warrant requiring the sheriff to summon a jury of five freeholders to meet on the land or property to be valued, and after administering an oath to such jurors, the said jurors shall assess the damages, reducing their verdict to writing and signing the same, which award shall be filed in the office of the clerk, and upon payment of said award the company was authorized to enter upon the premises described in the award. The said jury of inquisition was further required to describe the property taken or the bounds of land condemned and the duration of interest in the same.

The General Assembly of North Carolina at its regular session 1854-1855, enacted chapter 227, Public Laws 1854-55. Section 1 of said chapter 227 provides "that the said Atlantic, Tennessee & Ohio Railroad shall be a body corporate in this State, and with the powers and privileges in said act of incorporation granted shall also have power to extend their railroad to some point on the North Carolina Western Railroad or to some point on the North Carolina Railroad."

Section 4 of said chapter 227 is as follows: "Be it further enacted, that the said company shall have the same power of surveying, locating

and condemning property *that is allowed in the State of Tennessee;* also all the powers and privileges in constructing, equipping and running their said road, that is by the said act granted to them in the said State of Tennessee."

Thereafter and in pursuance of said act the A. T. &. O. Railroad Company constructed its railroad in the city of Charlotte about the year 1859 or 1860, locating its track either upon or near the land of the plaintiff. The defendant, Southern Railway Company, is the successor in title of the said A. T. & O. Railroad Company and is now the owner of all the right, title and interest formerly owned by the said A. T. &. O. Railroad Company in and to said line of railway and its appurtenances, and is now engaged in operating the same. The defendant as such successor in title claims a right of way or easement over all of the land of the plaintiff described in the complaint, lying within a distance of fifty feet from the right angle of the A. T. & O. Railroad Company.

The case was heard upon the complaint, answer, demurrer to answer, stipulations and exhibits, and judgment rendered decreeing that the plaintiff was the owner of the land in fee, free and clear of any right of way, easements, privileges or other estate or interest of defendant, and that the defendant has no claim, easement, right of way or other interest in, over and upon the land of the plaintiff.

Taliaferro & Clarkson for plaintiff.
Manly, Hendren & Womble for defendant.

BROGDEN, J. The question for decision is whether or not the defendant has an easement in and to the land of the plaintiff by reason of the construction of a line of railroad over or abutting the land of the plaintiff by the A. T. & O. Railroad, the defendant's predecessor in title. The defendant contends that it has such an easement. The plaintiff, upon the other hand, contends that defendant's claim constitutes a cloud upon his title and brings this action to remove the cloud.

If there be a cloud upon plaintiff's title, it arises from one or all of three sources, to wit:

(1) Entry by defendant's predecessor in title upon or abutting the lands of plaintiff and the construction of a line of railroad thereon, the entry having been made and the road completed in 1859 or 1860.

(2) C. S., section 1733, subsection 1, as follows, to wit: Right of way of railroad: The width of land condemned for any railroad shall not be less than 80 feet nor more than 100, except where the road may run through a town, when it may be of less width; or where there may be deep cuts or high embankments, when it may be a greater width.

(3) C. S., 440, subsection 1, as follows, to wit: No suit, action or proceeding shall be brought or maintained against the 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.

So that the defendant asserts that entry and construction of the railroad coupled with the provision of C. S., 1733, *supra,* raises a presumption that defendant has an easement in, and over that portion of plaintiff's land within fifty feet from the right angle of the track of the A. T. & O. Railroad Company.

It is universally held in this jurisdiction that a railroad corporation acquires by condemnation an easement over that portion of its right of way not actually occupied by its roadbed, tracks, drains and side-ditches: *Ward v. R. R.,* 109 N. C., 358; *Blue v. R. R.,* 117 N. C., 644; *R. R. v. Sturgeon,* 120 N. C., 225; *Neal v. R. R.,* 128 N. C., 143; *Shields v. R. R.* 129 N. C., 1; *McCullock v. R. R.,* 146 N. C., 316; *R. R. v. McLean,* 158 N. C., 498; *Hendrix v. R. R.,* 162 N. C., 9; *R. R. v. Bunting,* 168 N. C., 579; *Tighe v. R. R.,* 176 N. C., 239.

This easement or right of way under our law can be acquired by three methods, to wit:

(1) Purchase or grant; (2) Condemnation; (3) Statutory presumption. *Barker v. R. R.,* 137 N. C., 214.

It is conceded that the defendant did not acquire an easement in plaintiff's land by virtue of purchase, grant or condemnation, and that plaintiff has received no compensation for his property claimed in this action. Therefore, the doctrine of statutory presumption is the sole basis of defendant's claim.

There are many cases in this jurisdiction dealing with various aspects of controversies arising between citizens of the State and railroad companies in reference to the extent of the easements acquired in and to private property by virtue of provisions in charters, deeds and grants, or by reason of the application of C. S., 1733 and C. S., 440, *supra. R. R. v. McCaskill,* 94 N. C., 746; *Land v. R. R.,* 107 N. C., 72; *Liverman v. R. R.,* 109 N. C., 52; *Utley v. R. R.,* 119 N. C., 720; *Narron v. R. R.,* 122 N. C., 856; *R. R. v. Olive,* 142 N. C., 257; *Parks v. R. R.,* 143 N. C., 289; *Earnhardt v. R. R.,* 157 N. C., 358; *Abernethy v. R. R.,* 159 N. C., 341; *Caveness v. R. R.,* 172 N. C., 305; *R. R. v. Nichols,* 187 N. C., 153; *Young v. R. R.,* 189 N. C., 238.

The general principles established by the decisions are in substance:

(1) That if a method of acquiring property for a right of way is prescribed in the railroad charter that method is exclusive and must be strictly construed and strictly followed.

(2) That if the charter prescribes no maximum or minimum width of the right of way, then C. S., 1733, subsection 1, applies, and the law presumes the width therein specified subject to the right of the owner to recover compensation by compliance with C. S., 440, subsections 1 and 2.

This case stands upon a different footing.

The A. T. & O. Railroad Company, defendant's predecessor in title, was created by act of the General Assembly of Tennessee on 26 February, 1852. It was, therefore, a foreign corporation.

The General Assembly of North Carolina, Session 1854-1855, chapter 227, reënacted the Tennessee charter. The pertinent provisions of the North Carolina Act are as follows:

Section 1. That the said Atlantic, Tennessee & Ohio Railroad Company shall be a body corporate in this State, and with the powers and privileges in said act of incorporation granted shall have power to extend their railroad to some point on the North Carolina Western Railroad, etc.

Section 4. Be it further enacted, that the said company shall have the *same power* of surveying, locating and *condemning property that is allowed in the State of Tennessee;* also all the powers and privileges in constructing, equipping and running their said road that is by the said act granted to them in the State of Tennessee.

Obviously, it was the plain intention of the General Assembly of North Carolina to grant to this foreign corporation only such powers as were delegated to it by the State of Tennessee.

What powers, therefore, were delegated by the Tennessee statute? Substantially the following:

(1) To construct as speedily as their means will permit a railroad with one or more tracks.

(2) To purchase, have and hold in fee or for a term of years any lands, tenements or hereditaments which may be necessary for the said road, etc.

(3) To take possession of land or material *"where such land or material may be wanted"* after the same has been duly appraised in accordance with the method set out in the said section 31, subject, however, to the payment of whatever damages might be awarded by the jury of inquisition or by the court if an appeal was taken, it being further provided that the "jury of inquisition should describe the property taken or the bounds of the land condemned and the duration of interest in the same."

It is apparent from an examination of the statutes involved that no maximum or minimum right of way was provided by the law of Tennes-

see, and the A. T. & O. Railroad Company could only take *"such land as may be wanted"* by the method prescribed in section 31 of its charter.

The Legislature of North Carolina expressly withheld from the A. T. & O. Railroad Company the power of eminent domain except as granted by the law of Tennessee, and the law of that state specified no maximum or minimum width of right of way.

Eminent domain means the right of the state or of the person acting for the state to use, alienate or destroy property of a citizen for the ends of public utility or necessity. *Wissler v. Power Co.*, 158 N. C., 465.

This power is one of the highest attributes of sovereignty, and the extent of its exercise is limited to the express terms or necessary implication of the statute delegating the power.

The rule is stated thus in *R. R. v. Lumber Co.*, 132 N. C., 652; "In construing statutes which are claimed to authorize the exercise of the power of eminent domain, a strict rather than a liberal construction is the rule. Such statutes assume to call into active operation a power, which however essential to the existence of the government, is in derogation of the ordinary rights of private ownership and of the control which the owner usually has of his property. The rule of strict construction of condemnation statutes is expressly applicable to delegations of power by the Legislature to private corporation." *R. R. v. R. R.*, 148 N. C., 63; *Comrs. v. Bonner*, 153 N. C., 66; *Lloyd v. Venable*, 168 N. C., 532.

The defendant relies upon the case of *Tighe v. R. R.*, 176 N. C., p. 244. In that case the Raleigh & Gaston R. R. Company was operating under a charter prescribing the width of a right of way and authorizing the railroad company to take a right of way of that width. A deed had been executed and delivered to the company "for so much of a certain tract . . . as may be taken in constructing the connection between the Raleigh & Gaston and North Carolina Railroad according to the survey made by Ed Myers."

The Court properly held that a deed or grant for an indefinite quantity of land for purposes of a right of way amounted to a conveyance of the full width authorized by the charter or the general law.

The Legislature of North Carolina expressly granted to the A. T. & O. R. R. Co. only such powers as were conferred by the law of Tennessee. This fact, in itself, under the general rules of statutory construction excludes the application of the general law of North Carolina. The principle is summarized in the well known maxim *"expressio unius est exclusio alterius." Latta v. Williams*, 87 N. C., 129.

For this reason the principles announced in the *Tighe case* do not apply.

We are therefore of the opinion and so hold upon the record presented that there is no statute or statutory presumption creating an easement in plaintiff's land in favor of the defendant and hence that the defendant has no valid claim to any part of plaintiff's land described in the complaint.

Affirmed.

CLARKSON, J., took no part in the consideration or decision of this case.

C. B. FORE v. J. M. GEARY AND F. S. TERRY.

(Filed 27 January, 1926.)

Master and Servant—Negligence—Safe Place to Work—Evidence—Accident—Nonsuit.

It is the duty of the employer to furnish his employee a safe place to work, by the exercise of ordinary or commensurate care, and evidence is insufficient which tends to show that an employee acting under the direction of the defendant's vice principal, was injured in the course of his employment as stone mason on a building, by the unforeseeable and unaccountable falling of a steel beam upon him, after it had been put in place by the carpenters at work on the building, which was one of many similarly placed, which did not fall, there being no evidence of any defect in the beam or its manner of placing, which caused the fall.

APPEAL by plaintiff from *Dunn, J.*, at October Special Term, 1925, of BUNCOMBE. Affirmed.

Action to recover damages for personal injuries alleged to have been caused by negligence of defendants. From judgment as in case of nonsuit, rendered at close of plaintiff's evidence, upon motion of defendants, plaintiff appealed.

Mark W. Brown for plaintiff.
Merrimon, Adams & Adams for defendants.

CONNOR, J. On ..... November, 1924, plaintiff was at work, as a stonemason, on a building located near Black Mountain, North Carolina, then in process of construction by defendant, J. M. Geary, as contractor for defendant, F. S. Terry, as owner. He was 53 years of age, and had been a stonemason for twenty-five years. He had been at work on this building about two months. It was a large building, and was to be used as a residence by defendant, F. S. Terry. The outside walls were of

stone. On said day carpenters were at work inside the building; there was quite a number of men working there, carpenters, stonemasons and others. The roof had not been completed. The building was in process of construction, carpenters, stonemasons and others all being at work at the same time upon the building.

Plaintiff, as a witness in his own behalf, testified as follows: "On the day of the accident, I was working in one of the rooms—had been working there about half an hour when I was injured. Mr. Cordell was foreman of the stone work and put me to work there; he was just off the room. He called me and told me to take my tools and build up a place in that room; he could see the place where he told me to work, for it was open. At that time the carpenters were at work above the place where I was told to go to work; there were two of them. The foreman was in a position to see the carpenters when he told me to go there to work. They had torn out a hole for a pipe to go through—a tap for a sewer, or some kind of pipe. They made the hole bigger. The ceiling was constructed of metal beams; I believe the beams started at sixteen feet and ran down; they ran kind of corner-ways across the corner of the house and were of different lengths. At the place where I was filling in the hole in the wall, the beams were something like 12 or 14 feet long. I had nothing to do with the metal beams at all. I had nothing to do with the work of these carpenters.

"A beam went over the place where the stone was torn out, and I was sent in there to build up the wall. I commenced at the floor and was building up that hole inside the wall. Several beams had been set at or about the place where I was working, and the carpenters had gotten to that place and missed one. I lacked about six feet of having this cut-out place built up where the beam could be laid. The ceiling was about nine feet high and I was squatting down hammering stone at the time I was hurt. I was on a little scaffold about three feet high and laid some stone up and got up on top of the scaffold and while I was in that position one of those metal beams fell down on me; it struck me on the back of my head, and slipped down and caught me on my shoulders—hit me on the shoulders and head; it addled me for a little bit, and then after I came to I went on to work that evening. I went to Mr. Cordell and told him I had got hurt. I went back after awhile and worked the rest of the evening. From the time I received the injury I hurt in my shoulders and head and all down my side. It lasted three months. I lost about three months. I could not work on a high scaffold. I had spells with my head and had to quit driving my car because I would have dizzy spells.

"I worked under those men because the foreman sent me there. The man and the beam both fell on me; at the time, I was hunkered down

with my eyes on the stone, away from the beam; the man was on the beam when it struck me; he was up there doing something. I did not see what made the beam fall."

Mr. Hemphill, a witness for plaintiff, testified: "I am a carpenter. I was working on the building being erected for Mr. Terry near Black Mountain by Mr. Geary at the time plaintiff, Mr. Fore, was injured. I was placing the beams at the time—metal beams. Mr. Kerlee was working with me. The long beams had all been set up to this place, and we could not set the next beam until somebody filled in the space made by the hole in the wall. We jumped over the space where Mr. Fore was working. The last beam we set was about 22 inches from the opening where he was working; the beams were 22 inches apart. After we set the beams we would nail wood strips across them to take care of the floor—to nail the floor to—and when we would set them the distance they were supposed to be, we would nail a strip to hold them in place until the masons came along and built the wall up. We did not nail the beams right around Mr. Fore with strips. We were fixing to nail them, and in some way this one turned; I don't know what was the cause of it. I looked afterwards but could not determine. It had been setting on a small foundation, a stone in the wall kind of rounded, and this stone turned with the weight of the beam, and I fell with it; I don't know whether or not it was loose; anyway it tripped me and I fell. I was going there to fasten it down and I caught on the other beam. Probably caught this one with my left hand. I was working under Mr. Lyman, the foreman of the carpenters. I had no connection with Mr. Cordell, the foreman of the stonemasons. I don't remember whether I stood on the beam or not; but I know I had picked up a piece of timber to nail those strips across. I was at work in connection with my employment on the building.

"I was going across the place there to nail the beam down. It had been put there by one of the carpenters. There was nothing wrong with the beam that I know of. It was good daylight. I noticed Mr. Fore at work on the scaffold; he could see me, but I went ahead with my work and never observed what other men were doing."

Plaintiff alleges in his complaint that he was injured by the negligence of defendants, his employers, in that they failed to exercise due care to provide for him a reasonably safe place to work. He contends that the place at which he was directed to work by his foreman was unsafe, because, at the time he was directed to go there, and while he was at work, carpenters, employed by defendants, were engaged in fastening down metal beams, which they had placed in the construction of the ceiling of the room in which plaintiff was at work; that these carpenters were permitted to continue and did continue to work on said beams while plaintiff

was at work beneath them; that these beams were not securely fastened, and that one of them turned and fell upon him, thus injuring him. Defendant's foreman, under whose direction and supervision he was required to work, was present and knew the conditions under which plaintiff was working, when he was injured. There is no allegation or contention by plaintiff that the beam fell upon him because of any negligence of the carpenters, or because the method by which they were doing their work was unsafe or dangerous. He contends that the proximate cause of his injury was the negligence of defendants consisting in their failure to perform their duty to him, as their employee, to wit, to exercise due care to provide for him, while at work, a reasonably safe place.

The court was of opinion that the evidence offered by plaintiff was not sufficient to sustain his allegations or to support his contentions, and therefore allowed defendants' motion, made at the close of plaintiff's evidence for judgment as in case of nonsuit. C. S., 567. In this, plaintiff contends that there was error. His only assignment of error, upon his appeal to this Court, presents this contention.

The fact that plaintiff was injured as he alleges and as the evidence shows, raises no presumption of negligence; it is not, in itself, evidence of negligence. *Orr v. Rumbough,* 172 N. C., 754. The fact that an employee has been injured, while at work, carries with it no presumption of negligence; it is not, in itself, evidence that the place at which he was at work, at the time of the injury, was an unsafe place in which to work, or that there had been a breach of duty by his employer to exercise due care to provide a reasonably safe place for him, resulting, as the proximate cause, in his injury. *Shaw v. Mfg. Co.,* 143 N. C., 131.

It is not contended that the mere fact that an employee has been injured, while at work, imposes liability upon his employer for damages resulting from his injury. This Court has consistently held that an employer is not an insurer of the safety of his employee while engaged in the performance of duties within the scope of his employment. The law holds an employer liable for damages resulting from injuries to an employee, only when such injury is caused by the failure of the employer to perform some duty prescribed by law and arising out of the relationship. It is the wise and just policy of the law as administered in this jurisdiction, to protect the mutual rights and to enforce the mutual duties of employer and employee, to the end that justice shall be done to each, and that neither shall suffer wrong. The relationship is and should be mutually helpful. It is a useful and, indeed, essential human relationship, necessary in a complex civilization, built upon the principle of the division of labor, as is ours. *Greer v. Const. Co.,* 190 N. C., 632.

In the instant case, there was no inherent defect in the beam, which caused it to turn and fall, as was the case with the iron rail in *Pigford*

v. R. R., 160 N. C., 93; the beam had not been taken from the place where it belonged and put temporarily in an insecure place, as was the case with the piece of iron in *Hairston v. Cotton Mills,* 188 N. C., 557; there was no defect in its support, or probability of its falling, upon the release of a lever, as was the case with the crane in *Davis v. Shipbuilding Co.,* 180 N. C., 74, or the dipper in *Perkins v. Wood & Coal Co.,* 189 N. C., 602; its fall was not due to the dangerous method by which fellow-employees were doing their work, under the direction and supervision of a foreman of defendant, as in *Beck v. Chair Co.,* 188 N. C., 743, or in *Thomas v. Lawrence,* 189 N. C., 521. Nor was the place at which plaintiff was directed to work rendered unsafe by the presence of a latent source of danger, which he could not detect by his senses, as in *Barnes v. Utility Co.,* 190 N. C., 382, where the employee was fatally injured by coming in contact, at the place to which he had gone for the performance of his duties, with a wire highly charged with electricity, without notice to him of such condition of the wire.

In *Brown v. Scofields Co.,* 174 N. C., 4, this Court held that plaintiff, who was injured by the falling upon him of a pair of pliers which another employee of defendants, who was working above plaintiff, had in his possession, could not recover damages resulting from said injury upon the contention that defendants had failed to exercise reasonable care to provide plaintiff a safe place at which to work. The opinion, written by *Justice Brown,* is supported by abundant citations of authorities, sustaining the proposition that the "obligation of a master to provide a reasonably safe place and structures for his servant to work upon, does not oblige him to keep a building, which they are employed in erecting, in a safe condition at every minute of their work, so far as its safety depends on the performance of that work by them and their fellow-servants." *Armour v. Habor,* 111 U. S., 313. In that case, as in the instant case, the place was safe; the injury was the result of the act of a fellow-servant, which, whether accidental or negligent, imposed no liability upon the employer who could not have, by the exercise of reasonable care, foreseen the occurrence. Cited and distinguished in *Thomas v. Lawrence,* 189 N. C., 521.

The beam, which fell and injured plaintiff, had been placed by the carpenters just as the other beams, used in the construction of the ceiling, had been placed. None of these fell. Plaintiff was directed to build up the wall so that the beams overhead could be fastened. Hemphill, one of the carpenters, who was at work fastening down the beams, by nailing wooden strips across them, in some way, which he could not explain, fell and caught at this beam; it turned and fell, with Hemphill, upon plaintiff, who was at work below. When defendants' foreman directed plaintiff to take his tools and build up the wall, so that the beams

which had been placed by the carpenters could be fastened down by them and so that the missing beam might be put in its place, he could not have foreseen that one of these carpenters would stumble and fall upon one of the beams, causing it to fall. Plaintiff, who knew the purpose for which he was directed to build up the wall and knew that the carpenters were at work over him, did not foresee that one of these beams would fall upon him. He was a stonemason with twenty-five years of experience and had been at work on this building for two months. With Hemphill, the falling of the beam was an unforeseen event, occurring without his will or design. As to the foreman, who, it is contended, was the vice-principal of plaintiff, it was an unexpected, unusual and unforeseen occurence. Plaintiff's injury was caused by an unfortunate accident, fortunately for him, resulting in no serious or permanent injury. Defendants are not liable for such damages as resulted from plaintiff's injury, upon the facts established by the evidence considered in accordance with the rule applicable, as often stated by this Court.

"The employer does not guarantee the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. It is culpable negligence which makes the employer liable, not a mere error of judgment. The rule which calls for the care of a prudent man is in such cases the best and safest one for adoption. It is perfectly just to the employee and not unfair to the employer and is but the outgrowth of the elementary principle that the employee, with certain statutory exceptions, assumes the ordinary risks and perils of the service in which he is engaged, but not the risk of the employer's negligence. When any injury to him results from one of the ordinary risks or perils of the service, it is the misfortune of the employee, and he must bear the loss, it being *damnum absque injuria.*" This statement of the law by *Justice Walker* in *Marks v. Cotton Mills,* 135 N. C., 288, has been repeatedly and uniformly approved by this Court, and applied to the facts in many decisions, some favorable to the employer, and some to the employee. See Anno. Ed., and Shepherd's Citations.

No man, by the exercise of reasonable care, however high and rigid the standard of such care, upon the facts in any particular case, can foresee or forestall the inevitable accidents, and contingencies which happen and occur daily, some bringing sorrow and loss, and some bringing joy and profit, all however contributing, in part, to make up the sum total of human life. The law holds men liable only for the consequences of their acts, which they can and should foresee and by reasonable care and prudence, provide for.

There was no error in allowing the motion for judgment as in case of nonsuit. The judgment is

Affirmed.

MRS. ALICE E. NICHOLSON ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF MRS. ANNA C. ARNOLD, v. PEARSON BENNETT SERRILL.

(Filed 27 January, 1926.)

1. Wills—Devise—Debt of Devisee—Intent.

Where a testatrix had taken a chattel mortgage to secure a debt due by a beneficiary under her will, which remained unpaid at her death, and has devised to him a legacy in a large sum of money, clearly evidencing her intention that he was preferred over other beneficiaries, and does not by his will exclude the payment of the debt, the testator's intent is not to forego the collection of the mortgage security, and her executor may foreclose the mortgage and collect the debt.

2. Same—Trusts—Estates—Remainders.

Where a legatee owes a debt secured by chattel mortgage to the estate, made to the testatrix in her lifetime, and there is a devise of a large sum of money to be held by the executor in trust for him, but with certain contingent limitations over to others, etc., the sum so held in trust may not be diminished by the failure of the mortgaged property to pay off or discharge the debt, and a judgment to that effect is to that extent erroneous.

APPEAL by defendant from *Finley, J.*, at May Term, 1925, of HAYWOOD. Modified and affirmed.

Action to recover judgment on note executed by defendant, payable to order of plaintiff's testatrix, for decree of foreclosure and order directing the sale of personal property described in a chattel mortgage executed by defendant to secure the payment of said note and for order directing plaintiffs to retain from legacy bequeathed by testatrix to defendant the balance due, if any, after the application of the proceeds of said sale, as payment upon said note. From judgment upon the facts as found by the court, from pleadings and proofs offered, defendant appealed.

Alley & Alley for plaintiffs.
William T. Hannah and W. R. Francis for defendant.

CONNOR, J. On 11 April, 1921, defendant executed his note by which he promised to pay to the order of Anna C. Arnold, thirty-six months after date, the sum of seventeen hundred dollars, with interest from date at the rate of six per centum per annum, payable annually; on the same date defendant executed a chattel mortgage for the purpose of securing the payment of said note, by which he conveyed to Mrs. Anna C. Arnold certain articles of personal property described as follows: "One chest of drawers, rosewood, one bureau, one washstand, one bedstead of cherry, one set of springs, one wool mattress, two pillows, one eider-down quilt,

one very nice silk quilt, two nice single blankets, white, two army blankets, one table with dresser, mahogany, one oak Morris chair, upholstered in leather, one wicker rocker, one mahogany rocker, which has been painted maple, two straight walnut chairs, which need upholstering, one tapestry piece, one picture, two dead birds done on wood, 12 other pictures, one book case, one box of silver, some few pieces of silver, one trunk with sheets, pillow cases, table linen, etc., one trunk of toys, one trunk of books, one empty trunk, one steamer trunk, one barrel of china, all of this I have always paid taxes on, two vases." This chattel mortgage was duly recorded on 12 April, 1921. There was no allegation or evidence that any payments had been made on the note secured therein.

On 3 June, 1921, Anna C. Arnold made and published her last will and testament; she died at Raleigh, N. C., on 15 February, 1924, and thereafter said last will and testament was duly probated and recorded in Haywood County, where she resided. Plaintiffs, Alice E. Nicholson, Edward T. Clark and F. S. Ballard, appointed in said will as executors, have duly qualified as such. The other persons appointed as executors have not qualified, one, Chief Justice Walter Clark, having since died, and the other, Henry N. Clark, having renounced.

The interests of defendant, Pearson Bennett Serrill, in said will, arises from the following items and references therein to him:

"Second and third. In consideration of the love and affection I have for Pearson Bennett Serrill, whom I reared in my home from the time he was a small child until he reached his majority, I bequeath the sum of ($10,000) Ten Thousand Dollars in trust to be placed in the hands of 'The Wachovia Bank & Trust Company' of Asheville, North Carolina, as trustee for the use and benefit of the said Pearson Bennett Serrill. The said trustee is directed to place the said amount at interest to the best advantage, and the said trustee is directed to pay semiannually the interest at the best rate obtainable on said sum to the said Pearson Bennett Serrill until 1 July, 1955, and should the said Pearson Bennett Serrill be then living, then the whole amount with interest unpaid of said legacy shall be paid to him free of the trust, and should he die before that date said amount with any unpaid interest shall be paid to the lineal descendants of the said Pearson Bennett Serrill, if he has any, free of the trust; and in case he dies without lineal heirs, then it is my will that this said amount in the hands of the said trustees shall be freed from the trust and immediately become the property of Rev. J. D. Arnold's children, Mrs. J. T. Schaaf, Mrs. R. C. Stearnes, Mrs. Pearl Arnold Townsend, Miss Virginia Arnold, Prof. M. H. Arnold, Prof. Benjamin William Arnold, or the heirs of any that may be dead, first to the lineal

heirs, and in case of failure of lineal heirs, then their collateral heirs, who are entitled to receive it, and be discharged from the trust.

"Fourth. It is my will, if I should fail to leave sufficient money and personal property to pay legacies created in the preceding second and third paragraphs of this will, then in the event I authorize and direct my executors to first collect and sell my notes and bonds, and secondly real estate, except 75 acres farm land devised to Henry N. Clark, either at public or private sale to bring a sufficient amount to pay said legacies, and it shall be their duty to do the same."

"Nine. It is my will that whatever other personal estate which I may die possessed of which has not hereinbefore been disposed of that my executors hereinafter named shall use toward paying two legacies created in the second and third paragraphs of this will and in case there is not enough of said personal property to settle said legacies any over, then I bequeath any balance to my sister, Mrs. Alice E. Nicholson. To make it more certain should there not be enough of my personal property to pay said legacies not counting the personal property bequeathed to Mrs. Alice E. Nicholson in trust, my executors are directed to sell sufficient of my real estate to pay said legacies as it is my will that they shall be paid in any event and before anything else can be disposed of. What I left Pearson Bennett Serrill comes ahead of everything."

By the eleventh paragraph of her will, testatrix gives and bequeaths to Pearson Bennett Serrill a number of articles of personal property, listed in detail, of the same character as those conveyed in the chattel mortgage executed by defendant to secure his note for $1,700 payable to the order of testatrix, consisting of books, furniture, jewelry, etc., such as are suitable exclusively for personal use, and whose value is dependent chiefly upon associations. She gives the books, in which the name of her father, David Clark, is written, to her nephew, David M. Clark. She gives her "handsome lavaliere and chain" to her said sister for her natural life, and at her death to Pearson Bennett Serrill. In the twelfth paragraph she directs that "should Pearson Bennett Serrill die possessed of any or all this personal property and leave no lineal heirs, I wish said property to go to David C. Ballard's lineal heirs." The fourteenth paragraph is as follows:

"I especially charge Mrs. J. W. Nicholson and Col. W. J. Hannah, two of my executors, to see that Pearson Bennett Serrill gets all and everything I leave him and everything I intend him to have, also all things that are his and never were mine. Should there be any doubt, give him the benefit of the doubt."

Testatrix gives and devises to her brother, Henry N. Clark, seventy-five acres of her farm land in Halifax County, North Carolina, adjoining the lands formerly owned by Mrs. F. S. Ballard; the remainder of

her farm she gives and devises to her brothers, Chief Justice Walter Clark, Henry N. Clark and Edward T. Clark, and to her sisters, Mrs. Alice E. Nicholson, Mrs. Pattie C. Patterson, Mrs. Sallie C. Graham, Miss Lucy N. Clark, and to her nephew, David C. Ballard, as tenants-in-common. Her land in Haywood County she gives and devises to brothers and sisters and her brother-in-law, F. S. Ballard. All the residue of her estate wheresoever same is situate or found, she gives and devises to the children of Rev. J. D. Arnold, her step-children, or their lineal heirs.

The court was of the opinion that plaintiffs, as executors of Mrs. Anna C. Arnold, were entitled to have the articles of personal property described in the chattel mortgage executed by defendant, to secure the payment of the note for $1,700, sold and that the proceeds of said sale should be applied as a payment on said note; it was further of opinion that any sum remaining unpaid upon said note should be deducted from the legacy of $10,000, provided in said will, and that the remainder should be paid by plaintiffs over to the Wachovia Bank & Trust Company, to be held by said company upon the trusts declared in said will. It was thereupon considered, adjudged and ordered by the court "that said executors at once proceed to advertise a sale of the property secured by said mortgage at public auction, as therein provided, to the highest bidder for cash, the proceeds thereof to be applied on said indebtedness; that said executors, immediately after said sale under said mortgage, pay over to Wachovia Bank & Trust Company, in pursuance of the directions of the aforesaid will, the sum of $10,000, less any sum that may remain upaid on account of the aforesaid note and mortgage after the aforesaid personal property secured thereby shall have been sold as aforesaid."

Defendant excepted to said judgment, and assigns as error the holding by the court that plaintiffs had the right to deduct from the legacy of $10,000 any sum in payment of the note for $1,700, and the order contained in the judgment directing plaintiffs to deduct from said legacy such sum as might remain unpaid on said note after the sale of the property described in the chattel mortgage.

The purpose of the testatrix to make defendant, whom she evidently regarded as her foster son, the primary object of her bounty and the chief beneficiary under her will, is manifest. It may be, as defendant contends, that there were circumstances surrounding the execution of the note for $1,700 which would show that Mrs. Arnold had no purpose to require its payment to her during her lifetime, or to her executors after her death; if so, it is defendant's misfortune that she made no specific reference to said note or to the chattel mortgage securing same in her will. The facts that she apparently made no effort to collect the note or the interest on it, that the property conveyed in the mortgage

is of a character that gives it little pecuniary value and that provisions for and references to defendant in the will, indicate her purpose that defendant "should come ahead" of others, and that he should have the "benefit of any doubt," are not sufficient, as evidence, to establish her intention that plaintiffs, her executors, into whose hands the note and mortgage have come as assets, should release defendant from his obligation upon said note, or should not enforce collection by foreclosure of the chattel mortgage. There was no error in the judgment directing plaintiffs to advertise and sell the personal property described in the chattel mortgage.

Defendant's contention, however, that there was error in directing plaintiffs to pay to the Wachovia Bank & Trust Company, in pursuance of the directions of the will, the sum of $10,000, less any sum that may remain unpaid on the note, after the sale under the mortgage, presents a more serious question. The right and duty of an executor to deduct from a legacy the amount of any indebtedness of the legatee to the estate of his testator, is well settled, and is in full accord with elementary principles of justice. The principle has been frequently applied where the legacy is bequeathed to the legatee, absolutely. *Balsley v. Balsley,* 116 N. C., 472; *Webb v. Fuller,* 22 L. R. A., 177; *Lambright v. Lambright,* 6 Anno. Cas., 807; 24 C. J., 489. It is the duty of the executor to retain so much of such a legacy as is required for the payment of the indebtedness of the legatee to the estate. "The theory of retainer is that it is the executor's duty to collect all debts due the estate, and that such debts are assets which it is the executor's right to retain and offset against a legacy." *In re Bogert's Estate,* 85 N. Y. Sup., 291; 24 C. J., 487, and citations.

It has been held, however, that where a legacy is left to A. for life, with remainder over to his children, a debt due from A. to the testator cannot be set off against the principal of the trust fund. The whole must be invested for the benefit of the tenant in remainder. *Voorhees v. Voorhees,* 18 N. J. Eq., 223.

The right of an executor to set off against a devisee debts owing by the devisee to the estate cannot be made effectual to the injury of the rights of others whose interests are in no way involved in the controversy and a set-off against a devisee for life cannot affect the rights of the remaindermen in fee. *In re Brachey's Estate* (Ia.), 147 N. W., 188; *In re Bogert's Estate, supra.*

The sum of $10,000 is directed by the testatrix to be paid to the Wachovia Bank & Trust Company as a trust fund, primarily for the use and benefit of defendant; in certain contingencies, however, other persons will have an interest in said trust fund. No deduction can be made from the principal of said fund without affecting their rights. The purpose

of the testatrix that said sum shall be and remain intact until the happening of the contingences as stated in the will, is clearly expressed. To permit a deduction from said sum to be made would not only injuriously affect the rights of persons other than defendant, but would be clearly contrary to the wishes of the testatrix, as solemnly expressed in her will. We must hold therefore that there was error in directing any deduction from the $10,000; the entire sum should be paid by plaintiffs to the Wachovia Bank & Trust Company, to be held by said company upon the trusts declared in the will. The judgment modified in accordance with this opinion is

Affirmed.

W. H. HUMPHREY v. REXFORD STEPHENS, ADMINISTRATOR OF S. J. TAYLOR, DECEASED, AND BUTTERS LUMBER COMPANY, A CORPORATION.

(Filed 27 January, 1926.)

1. Limitation of Actions—Debtor and Creditor—Deceased Persons—Executors and Administrators—Actions.

C. S., 412, barring the surviving cause of action against the personal representative of a deceased debtor one year from the time the action would have been barred in the lifetime of the deceased debtor, is an enabling statute, but does not extend the time for the commencement of the action if the action was barred in the lifetime of the deceased. The rights of creditor and debtor discussed and statute construed.

2. Same—Mortgages—Foreclosure—Sales.

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note.

3. Limitation of Actions—Statutes—Prospective Effect.

The conclusive presumption of payment of a note secured by mortgage or deeds of trust of land after fifteen years, etc., is prospective in effect, and inapplicable to such instruments theretofore executed. Const. of N. C., Art. I, sec. 17.

APPEAL by defendants from *Grady, J.*, at March Term, 1925, of ROBESON. Affirmed.

W. H. Humphrey, Jr., and McKinnon & Fuller for plaintiff.
McLean & Stacy for defendants.

CLARKSON, J. On 2 December, 1909, S. J. Taylor, for value, executed and delivered to the plaintiff his note, under seal, for the sum of $110, and, at the same time, executed a mortgage deed on a tract of land in Robeson County, containing 66 acres, more or less, for the purpose of

securing the payment of said note. Thereafter, to wit, on 10 June, 1911, S. J. Taylor conveyed the mortgaged lands to George B. McLeod, who, in turn, on 11 March, 1913, conveyed the premises to the defendant, Butters Lumber Company. S. J. Taylor, maker of the note and mortgage, died on 26 December, 1914, and, on 31 May, 1924, the defendant Rexford Stephens, was appointed administrator of his estate. This action was instituted on 17 July, 1924.

There are only two questions involved in this appeal: (1) Is the action as to the defendant administrator barred? (2) Is the right of the foreclosure of the mortgage deed barred? We do not think the action on the debt barred, and the mortgage is an incident to the debt and is not barred. There is a difference in the statute between creditor and debtor.

C. S., 412, in part, is as follows:

If a person—a creditor—one who has claim on another—"entitled to bring an action died before the expiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of that time and within one year from his death," etc.

In *Lowder v. Hathcock,* 150 N. C., 440, it is said: "It is true this is an enabling and not a disabling statute, and does not cut down the time given by the general statute, but extends it (if not expired) to at least one year after death of a *creditor* and at least one year after issuing letters to the representative of a *debtor. Person v. Montgomery,* 120 N. C., 111."

The enabling statute giving one year to the representatives of the creditor does not apply if the creditor died after the bar of the statute was complete.

Under C. S., 412, *supra,* if a person is a debtor, one who owes another, the statute says: "If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person."

Benson v. Bennett, 112 N. C., 505, John Irvin, the debtor, died 9 July, 1885; J. C. Bennett was appointed administrator of his estate 21 August, 1885. The cause of action out of which the claim arose was 24 May, 1884. If the debtor, Irvin, had not died the action would have been barred under the 3-year statute, 24 May, 1887. The claim would have been barred 24 May, 1887, three years from time action arose after his death without the enabling statute. The action was brought 5 July, 1887—1 month and 10 days too late, without the enabling statute. Exclude the time the statute did not run from the debtor's

death 9 July, 1885, to time letters of administration were issued, 21 August, 1885—1 month and 12 days. We have one day margin—making 2 years and 11 months and 29 days—time within 3-year statute. *Redmon v. Pippen,* 113 N. C., 93; *Person v. Montgomery,* 120 N. C., 111; *Winslow v. Benton,* 130 N. C., 58; *Fisher v. Ballard,* 164 N. C., 326; *Irvin v. Harris,* 182 N. C., 660; *S. c.* (rehearing), 184 N. C., 547.

In *Geitner v. Jones,* 176 N. C., 544, it was held: "The court below was of the opinion that the action was barred by the statute of limitations. The note in suit fell due 18 June, 1912, A. A. Shuford, the payee, died 2 May, 1912. J. G. Hall died 1 August, 1913, and his personal representative was not appointed till 4 August, 1917. Hall having died before the expiration of the time limited for the commencement of this action, the plaintiffs were entitled to institute this action 'within one year after the issuing of letters testamentary, provided such letters were issued within ten years after the death' of the debtor. Revisal, 367 (C. S., 412). His administrator was made party to this action by summons issued 15 February, 1918, and the claim therefore is not barred. *Coppersmith v. Wilson,* 107 N. C., 31; *Winslow v. Benton,* 130 N. C., 58, which holds that the section is an enabling and not a disabling statute. The debt not being barred, the foreclosure of the security can be ordered. Revisal, 391 (3)," (C. S., 437 (3).

The facts in the present case: S. J. Taylor, the debtor, executed a note under seal, secured by mortgage on certain land to plaintiff W. H. Humphrey, the creditor, on 2 December, 1909. The 10-year statute would have barred the note under seal, if Taylor had lived, on 2 December, 1919 (according to the record it was due the day it was made). He died on 26 December, 1914 and within 10 years as set forth in the statute—on 31 May, 1924, the defendant, Rexford Stephens, was appointed administrator of his estate. This action was instituted 17 July, 1924. According to the enabling statute, exclude the time between death of the debtor, S. J. Taylor, 26 December, 1914, and the administration on his estate within 10 years of his death, 31 May, 1924, the note being under seal is not barred. Is the right of foreclosure of the mortgage barred by the 10-year statute of limitation? The *Geitner case, supra,* decides it is not.

C. S., 437 (3), (period prescribed 10 years in which to bring action), quoted in *Geitner case, supra,* is as follows: "For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or *within ten years after the last payment on the same.*" The above is Revisal, 391 (3) and section 152 (3) of The Code, 1883, vol. 1, and is construed by *H. G. Connor, J.,* in *Menzel v. Hinton,* 132 N. C., 660. The opinion was delivered 19 May, 1903.

Walker, J., in *Cone v. Hyatt,* 132 N. C., 812, says: "We have held at this term, in *Menzel v. Hinton,* that the statute of limitations does not apply to a power of sale contained in a mortgage or deed of trust, when the deed is foreclosed, not in an action brought for that purpose, but simply by the mortgagee or trustee executing the power of sale. The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute, it was held that 'the proceeding to foreclose a mortgage by advertisement is not a suit; such a proceeding is merely the act of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court."

C. S., 2589, is as follows: "The power of sale of real property contained in any mortgage or deed of trust for the benefit of creditors shall become inoperative, and no person shall execute any such power, when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations." Revisal, sec. 1044, had the additional: "Wherever an action to foreclose any such mortgage or deed of trust is now barred by the statute of limitations, the authority to execute the power of sale contained therein shall be barred on the first day of January, one thousand nine hundred and seven." This act was passed to bar the power of sale and meet the decisions in the *Menzel* and *Cone cases, supra. Scott v. Lumber Co.,* 144 N. C., p. 44.

When a debt is secured by a mortgage, the debt is the principal and the mortgage only the incident, security for the debt. An assignment of the debt passes all the rights of the creditor in the mortgage. *Hyman v. Devereux,* 63 N. C., 629; *Smith v. Godwin,* 145 N. C., 242; *Stevens v. Turlington,* 186 N. C., 194; *Trust Co. v. White,* 189 N. C., 283. If the mortgage debt is barred that does not *per se* bar the right of foreclosure. *Worth v. Wrenn,* 144 N. C., p. 661. A transfer of the debt does not *per se* carry a right to exercise the power of sale in a mortgage. *Jones v. Williams,* 155 N. C., 179. The note, under seal, in the present case was made when C. S., 412, *supra,* was the law of the State.

"In *House v. Parker,* 181 N. C., p. 42, it is said: 'But the general laws of the State in force at the time of its execution and performance enter into and become as much a part of the contract as if they were expressly referred to or incorporated in its terms. *O'Kelly v. Williams,* 84 N. C., 281; *Graves v. Howard,* 159 N. C., 594; and *Van Huffman v. Quincy,* 4 Wallace, 552.' " *Douglas v. Rhodes,* 188 N. C., 582.

"If a mortgage is a mere incident to the debt which it is given to secure, it necessarily follows that it lives as long as the debt, and that it may be foreclosed so long as an action upon the debt is not barred by

the statute of limitations." *Menzel v. Hinton,* 132 N. C., 660, reported in 95 Amer. St. Rep., 669, Note C, citing: *Moulton v. Williams,* 6 Idaho, 424; *Hagan v. Parsons,* 67 Ill., 170; *Hibernian Banking Assn. v. Commercial Nat. Bank,* 157 Ill., 524; *Brown v. Rockhold,* 49 Iowa, 282; *Jenks v. Shaw,* 99 Iowa, 604; *Prewitt v. Wortham,* 79 Ky., 287; *Clift v. Williams,* 105 Ky., 559; *Berry v. Marshall,* 23 La. Ann., 244; *Fraser v. Bean,* 96 N. C., 327; *Balch v. Arnold,* 9 Wyo., 17.

Public Laws 1923, chap. 192, material part, is as follows: "That 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 partly secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered," etc.

In *Hicks v. Kearney,* 189 N. C., 316, it is held: The conclusive presumption of the payment of a debt secured by mortgage, etc., after fifteen years, as against creditors or purchasers (Public Laws 1923, chap. 192) is prospective in its effect. Const. of U. S., Art. I, sec. 10; Const. of N. C., Art. I, sec. 17. It would seem that the Legislature, in passing the above statute, construed the decisions of this State as we do in this case, and have provided a method to quiet mortgages and liens of long standing. The mortgage follows the debt. The debt here is not barred nor is the mortgage.

For the reasons given, the judgment below is

Affirmed.

HENRY M. McADEN, LUCY M. BLAND, CHAS. A. BLAND, MARY M. DAVIDSON, RUFUS Y. McADEN, JAMES T. McADEN, BENNIE Y. McADEN STRONACH AND JOHN B. STRONACH, v. J. S. WATKINS.

(Filed 27 January, 1926.)

Injunction—Bonds—Principal and Surety—Liability.

The provision of the statute that the plaintiff in injunction give bond is mandatory, the amount fixed by the judge, conclusive of the extent of the liability thereon, the procedure being for the defendant to move to have the amount increased when he so desires, or thinks it necessary for his protection. C. S., 854, 855.

APPEAL by plaintiffs from *Bryson, J.*, and a jury, at August Term, 1925, from CHEROKEE. Modified and affirmed.

This was an inquiry of damages claimed to have been sustained by injunction had before Bryson, Judge, and a jury, at August Term, 1925, of Cherokee Superior Court. The action was instituted by plaintiffs against the defendant in May, 1921; they claimed to be the owners of tract No. 7826, grant No. 3112, containing 640 acres of land situate in Cherokee County, and that during the spring of 1921, the defendant wrongfully cut down many of the timber trees standing and growing thereon, and otherwise trespassed to their damage in a sum which they estimated at $1,000. On 9 June, 1921, a restraining order was issued by Hon. G. S. Ferguson, Judge, against the defendant, and the same was returnable on 18 June, 1921, before Judge Bryson at Bryson City, North Carolina, and the restraining order was served on the defendant on 10 June, 1921. The defendant, in his answer, set up a denial of plaintiff's title, and, in addition, that the defendant owned one parcel of land containing one hundred acres, and another parcel containing 50 acres, part of entry No. 7658, grant No. 3851, and averred that he had been cutting timber on his own land of which he and those under whom he claimed had been in possession under known and visible lines and boundaries with color of title for more than seven years, to wit, for twenty years before the institution of this action. At the April Term, 1924, plaintiffs, by leave of court, amended their complaint by alleging their ownership of tract No. 7273, grant No. 3073, containing 320 acres. At December Special Term, 1924, the question of title was tried, and the plaintiffs recovered judgment for all of the lands included in both of said grants, except that part thereof adjudged to be owned by the defendant, Watkins, who was adjudged to be the owner of 50 acres, part of grant No. 3851, tract No. 7658, and grant No. 3765, tract No. 1508, 100 acres, as shown in the yellow lines on the map, which was attached to the judgment; the plaintiffs also recovered judgment for damages for $50 for trespass committed upon their lands, and in said judgment an inquiry was directed to be instituted to ascertain the damages sustained by the defendant on account of the injunction.

On 24 March, 1925, the defendant filed bill of particulars and prayed judgment against plaintiffs: "First, for the sum of $52.50 for the bark lost as alleged in paragraph two of the bill of particulars; second, the sum of $300 lost on the 100 cords of chestnut wood already cut as alleged in paragraph 3 of the bill of particulars; third, for the sum of $1,800 for loss of the chestnut wood left standing by reason of the fall in the market price as alleged in paragraph 4; fourth, for the sum of $650, depreciation in value of teams and outfit as alleged in paragraph 5; fifth, for the sum of $250 for depreciation in the value of the poplar

timber as alleged in paragraph 6, and for the costs of this motion, with general relief, as is proper under the circumstances"—total $3,052.50.

The issue submitted to the jury and their answer thereto was as follows: "What sum, if any, is the defendant, Watkins, entitled to recover on account of the injunction issued in this action? Answer: $1,175."

The following judgment was rendered: "Now, upon motion of attorneys for J. S. Watkins, it is considered and adjudged by the court that the said J. S. Watkins do have and recover of the plaintiffs above named, and their surety upon the injunction bond in this cause, J. W. Walker, the penalty of said bond, to wit, $500, with interest thereon from 10 August, 1925, until paid, and that the said J. S. Watkins do recover the additional and further sum of $675 against the plaintiffs above named: Henry M. McAden and the other plaintiffs, with interest thereon from 10 August, 1925, and that the above named plaintiffs and J. W. Walker do pay the costs of this action to be taxed by the clerk which have accrued subsequent to the final judgment at January Term, 1925."

Numerous exceptions and assignments of error were made by plaintiffs and appeal taken to the Supreme Court, among them: "The court erred in signing the judgment appearing in the record."

M. W. Bell and Dillard & Hill for plaintiffs.

R. L. Phillips, Moody & Moody and D. Witherspoon for defendant.

CLARKSON, J. The injunction issued 9 June, 1921, by Judge G. S. Ferguson on behalf of plaintiffs and against defendant contained the following: "Upon the plaintiffs' filing with the clerk of the Superior Court of Cherokee County a bond in the sum of $500, conditioned as provided in section 854 of the Consolidated Statutes, justified as required by law, said clerk will certify copy of this order for service on said defendant," etc.

The bond was duly given and accepted by the court for $500, with J. W. Walker as surety.

C. S., 854, is as follows: "Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it."

C. S., 855, is as follows: "A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages upon all the persons who have an interest in the undertaking."

Amount of undertaking must be fixed by the judge. *Bynum v. Powe,* 101 N. C., 416. The requirement that an undertaking be given is mandatory. *McKay v. Chapin,* 120 N. C., 159. If the undertaking is not sufficient, upon good cause shown, it may be increased. *Preiss v. Cohen,* 112 N. C., 283.

The procedure in the present case to recover damages was in accordance with the statute, in the original cause. *McCall v. Webb,* 135 N. C., 365; *Davis v. Fibre Co.,* 175 N. C., 28.

In *Davis v. Fibre Co., supra,* it was held: "It is now well settled that when an injunction is wrongfully issued as to any part of the plaintiff's demand, and is partially dissolved to that extent, the party enjoined will be entitled to such damages within the limit of the penalty of the bond as he may have sustained by reason of the issuing of the injunction. A. & E. Enc. of Law, vol. 16, pp. 464, 465, and cases cited; *Rice v. Cook,* 92 Cal., 144."

It will be noted that the recovery is "within the limit of the penalty of the bond." In fact, the statute (C. S., 854, *supra*), limits the amount of the damages "not exceeding an amount to be specified."

In *Timber Co. v. Rountree,* 122 N. C., p. 51, it is held: "It is plain, therefore, that the penalty of the bond is the limit of the liability of the plaintiff and its sureties on the undertaking, the proceeding being also in effect a suit upon the undertaking, and there was error in entering a judgment for a greater amount against the plaintiff in the action than $300, the penalty of the bond." *Crawford v. Pearson,* 116 N. C., 718; *Shute v. Shute,* 180 N. C., p. 388.

In the present case the judge who granted the injunction required a bond in the sum of $500. If this was not sufficient, defendant could, upon notice and good cause shown, have had the undertaking increased. The jury assessed the damages in the sum of $1,175. The judgment against plaintiffs must be reduced to the penalty of the bond $500 and cost.

In conformity with this opinion, the judgment below is

Modified and affirmed.

OVAL OAK MANUFACTURING COMPANY v. ATLANTIC & YADKIN R. R. CO., A. E. SMITH AND J. Y. FRY, RECEIVERS.

(Filed 27 January, 1926.)

1. Railroads—Negligence—Fires.

It is required of a railroad company in the operation of its trains to use due care to have its locomotives equipped with a proper spark arrester, etc., such as are approved and in general use, and that they are run in a careful manner in regard to the escape of sparks therefrom, but not that sparks shall not otherwise escape.

2. Same—Burden of Proof.

In an action to recover damages against a railroad company for the negligent setting out of sparks from its passing locomotive, the burden rests throughout the trial upon the plaintiff to show that the defendant was negligent, and that this negligence was the proximate cause of the injury.

3. Same—Evidence—Prima Facie Case.

Where the plaintiff has shown by his evidence that a spark from a passing locomotive of defendant railroad company set fire to his property, he makes out a prima facie case, that the fire causing the damage was from the negligent equipment or operation of the locomotive, which is sufficient to take the case to the jury upon the issue, but does not change the burden of proof.

4. Same—Nonsuit—Questions for Jury.

Evidence that the plaintiff's warehouse caught fire about one-half hour after the defendant's locomotive had passed nearby, on an upgrade, emitting sparks and hot cinders, which from the direction of the wind and the combustible material at the place it caught, indicated that the fire had started from these sparks or hot cinders, and that there was no fire at the time in or about the place, is sufficient to deny defendant's motion as of nonsuit thereon.

APPEAL by defendants from *Devin, J.*, at August Term, 1925, of CHATHAM. No error.

Civil action to recover damages for loss of plaintiff's warehouse and contents, destroyed by fire alleged to have been caused by defendant, in negligently operating an engine with a defective spark arrester over its railroad passing by said warehouse, and thereby causing sparks and fire emitted by said engine to fall upon and set fire to said warehouse. Upon defendant's denial of liability, the following issues were submitted to and answered by the jury:

1. Was plaintiff's property burned by the negligence of defendant as alleged in the complaint? Answer: Yes.

2. What damages, if any, is plaintiff entitled to recover therefor? Answer: $6,000.

From judgment upon this verdict, defendant appealed.

Long & Bell and Wade Barber for plaintiff.
Walter D. Siler and King, Sapp & King for defendants.

CONNOR, J. The only assignment of error, upon this appeal, is based upon defendant's exception to the refusal of the court to allow defendant's motion first made at close of plaintiff's evidence and upon denial renewed at the close of all the evidence, for judgment as in case of nonsuit; C. S., 567. No exception was taken to the admission or rejection of evidence, or to instructions of the court to the jury. The charge was clear, full and correct. The court instructed the jury that it was the duty of defendant to exercise due care to keep and maintain, in reasonably proper and effective condition, such means and appliances for the prevention of the escape of fire from its engine as are approved and in general use by railroad companies of the character of defendant in this section of the country; that it was also its duty to exercise due care to have its engines handled in a reasonably proper manner by a reasonably competent and skillful engineer; that the law does not require railroad companies to prevent the escape of fire from engines entirely, but only to use reasonable care to prevent such escape—such reasonable care being that which a reasonably prudent man, under like circumstances, and charged with a like duty, would have exercised. Necessarily steam engines must emit smoke and some fire and cinders. "Before the plaintiff can recover from the railroad company he must show the jury, by the greater weight of the evidence, that the railroad company has failed to exercise reasonable care to prevent the escape of fire and that such failure of duty upon the part of the railroad company was the proximate cause of the injury."

The court instructed the jury that the burden of proof was on the plaintiff, in the first place, to satisfy the jury that the fire which destroyed plaintiff's property was set out and caused by defendant, that is, that sparks from defendant's engine caused the fire which destroyed the warehouse. "If the plaintiff has failed to satisfy you about that, then you would answer the first issue, 'No,' and the plaintiff would go out of court; but if the plaintiff has satisfied you, by the greater weight of the evidence, that the fire which burned the warehouse was caused by sparks which came from defendants' engine, that fact alone would not entitle plaintiff to have you answer the issue in its favor. The plaintiff must further satisfy you, by the greater weight of the evidence, that the escape of the sparks from the engine was due to the negligence of defendant; but there is this rule of law which the courts lay down: If the jury finds from the evidence, and by its greater weight, that fire came out of defendant's engine and set fire to and burned up plaintiff's warehouse, that will make what we call in law a prima facie case; not that that fact alone would decide the matter, but if found by the jury,

it would be sufficient to carry the case to the jury to determine upon all the evidence whether they are satisfied by its greater weight that the escape of the sparks from the engine was due to the negligence of defendant as alleged in the complaint. The burden of proof is always on the plaintiff to show the jury by the greater weight of the evidence not only that the defendant caused the fire which destroyed plaintiff's property, but also that the fire was due to the negligence of defendant as alleged. The burden of proof does not change; the law does not require that the defendant shall offer evidence—it may do so or not as it sees fit."

These instructions are fully supported by many decisions of this Court. *Dickerson v. R. R.*, 190 N. C., 292; *Cotton Oil Co. v. R. R.*, 183 N. C., 95; *Williams v. Mfg. Co.*, 177 N. C., 512; *Bradley v. Mfg. Co.*, 177 N. C., 153; *Perry v. Mfg. Co.*, 176 N. C., 68; *Bailey v. R. R.*, 175 N. C., 699; *Boney v. R. R.*, 175 N. C., 354; *Moore v. R. R.*, 173 N. C., 311; *Aman v. Lumber Co.*, 160 N. C., 370; *Hardy v. Lumber Co.*, 160 N. C., 113; *Currie v. R. R.*, 156 N. C., 419; *Kornegay v. R. R.*, 154 N. C., 389; *Deppe v. R. R.*, 152 N. C., 79; *Cox v. R. R.*, 149 N. C., 117; *Knott v. R. R.*, 142 N. C., 238; *Williams v. R. R.*, 140 N. C., 623; *Craft v. Timber Co.*, 132 N. C., 151.

The evidence offered by plaintiff tends to show on 8 October, 1924, it owned a warehouse situate just off defendant's right of way between 50 and 60 feet from the center of its track and about 400 feet north of defendant's station at Siler City; this warehouse and its contents were completely destroyed by fire on the afternoon of 8 October, 1924, between 3 and 4 o'clock; when the fire was first discovered it was burning in the northeast corner of the warehouse next to the railroad; the wind was blowing west from the railroad toward the warehouse; defendant's track from the station north to and beyond the warehouse is slightly elevated and upgrade.

A passenger train operated by defendant on its track running by plaintiff's warehouse, passed going north about 30 or 35 minutes before the fire was discovered; a large quantity of broom corn had been stored by plaintiff in the warehouse and much of this had shattered and sifted through the cracks in the floor to the ground beneath the warehouse. The fire was first discovered underneath that portion of the warehouse in which the broom corn was stored.

When defendant's passenger train passed the warehouse about 3 o'clock, p. m., the engine was emitting cinders which fell upon persons at work nearby. These cinders were so hot that comment was made by these persons who were standing about 5 feet from the track and about 65 feet from the warehouse. About 30 or 35 minutes after the train passed smoke was observed coming from beneath the warehouse and in a few minutes the building was in flames. Employees of plaintiff were at

work in the warehouse until 9:30 a. m. on that day and at 1 p. m., an employee went into the warehouse, closed and locked the doors. There was no fire in or about the warehouse that day prior to the passing of defendant's train. Defendant's train left the station going north about 3 p. m. The fire was seen by a witness who was a quarter of a mile away before 4 o'clock. Smoke was coming from the northeast corner of the warehouse, next to the railroad where the broom corn was stored.

We cannot hold that this evidence was not sufficient to be submitted to the jury upon plaintiff's contention that sparks or burning cinders emitted from defendant's engine set fire to plaintiff's warehouse. *Boney v. R. R., supra; Deppe v. R. R., supra.* If this fact, to wit, that defendant's engine emitted sparks or burning cinders which caused the fire which destroyed plaintiff's property, was found by the jury, it was sufficient to be considered by them, as evidence to sustain plaintiff's allegation that the fire was caused by the negligence of defendant, either in failing to have and maintain a proper spark arrester on its engine, or in negligently operating the engine as it passed the warehouse within 50 or 60 feet on the track which was slightly elevated or upgrade. "The fact that a spark from an engine caused the fire, whether on or off the right of way is evidence of negligence, although not conclusive." *Justice Walker* in *Williams v. Mfg. Co.*, 177 N. C., 512. Evidence offered by defendant tended to show that there was no failure on part of defendant to perform its duty with respect to the spark arrester, or with respect to the manner in which the train was operated. There was no error, however, in submitting the issues to the jury, upon all the evidence. There was evidence sufficient to support the answers to both issues. There is no error of law or legal inference which entitles defendant to a new trial. The judgment is affirmed.

No error.

LOUIE M. GRAVES v. K. L. COPE, SHERIFF, AND H. M. DEADMON, L. L. SMITH AND G. H. GRAHAM, COMMISSIONERS OF DAVIE COUNTY.

(Filed 27 January, 1926.)

1. Sheriffs—Taxation—Statutes.

Under the various general statutes relating to the collection of taxes by the sheriff, requiring the collection according to copy of tax list delivered to him, C. S., 7930; the power of the county commissioners as to releasing, etc., certain persons, C. S., 7976; his duty to immediately collect, C. S., 7992; the year given in which to settle, C. S., 7998; the power of sale given him, C. S., 8006, 8010, and the power to attach property, C. S., 8004; the time fixed for settlement, C. S., 8049; and the duty

to sue him in case of his default, C. S., 8051: *Held*, the sheriff and his bondsmen are liable for the full amount on the tax list given to him, except certain specific deductions allowed by law.

2. Same—Delinquent Taxes—Tender to Successor—Sheriff—Mandamus.

A sheriff being liable for the collection of all taxes upon the list given him by statute, a tender by the delinquent taxpayer of the amount due to the sheriff's predecessor as tax collector, is properly refused, and a mandamus will not lie to compel the present incumbent to receive them.

3. Same—Public Local Statutes.

Where a public-local law on the subject applying to a particular county cannot be construed as authorizing it, a mandamus will not lie to compel the sheriff of the county to accept delinquent taxes due to his predecessor in office, and remaining uncollected.

4. Mandamus—Case Agreed—Chambers—Questions for Court.

Where the question of mandamus to compel a sheriff to accept unpaid taxes by a delinquent to the defendant sheriff's predecessor in office, upon a case agreed, there is no issue of facts for a jury, and the matter may be heard and determined by the judge at chambers.

5. Same—Statutes—Service of Summons.

An order of mandamus issued to a public officer, sheriff in the present case, may not lawfully be issued (except where the relief sought is a money demand), unless ten days have elapsed between the service of the summons and the signing of the order.

APPEAL by defendants from order of *Long, J.*, at chambers, dated 2 January, 1925, continuing order of *Finley, J.*, dated 15 December, 1924, for hearing at next succeeding term of Superior Court of DAVIE County for trial of civil actions.

Application for writ of mandamus, requiring defendant, K. L. Cope, sheriff of Davie County, to accept from plaintiff, a resident and taxpayer of said county, a sum of money tendered by him in payment of taxes due said county for years 1922 and 1923.

On 15 December, 1924, Judge Finley signed an order, requiring defendant, as sheriff of Davie County "to collect the back taxes due said county by taxpayers thereof, including the taxes due said county by the petitioner in this cause," and directing that "a copy of this order, together with the petition and summons be served on defendants, and that they be notified to appear before Hon. B. F. Long, judge holding the courts of the Seventeenth Judicial District, on 26 December, 1924, at Statesville, North Carolina, and show cause why this order should not be made permanent."

Pursuant to said order, defendants appeared before Judge Long and filed answers to the petition; the cause was heard by Judge Long, upon a statement of agreed facts, and on 2 January, 1925, Judge Long signed

an order, continuing the order of Judge Finley for hearing at the next succeeding term of the Superior Court of Davie County for the trial of civil actions.

Defendants excepted to this order and appealed therefrom to the Supreme Court.

Walter E. Brock for plaintiff.
A. T. Grant, Jr., and Grier & Grier for defendants.

CONNOR, J. The only question presented by this appeal is whether the sheriff of Davie County has the right and whether it is his duty to collect taxes due the county of Davie assessed for years preceding the year in which his term of office began, which were not collected by his predecessor whose term of office included the years for which the taxes were assessed. Defendant, K. L. Cope, was elected sheriff in November, 1924, and was duly inducted into said office on the first Monday in December thereafter. On 13 December, 1924, plaintiff tendered to said K. L. Cope, sheriff, the sum due by him for taxes for the years 1922 and 1923, and demanded his tax receipts therefor. Defendant declined to accept said sum, contending that he had neither the right nor the duty to collect taxes assessed for the years 1922 and 1923 and not collected by his predecessor. Roy M. Walker was sheriff of Davie County for the term beginning on 1st Monday in December, 1922, and ending on 1st Monday in December, 1924; the tax lists for said years were delivered to him on or before 1st Monday in October of said years, as required by statute. He failed to collect taxes due by plaintiff as shown by said list. His term of office expired on the 1st Monday in December, 1924, when defendant, K. L. Cope, pursuant to his election in the preceding November, duly qualified as sheriff for the term beginning on said date.

It is the duty of the board of commissioners of each county to cause the register of deeds to make out annually two copies of the tax list for each township in said county; one of said copies shall be delivered to the sheriff of said county on or before the first Monday in October of each year. The clerk of the board of commissioners shall endorse on the copies delivered to the sheriff an order to collect the taxes therein mentioned and such order shall have the force and effect of a judgment and execution against the real and personal property of the persons charged with taxes as shown in said lists. C. S., 7930; Public Laws 1923, ch. 12, sec. 76; Public Laws 1921, ch. 38, sec. 83. The board of commissioners has no power to release, discharge, remit or commute any portion of the taxes assessed and levied against any person or property within its jurisdiction for any reason whatever. C. S., 7976. All taxes are due on the first Monday in October of each year, and it is the duty of the sheriff to whom the tax lists, endorsed by the clerk,

are delivered, to proceed immediately to collect same. C. S., 7992. The sheriff and in case of his death, the sureties on his bond, shall have one year and no longer, from the day prescribed, for his settlement and payment of taxes due the State, to finish the collection of all taxes. C. S., 7998. In order to enforce collection the sheriff may first levy upon and sell the personal property, and second, if sufficient personal property cannot be found, it shall be his duty to sell the real estate of the taxpayer. C. S., 8006, 8010. If any poll tax or other tax shall not be paid within sixty days after same is due, it shall be the duty of the sheriff if he can find no property of the person liable sufficient to satisfy the same, to attach any debt, or other property incapable of manual delivery, due or belonging to the person liable, or that may become due before the expiration of the calendar year, and the person owing such debt or having such property shall be liable for such tax. C. S., 8004.

On or before the first Monday in February in each year, the sheriff shall account to the county treasurer or other lawful officer, for all taxes due the county for the fiscal year; C. S., 8048. The sheriff shall be charged with the sums appearing by the tax list as due for county taxes and shall be allowed to deduct therefrom all insolvents and uncollectible poll taxes and also the amount of county tax on lands bid off by the county and costs and fees for making sale of lands for collection of taxes; provided, that a majority of the board of commissioners may extend the time for collection and settlement of taxes due the county not later than 1 May in the year following that in which the taxes are levied, C. S., 8049. Upon failure of the sheriff to account with the county treasurer and auditing committee, as provided by statute, it shall be the duty of the county treasurer, or if he neglects or refuses to perform such duty, it shall be the duty of the chairman of the board of county commissioners to cause an action to be brought in the Superior Court of the county on the bond of the sheriff, against him and his sureties, to recover the amount owing by him and the penalty prescribed by statute, C. S., 8051.

It must be conceded that under the statutes of this State relative to the collection of taxes the sheriff to whom a tax list is delivered is liable to the county for the total amount shown to be due thereby and that the only deductions that may lawfully be made therefrom are amounts charged in said lists which are lawfully allowed as insolvent and uncollectible taxes, the amounts levied and assessed as taxes upon lands which have been bid off, at tax sales, by the county, and the commissions and fees, if any, allowed by law as compensation for his services. *Comrs. v. Wall,* 117 N. C., 377.

It is contended, however, that by virtue of the statute which provides that the sheriff of Davie County shall receive an annual salary, payable monthly, for his services, and that he shall not retain the commissions

provided by statute, he is relieved of the duty and is without power to collect any taxes after the expiration of his term of office, and that taxes not collected by him must be collected by his predecessor.

The statute relative to the compensation of the sheriff of Davie County, in force and effect from and after first of March, 1921, and applicable to the present sheriff and his predecessor, to whom the tax lists for the years 1922 and 1923 were delivered, is chapter 84, Public-Local Laws 1921, as amended by chapter 355, Public-Local Laws 1923. The only effect of the amendment was to reduce the salary of the sheriff from $2,500 to $2,200. Chapter 257, Public-Local Laws 1917, relied upon by the plaintiff, was repealed by section 15 of chapter 84, Public-Local Laws 1921. Section 13 of said chapter 257, provides that "at the expiration of the term of office of any person holding the office of sheriff of Davie County, he shall be required to turn over to the incoming officer all books, papers and accounts, showing uncollectible taxes, licenses and all unfinished business of his said office, and on and after the date when the newly elected officer shall give bond and be inducted into office, he shall perform all the duties of said office of sheriff." This provision is not included in chapter 84, Public-Local Laws 1921; it is not applicable to either the present sheriff or to his predecessor. There is no provision in the statute applicable to either which relieves the latter from liability for the tax lists delivered to him during his term of office, or which makes it the duty of the former to collect taxes which his predecessor has failed to account for as required by law.

There was error in declining the motion of defendants that the application for the writ of mandamus be denied. The cause was heard upon a statement of facts agreed. There was, therefore, no controversy as to the facts. Indeed, there were no issues of facts raised by the pleadings, requiring submission to a jury. The summons was properly returnable before the judge of the Superior Court, at chambers. He had jurisdiction to hear and determine the action, both as to law and fact. The motion for a continuance to the next term should have been denied. C. S., 868. *Lenoir County v. Taylor,* 190 N. C., 336.

The order signed by Judge Finley was erroneous, for that although the summons was properly returnable before him as judge of the Superior Court, at chambers, the relief sought not being the enforcement of a money demand (C. S., 867 and 868), ten days had not elapsed between the service of the summons and complaint and the signing of the order. A writ of mandamus can be issued by the judge of the Superior Court only after service of summons and complaint, and after the expiration of not less than ten days. There was error in the order signed by Judge Long for that upon the statement of agreed facts, the application should have been denied.

Reversed and dismissed.

CHARLIE KINSLAND v. S. J. KINSLAND AND SELMA KINSLAND.

(Filed 27 January, 1926.)

Appeal and Error—Trespass—Water and Watercourses—Ponding Water —Determinative Issues—Evidence.

A mandatory injunction in trespass for defendant to remove dam and for damages to plaintiff's land from ponding water thereon, will not issue unless the dam was constructed by plaintiff on defendant's adjoining land; and where the evidence is conflicting and no determinative issue as to the ascertainment of this fact has been answered, a new trial will be ordered on appeal.

APPEAL by defendants from *Finley, J.*, at Spring Term, 1925, of MACON.

Plaintiff alleges that he is the owner of a tract of land known as section 117, grant 2983, and that the defendants own a tract adjoining his on the south and southwest; that Watauga Creek runs through both tracts from northeast to southwest; that the defendants prior to the institution of the action entered upon the plaintiff's land in violation of law and trespassed thereon "by hauling logs and moving earth and dirt in the beginning of the erection of a dam on the lands of the plaintiff at and near the line between the plaintiff and defendants." The purpose in building the dam is to operate a gristmill. The plaintiff alleges further that the dam has ponded the water on his land and obstructed the flow of water from his ditches and has caused his land to become sour and unfit for cultivation, and that the defendants intend to complete the dam and raise the water to a greater height. There are allegations in reference to the trespass which need not be stated in detail.

The defendants admit the plaintiff's title to the land in grant 2983, but deny that his land is located as the plaintiff claims, and deny the trespass.

The following verdict was returned:

1. Is the plaintiff's southwest corner located at red A, as shown on the map? Answer: Yes.

2. Has the defendant trespassed upon the lands of the plaintiff, and if so, to what extent? Answer: Yes, to the extent of all the lands affected by the dam north of the line from the red letter A to the red letter B, shown on the map.

3. Is the plaintiff's action barred by the statute of limitations? Answer: No.

Judgment was rendered declaring the plaintiff the owner of the land described in grant 2983 and its location as shown on the map, and adjudging that the defendants had trespassed upon his land in the erection and maintenance of the dam and in ponding water thereon, and that the dam be removed, etc. The defendants excepted and appealed.

J. G. Robertson, J. Frank Ray, Jr., and Horn, Patton & Poindexter for plaintiff.

T. J. Johnston and Jones & Jones for defendants.

ADAMS, J. It is a matter of regret that the case upon its third appearance in this Court cannot finally be disposed of; but for error appearing in the present record determinative issues must be submitted to another jury. On the first appeal it appeared that the principal damage complained of resulted from the erection and maintenance of a dam and gristmill on the defendants' land (186 N. C., 760), and on the second we said: "There is evidence tending to show that the defendants after invading the plaintiff's possession built the dam on the plaintiff's land and that the alleged trespass is continuous in its nature. There is evidence to the contrary. The issue raised should be submitted to the jury and the verdict will determine the questions whether the defendants have committed the alleged trespass and whether the plaintiff is entitled to an order restraining a continuance of the trespass and a mandatory injunction to compel the defendants to remove the dam, although actual damages are not demanded. If the trespass is continuous it is not necessary to allege the insolvency of the defendant." 188 N. C., 810. It will be observed upon examination that the opinion draws a distinction between the erection by the defendants of a dam on the plaintiff's land and the ponding of water on the plaintiff's land by a dam built on the land of the defendants. If the defendants have constructed a dam on the plaintiff's land without his permission the plaintiff is entitled to a mandatory injunction for its removal from his premises, and to compensatory damages caused by this trespass, recoverable as at common law, for such a trespass does not come under the operation of C. S., 2555 *et seq. Henly v. Wilson,* 77 N. C., 216, 221. But if the dam is entirely on the land of the defendants and water is thrown back and ponded on the plaintiff's land, the plaintiff, as pointed out by *Hoke, J.,* in the first appeal, must seek relief under section 2555 *et seq.*

Was the dam or any part of it built on the plaintiff's land without his permission? If the jury finds this to be the fact, the plaintiff may enforce the removal of the dam or so much of it as may be on his own premises and recover damages as we have indicated. Did the defendants build the dam on their own land and thereby back the water on land owned by the plaintiff? If so, the statutory remedy must be pursued if damages are sought. The method of assessing damages under C. S., 2557, is fully and clearly set forth in a number of cases. *Gillet v. Jones,* 18 N. C., 339; *Beatty v. Conner,* 34 N. C., 341; *Bryan v. Burnett,* 47 N. C., 305; *Hester v. Broach,* 84 N. C., 251; *Burnett v. Nicholson,* 72 N. C., 334; *S. c.,* 86 N. C., 99; *Goodson v. Mullen,* 92 N. C., 207.

It does not definitely appear whether any part of the dam itself is on the plaintiff's land. There is evidence in support of either contention. The uncertainty seems to arise from the use of language which confuses the dam proper with the water obstructed by the dam and collected on the plaintiff's land. The issues submitted do not clearly determine the question. There should be a definite issue as to whether the dam itself or any part of it—not the ponded water—is on the premises of the plaintiff. If it is not, and the plaintiff seeks to recover damages under C. S., ch. 52, art. 4, there should be an issue as to annual damages. Other appropriate issues may be submitted as the trial court may determine.

For the errors complained of there must be a

New trial.

CITY OF DURHAM v. MELISSA L. PROCTOR ET AL.

(Filed 27 January, 1926.)

Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Benefits and Advantages—Front Foot Rule—Discretionary Powers.

Where on appeal to the Superior Court the jury has increased the amount fixed by the city authorities to be apportioned between the city and the property owners, in accordance with the benefits or advantages along a street improved, and the court has ordered a reapportionment on the second appeal, the objection that the city had adopted the "front foot rule" is untenable on the ground that the city commissioners have acted arbitrarily and have not exercised an independent judgment in making the reapportionment, in the absence of proof of *mala fides*.

BROGDEN, J., having been of counsel, took no part in the consideration or decision of this case.

APPEALS by plaintiff and defendants from *Calvert, J.*, at May Term, 1925, of DURHAM.

Special proceeding commenced before the clerk of the Superior Court of Durham County pursuant to the provisions of chapter 220, Public Laws 1923 (amended by chapter 107, Public Laws, Extra Session, 1924) to condemn land, rights, privileges and easements for the purpose of widening certain thoroughfares situate near the municipal building, and found necessary to the growth and development of the city of Durham.

An assessment district was duly established, and commissioners were appointed to appraise the value of the land to be taken for street purposes, and to fix the benefits, if any, accruing to all lots or parcels of

land lying within said district. It was determined by the city council that 75% of the estimated cost should be assessed against the city at large, and 25% against the lands benefited in the assessment district. The commissioners duly made their report as to damages sustained for the lands taken, and filed a separate report in writing, showing their estimate or appraisal of benefits accruing to the different lots in the district.

The city thereupon deposited the amount required to be paid by it with the clerk of the Superior Court in accordance with the provisions of the statute. Certain property owners appealed from the awards allowed by the commissioners as damages for the taking of their property, and the jury increased such awards from a total of $68,158.50 to a total of $82,087.50. Following this, an order of reassessment of the benefits was entered and the commissioners duly apportioned the excess of $13,929 allowed by the jury over that originally fixed by them between the city at large and the lands benefited in the district in the proportion of 75% to the city and 25% to the property benefited, reporting their action to the clerk as required by law.

Exceptions were filed to this report, and on the hearing, a jury trial being waived, the assessments were vacated on the ground that the commissioners "did not exercise an independent judgment in an appraisal of the value of the benefits accruing from the improvements on the separate lots so assessed," in that they adopted a so-called "frontage rule" in arriving at their conclusions, and his Honor remanded the proceeding to the clerk for the appointment of three commissioners to go upon the lots or lands located within said assessment district, as shown on the map of such district, and ascertain and determine, by a majority vote, the value of the benefits or advantages to such lots or lands accruing from the acquisition of the land for the widening and improvement of said streets, both such benefits or advantages as are special to such lots and those in common with other lots located in said district.

From this order and judgment both sides appeal, assigning errors.

W. J. Brogden and S. C. Chambers for plaintiff.

McLendon & Hedrick, J. Elmer Long and Fuller & Fuller for defendants.

PLAINTIFF'S APPEAL

STACY, C. J., after stating the case: The damages awarded for the lands condemned are not in dispute, but the city of Durham appeals from the judgment vacating the apportionment of the costs between the city at large and the properties benefited within the district, on the ground that, though alleged, no arbitrary action on the part of the commissioners

or others has been shown or found, and that, in the absence of such finding, the apportionment made by the commissioners and approved, as by the statute provided, is final. We think the city's position is well taken. The municipal authorities were fully empowered to establish the assessment district, and to assess the burdens in proportion to the benefits. This they did, taxing the city at large with 75% of the cost and the benefited properties in the district with the remaining 25%. Ample provision is made for a hearing, and such was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or with *mala fides*. The fact that the commissioners adopted a so-called "frontage rule" in fixing the value of the benefits or advantages to the different lots within the assessment district, in our opinion, is not sufficient to upset the apportionment made, without an additional finding that the application of such a rule resulted in hardship or injustice to the property owners in the particular case. It is only such practical equality as is reasonably attainable under the circumstances, and not absolute mathematical accuracy, that is to be expected in a matter of this kind. Certainly the finding, as made, that the commissioners "did not exercise an independent judgment in an appraisal of the value of the benefits accruing from the improvements on the separate lots so assessed," is not a finding of arbitrariness, abuse of discretion, or *mala fides*, on the part of the commissioners.

The principles of law applicable to the instant proceeding, have been so thoroughly discussed, with full citation of authorities, in the comparatively recent cases of *Gunter v. Sanford*, 186 N. C., 456, *Felmet v. Canton*, 177 N. C., 54, *Butters v. Oakland*, 263 U. S., 164, and others that we deem it unnecessary to repeat here, more than in substance, what has been said in these recent decisions. On the record, as now presented, we think the plaintiff was entitled to have the assessments against the different lots approved. In entering a contrary judgment, there was error.

On plaintiff's appeal, error.

DEFENDANTS' APPEAL

STACY, C. J. The only exception presented by the defendants' appeal is addressed to the refusal of the court to dismiss the action on the pleadings and the record. It follows from what we have said in regard to plaintiff's appeal that no error was committed in overruling defendants' motion to dismiss the proceeding.

On defendants' appeal, affirmed.

BROGDEN, J., having been of counsel, took no part in the consideration or decision of this case.

STATE v. JIM BALLARD.

(Filed 27 January, 1926.)

1. Homicide—Malice—Evidence—Scienter—Murder in the First Degree.

Where the evidence on the trial of a homicide that the prisoner, knowing the deceased, an officer of the law, had come to arrest him, got a shot gun and went up the stairs to the second story of the house, loaded the gun and shot and killed the deceased through a hole in the floor, evidence that the prisoner on the preceding night personally threatened to "get" the deceased, etc., is competent as tending to show premeditated malice on the part of the prisoner towards the deceased, and objection that the witness had not heard the whole conversation is untenable.

2. Trials — Improper Remarks of Counsel — Instructions — Appeal and Error—Prejudice—Harmless Error—Homicide.

It would be prejudicial error to permit uncorrected a characterization by a prosecuting attorney in his speech to the jury of the prisoner on trial for a homicide as a "human hyena," but where the trial judge immediately stops him and at that time and later in his charge strongly emphasizes the impropriety of the remark, and tells the jury that the prisoner is entitled to a fair and impartial trial under the evidence, a new trial will not be granted on appeal.

APPEAL by defendant from *Grady, J.*, at June Special Term, 1925, of GATES.

Criminal prosecution tried upon an indictment charging the defendant with the murder of Vernon Eason.

On 5 May, 1925, about 9:30 or 10:00 p. m., Vernon Eason, a deputy sheriff of Gates County, together with two assistant officers, his brother, Millard Eason, and S. A. Jenkins, went to the home of the defendant, Jim Ballard, who lives about four miles from Gatesville, to arrest him on a warrant charging him with resisting an officer. As the officers approached the defendant's house, they separated, Millard Eason and Jenkins going to the rear of the house and Vernon Eason to the front. The house is a two-story dwelling with an 8-foot hall and stairway. Vernon Eason walked up to the door, knocked and called the defendant. He made no answer, but the other officers saw the defendant, who was sitting with his wife in their bedroom, get up, go to the bureau in his room and from the bureau to the bed, turn back the mattress, and then go out into the hall and start up the stairs. Just at this time, Cora Ballard, wife of the defendant, opened the front door and Vernon Eason said to the defendant: "Don't go up stairs, I have papers for you." The defendant had a gun in his hand and proceeded to the second floor of the house. Sally Mary Ballard, who was on the second floor, came running down the steps, and looking back at Jim Ballard, said, "Don't shoot

me." Vernon Eason went into the house and was standing at the foot of the stairs when he called to the defendant, who was then at the top of the stairway with a shotgun in his hands, to "come down I have papers for you." The other officers came into the hallway and were standing near Vernon Eason when Sally Mary Ballard got a lamp and held it so it would shine on Vernon Eason's face. Immediately the defendant from upstairs poked his gun through the flooring, shot Vernon Eason in the face and chest, killing him almost instantly.

Consternation then reigned for some time, several shots being exchanged between the officers and the inmates of the house, Cora Ballard joining in the shooting. The two officers dragged the body of the deceased about thirty steps from the house, left it and went to a nearby house to call for help from Gatesville. They left the deceased lying on his left side; when they returned in a very short time, he was lying on his back, with his arms folded, his head bruised and his skull knocked in. It was a bright, moonlight night.

The defendant, testifying in his own behalf, said that he did not load his gun until he got upstairs, as he had his shells in his hand on the way up; that the deceased told him he would shoot him if he went upstairs; and that he did not shoot until after the officer had shot at him. The defendant fired the first shot according to the State's evidence. He knew that the deceased was an officer and had a warrant for his arrest.

At the close of the evidence, defendant's counsel suggested that the prisoner was guilty of murder in the second degree, at least, and requested the court to submit the case to the jury solely upon the question as to whether there was sufficient premeditation and deliberation to constitute murder in the first degree.

The State contended that the prisoner deliberately armed himself with a gun and shot the deceased in cold blood, with malice aforethought and with premeditation and deliberation.

The jury found the prisoner guilty of murder in the first degree, and from the statutory sentence of death pronounced thereon, this appeal is prosecuted.

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

Bridger & Eley for defendant.

STACY, C. J., after stating the case: There was ample evidence offered on the hearing to warrant the jury in returning a verdict against the prisoner, as it did, of murder in the first degree. *S. v. Benson,* 183 N. C., 795. And from a careful examination of the entire record, we are of opinion that appellant has no just grounds for complaint. His

exceptions must all be resolved in favor of the validity of the trial. There are only two which merit any discussion.

The first exception is addressed to the admission of certain evidence tending to show malice on the part of the prisoner towards the deceased. Herbert Raby was allowed to testify, over objection, that he went out with Vernon Eason to Noah Ballard's house on the night before the killing. Jim Ballard was there and in talking to Vernon Eason, the witness heard him say: "You are white and I am black. You are nothing but a meat man, just like me. It is no more for you to die than it is for me." And he added: "I'll get you." There was some argument between the officer and the defendant, but the witness did not hear it all.

It is contended on behalf of the prisoner that this evidence was incompetent and should have been excluded, because the witness did not hear all that was said by the officer and the defendant, and for the further reason that there is nothing to connect it with the homicide. The exception is without merit. The evidence is clearly competent as tending to show malice on the part of the prisoner towards the deceased. It contains a threat against the deceased. *S. v. Merrick,* 172 N. C., p. 873.

In *S. v. Norton,* 82 N. C., 629, it was said that in a prosecution for assault and battery, where the intent with which the act was done was not an essential element of the offense, declarations of the defendant, threatening the prosecutor, made two weeks prior to the assault, were inadmissible, because they in no way helped to explain or elucidate the transaction under investigation. But in writing the opinion in that case, *Ashe, J.,* took occasion to observe: "If the defendant had been indicted for murder, for an assault with intent to kill, for a conspiracy or forgery, or any other offense where the *scienter* or the *quo animo* constitutes a necessary part of the crime charged, such acts and declarations of the prisoner as tend to prove such knowledge or intent are admissible, notwithstanding they may in law constitute a distinct crime. *Dunn v. State,* 2 Ark., 229; *Thorp v. State,* 15 Ala., 749."

And in *S. v. Exum,* 138 N. C., 605, where the defendant was charged with murder, a prosecution similar to the one at bar, it was held that evidence tending to show previous threats on the part of the prisoner against the deceased, was "undoubtedly competent." To like effect are the decisions in *S. v. Wilson,* 158 N. C., 599, *S. v. McKay,* 150 N. C., 813, *S. v. Stratford,* 149 N. C., 483, *S. v. Rose,* 129 N. C., 575, *S. v. Hunt,* 128 N. C., 589, *S. v. Moore,* 104 N. C., 743, and many others too numerous to be cited.

The prisoner's second exception is addressed to certain remarks of one of the counsel for the State, who, in arguing the case before the jury, referred to the prisoner as a human hyena, and used language in substance as follows: "Remember, gentlemen, you are trying the defendant

for his life, for taking the life of one of your county's young men, a brave and fearless officer of the law, a man of high character and standing, who has been brutally murdered by the defendant who sits over there. He is a human hyena and should be treated as such."

The prisoner objected, and the court at once corrected the counsel who was speaking and directed that the statement be stricken out. Counsel apologized and then proceeded with his argument. His Honor, also, added the following caution when he came to charge the jury: "The fact that Jim Ballard is a negro hasn't anything to do with the case. He has as much right to a fair trial as you would have if you were charged with a like felony. He has the same right to have you consider his evidence and to give him each and every advantage you would give to a white man; and if you do not do it this trial will be a mere mockery, nothing more or less."

The characterization of the prisoner as a human hyena was, of course, improper, but the court was swift to interfere in his behalf. Not only did he stop counsel at the time, but he also endeavored to remove any baneful effects from the minds of the jurors when he came to deliver his charge. We think he did all that the law requires. See *S. v. Tucker,* 190 N. C., 708, where the subject was fully discussed at the present term.

After a careful and searching examination of the record, we are unable to discover any action or ruling of the trial court which was prejudicial to the prisoner. The verdict and judgment must be upheld.

No error.

GLOBE YARN MILLS, INC., v. C. C. ARMSTRONG ET AL., TRADING AS GASTONIA COTTON COMPANY, AND G. M. McFADDEN ET AL., TRADING AS GEORGE H. McFADDEN & BROS. AGENCY.

(Filed 27 January, 1926.)

1. Evidence—Contracts—Burden of Proof.

Where plaintiff sues for damages for defendant's breach of contract in not furnishing cotton of a certain length bought under a certain name (Beza), and the evidence is conflicting, the burden of proof is upon the plaintiff to show the breach he alleges.

2. Courts—Instructions—Verdict—Evidence—Burden of Proof.

The court cannot direct a verdict for a party upon whom rests the burden of proof.

3. Contracts—Bargain and Sale—Breach—Damages.

A purchaser of goods must not only prove that the fraud he alleges was an inducement to the contract of sale, but must prove his damage as a result thereof.

4. Contracts—Bargain and Sale—Goods Delivered—Disavowal of Contract.

Where damages for breach of contract are sought in the action upon the ground that cotton of a certain length had been contracted for by purchaser, and that of a shorter staple had been delivered, it should appear that the purchaser had disavowed the purchase of the kind delivered within a reasonable time, under the facts of this case.

5. Principal and Agent—Actions—Contracts—Evidence.

Where the plaintiff's own evidence shows that a defendant in an action for breach of contract has therein acted as an agent for the codefendant, no recovery can be had against the agent alleged to have been a partner of his codefendant.

APPEAL by plaintiff from *Harding, J.*, at May Term, 1925, of GASTON.

The plaintiff is a corporation; the Gastonia Cotton Company and the McFadden Agency are partnerships. For a first cause of action the plaintiff alleges that in the month of October, 1921, the defendants contracted to deliver to it at Mount Holly in March, 1922, 100 bales of full 1 3-16 inch strict middling cotton, for which the plaintiff agreed to pay 33 cents a pound; that the defendants called the cotton "Beza," and that at the time of the sale the agent and representative of the defendants gave the plaintiff a description of the term "Beza," stipulating that the article so designated was 1 3-16 inch cotton and that the plaintiff relied upon this representation; also that the agent of the defendants warranted and guaranteed that the cotton to be delivered would be "full 1 3-16 inch cotton." It is further alleged that the date of delivery was postponed until June, 1922; that the plaintiff performed all the obligations resting upon it by reason of the contract, and that the defendants failed and refused to comply thereby, damaging the plaintiff in the sum of $2,000.

For a second cause, the plaintiff alleges that the defendants induced it to enter into the alleged contract by falsely and fraudulently representing that the word "Beza" meant full 1 3-16 inch cotton, well knowing the plaintiff's ignorance of the meaning of the word and the necessity of its relying upon the representations of the defendants; that these representations were made with the specific intent to defraud; and that the plaintiff was defrauded and damaged in the sum of $2,000.

The defendants filed separate answers, each denying the material allegations of the complaint and setting out the alleged contract and the correspondence between the parties. The contract describes the cotton as 100 bales with staple equal to type "Beza," strict middling.

At the conclusion of the evidence and after some of the counsel had argued the case to the jury the judge entered a judgment of nonsuit as to the Gastonia Cotton Company, and withdrew the 4th, 5th, 6th and 7th issues and submitted only the first three. The seven issues formerly agreed upon were as follows:

1. Did the defendants, George H. McFadden & Bros. Agency, contract and agree to deliver to the plaintiff 100 bales of full 1 3-16 inch strict middling cotton as alleged in the plaintiff's first cause of action? Answer: No.

2. If so, did said defendants breach said contract as alleged in the complaint? Answer: .....

3. What damages, if any, is the plaintiff entitled to recover by reason of said breach as alleged? Answer: .....

4. Did the defendants, Gastonia Cotton Company, falsely and fraudulently represent to the plaintiff that the cotton described in the contract referred to as Exhibit "P-1, was full 1 3-16 inch strict middling cotton as alleged in the plaintiff's second cause of action? Answer: .....

5. Did the defendants, Geo. H. McFadden, falsely and fraudently represent to the plaintiff that the cotton described in the contract referred to as Exhibit "P-1" was full 1 3-16 inch strict middling cotton as alleged in the plaintiff's second cause of action? Answer: .....

6. If so, was the plaintiff induced by said false and fraudulent representations to execute said contract, Exhibit "P-1" as alleged? Answer: .....

7. What damages, if any, is the plaintiff entitled to recover on the second cause of action? Answer: .....

Judgment for defendants from which the plaintiff appealed, excepting and assigning errors.

Woltz & Woltz, George W. Wilson and John M. Robinson for plaintiff.

S. J. Durham for Gastonia Cotton Company.

Mason & Mason, Clyde R. Hoey and O. F. Mason, Jr., for George H. McFadden Bros. Agency.

ADAMS, J. The appellees raise a serious question by asserting the insufficiency of the appellant's brief (Rule 28), especially with reference to the first alleged cause of action; but waiving the point and considering the exceptions we find no error which entitles the plaintiff to a new trial.

It will be observed that the cause first alleged is destroyed by the answer to the first issue. Four of the exceptions relating to this issue are addressed to a statement in the charge of various contentions made by the defendants; and under many approved and familiar decisions these exceptions under the facts disclosed cannot be entertained. The jury were instructed in effect that the burden was on the plaintiff to show by the greater weight of evidence that the contract was as the plaintiff contended; that is, that the plaintiff and Smoot entered into an agreement that type "Beza" should mean full 1 3-16 inch staple strict middling cotton and that Smoot guaranteed that any cotton shipped out on

the contract, by whatever name, should comply with this description; and if such were the facts the plaintiff would still have the burden of satisfying the jury that Smoot was either authorized to make the contract or that it was ratified by the McFadden Agency. These instructions were correct and, as suggested by the appellees, are not specifically impeached in the plaintiff's brief. Moreover, no special instruction was prayed by the plaintiff, and a familiar principle of practice forbids a directed instruction in favor of the party upon whom rests the burden of proof. *Cox v. R. R.*, 123 N. C., 604; *House v. R. R.*, 131 N. C., 103, 105.

The eleventh, twelfth, thirteenth, fourteenth, and fifteenth exceptions relate to the third and fourth issues, which were not answered. Upon the first cause of action the appellant has failed to show reversible error.

In the statement of his second cause of action the plaintiff says that the defendants induced him to enter into the alleged contract and that when he did so he was ignorant of the meaning of the word "Beza" and had to rely upon the defendants' definition of the word and their description of the cotton; also that they induced him "to enter into said contract" by representations which they knew to be false and fraudulent, and thereby damaged him in the sum of two thousand dollars. In substance he alleges that if in the contract of sale the word "Beza" means 1⅛ inch staple and not 1 3-16, he was deceived and inveigled by the defendants into the execution of the contract.

His Honor withdrew from the jury the last four issues on the ground that the evidence was not sufficient to sustain any award of damages in answer to the seventh issue. The plaintiff refused to accept the cotton that had been shipped and the defendants wrote him they had paid the draft, had ordered the cotton to Charlotte, and would reserve the right to charge him with any resulting loss; and they say that he has suffered no loss and that his second cause of action cannot be upheld. It is significant that he makes no allegations as to the way in which the alleged loss was incurred.

Only two witnesses testified and they on behalf of the plaintiff; and the only testimony bearing on the question of the plaintiff's loss is that of R. F. Craig. He said: "I wanted full 1 3-16 inch cotton because I had sold the yarn on that basis. At the time of making the contract I told Mr. Smoot that I had a customer who had asked me to purchase 100 bales of cotton full 1 3-16 inch who wanted to try the yarn against some other yarn he was trying, and I am pretty sure I told him who the customer was. I am positive I told him that I wanted 100 B|C full 1 3-16 inch Mississippi cotton."

The price at which the plaintiff "sold the yarn on that basis" does not appear, or whether the plaintiff profited or lost by the sale. It does not

appear, in truth, whether the yarn was or was not delivered, or whether it was accepted or rejected. Certainly this testimony does not disclose a loss to the plaintiff. Craig testified, however, that at the time the plaintiff entered into the contract of sale 1⅛ inch staple cotton was selling for thirty cents a pound and full 1 3-16 inch cotton for thirty-three cents a pound; and he contends that he was damaged to the extent of three cents a pound by reason of the alleged fraud. The inference does not follow. The verdict shows there was no contract to sell 1 3-16 inch cotton, and the plaintiff has not paid thirty-three cents or any other sum for the cotton tendered; on the contrary it denies that it obligated itself to pay thirty-three cents for 1⅛ inch cotton; and if it has neither paid nor bound itself to pay thirty-three cents for 1⅛ inch cotton it cannot be damaged by the fact that 1⅛ inch cotton was worth only thirty cents. We think the evidence is not sufficient to warrant a new trial on the ground of alleged loss or damage.

It may be said in addition that the evidence of fraud is not convincing. The contract of sale is dated 22 October, 1921. Craig testified that within 30 or 60 days thereafter he again examined the sample and was then informed by Holland and others in the office that it was not 1 3-16 inch staple and that the defendants "did not put it up for that." He said he communicated this information to the defendants immediately, but explained on the cross-examination that he first mentioned the matter to them on 11 May, 1922. Meantime, on 28 February, the plaintiff requested that the shipment be postponed and on 15 April assured the defendants it would take every bale as soon as shipping instructions were received. This hardly has the appearance of a prompt disavowal of the contract. There are other circumstances not less significant. It is very doubtful, also, whether there is adequate evidence of a fraudulent intent on the part of Smoot; indeed, Craig's testimony affords strong evidence to the contrary.

Upon the whole record we are of opinion that the judgment of nonsuit as to the Gastonia Cotton Company is free from error. They acted in the capacity of agents and the agency was disclosed. Craig testified that he was the president and acting treasurer of the plaintiff corporation and that the contract was made, not with the Gastonia Cotton Company, but with the McFadden Agency. *Hite v. Goodman,* 21 N. C., 364; *Fowle v. Kerchner,* 87 N. C., 49; *Russell v. Koonce,* 104 N. C., 237; *Leroy v. Jacobosky,* 136 N. C., 443; *Hicks v. Kenan,* 139 N. C., 337.

We find

No error.

WALTER B. CARPENTER, ADMINISTRATOR, v. ASHEVILLE POWER & LIGHT COMPANY.

(Filed 27 January, 1926.)

1. Electricity—Negligence—Evidence—Nonsuit.

Evidence that an electric power company furnished a lower voltage of electricity for domestic purposes by transferring it from wires carrying a higher and deadly voltage, and that plaintiff's intestate, his wife, was killed by this higher voltage passing along the wires in her home, while engaged in her domestic duties: *Held*, sufficient of defendant's actionable negligence to deny its motion as of nonsuit.

2. Damages—Evidence—Offer of Employment.

Upon the issue of the measure of damages in an action for a wrongful death: *Held*, evidence that plaintiff's intestate had received an offer to sing in a church choir for twenty-four hundred dollars a year, unaccepted, was incompetent.

3. Evidence—Instructions—Appeal and Error—Prejudice.

Material evidence upon an issue wrongfully admitted will not be considered as nonprejudicial, when emphasized by the judge in his charge to the jury.

4. Damages—Wrongful Death—Negligence—Measure of Damages.

The damages recoverable for the wrongful death of another negligently caused, is the net present pecuniary worth of the deceased, to be ascertained by deducting the probable cost of his own living and his ordinary or usual expenses, from the probable gross income derived from his own exertions, based upon his life expectancy. C. S., 161.

5. Same—State Statutes—Descent and Distribution—Federal Statutes.

Under our State statute allowing the recovery of damages for a wrongful death, the amount is to be disposed of as provided for the distribution of personal property in case of intestacy, while under the Federal statute, the damages are based on the pecuniary loss of those made the beneficiaries under the provisions of the statute.

APPEAL by defendant from *Stack, J.*, at April Special Term, 1925, of BUNCOMBE.

Civil action to recover damages for an alleged wrongful death caused by the defendant's alleged negligence in failing properly to "ground" its transformers, or secondary system, used in connection with its sale and distribution of electric current for household and commercial purposes.

Plaintiff's intestate, a young woman thirty years of age, wife and mother, highly educated, peculiarly gifted in music, and of good health, was killed on 7 November, 1923, in the kitchen of her home while discharging some household duty, by coming in contact with an excessive electric current flowing over the wires of the defendant and which were

connected with plaintiff's home under a contract to supply his house with electricity for domestic purposes.

The defendant in the operation of its business maintains two sets of wires—one, comprising its primary system, running from its powerhouse to transformers and carrying an electric current of 2200 volts or more, the other, known as its secondary system, running from the transformers, where the voltage is "kicked down" to a current of 110 volts, to the homes of its customers for use in lighting and operating small motors, etc. The transformer near the plaintiff's house, it is alleged, failed to operate, or to reduce the current from the higher to the lower voltage, and in consequence of which the higher voltage was transmitted over the secondary wires to plaintiff's home and caused the death of his wife. The negligence alleged consists in the failure of the defendant to have its transformers "grounded" so as to convey the deadly current to the ground, rather than over its secondary wires, in case a transformer failed to operate, or in case the primary wires came in contact with the secondary wires, as they did in the instant case.

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

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

"2. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $35,000.

From a judgment on the verdict for plaintiff, the defendant appeals, assigning errors.

Harkins & Van Winkle and Mark W. Brown for plaintiff.
Martin, Rollins & Wright 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 cannot be sustained. The evidence was sufficient to carry the case to the jury. The motion was properly overruled on authority of *McAllister v. Pryor,* 187 N. C., 832, where the question is fully discussed in a valuable opinion by *Associate Justice Clarkson.*

But we think the trial court committed error, prejudicial to the defendant, in the admission, over objection, of the evidence of Dr. Ambler, father of plaintiff's intestate, to the effect that he had seen a letter from a Mr. Harker, written to his daughter prior to her marriage and seven or eight years before her death, offering her $2,400 a year to sing in Richmond, Va., with the promise that her salary would be increased to $3,000 per annum at the end of the first year. The offer was not accepted and the letter was not in evidence. In fact, plaintiff's intestate

never sang for money at any time. This testimony was incompetent and should have been excluded. As said in *Chandler v. Marshall,* 189 N. C., 301, "This is not the kind of evidence to be sanctioned by our courts of justice, for the determination of the rights of litigants." In addition to violating the rule against hearsay, it contains evidence of an unaccepted offer, the reception of which is very generally disapproved by the authorities on the subject. *Canton v. Harris,* 177 N. C., 10, and cases there cited.

Nor can we hold the admission of this evidence to be harmless error, as suggested by plaintiff, for in delivering his charge to the jury, the judge specifically called attention to it in the following manner: "The plaintiff contends that Mrs. Carpenter was only about thirty years of age; that she was an educated and intelligent woman, and had a potential power to make much money; that she had been offered $2,400 a year, with promise of increase to $3,000; that her services in the home were of great money value and he cannot supply them except at a high price." From this, it will be seen that the incompetent testimony of Dr. Ambler was fully submitted to the jury on the issue of damages. Defendant is entitled to a new trial because of this error.

The amount of damages which may be recovered in cases arising under C. S., 160, for the death of a person, caused by the wrongful act, neglect or default of another, is fixed by C. S., 161, at "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." There is a marked distinction between the measure of damages in cases for wrongful death arising under the Federal Employers' Liability Act and in such cases arising under the State law. Under the State statute, giving a right of action for wrongful death, the damages are based on the present worth of the net pecuniary value of the life of the deceased (*Horton v. R. R.,* 175 N. C., 477), and the amount recovered in such action is to be disposed of as provided for the distribution of personal property in case of intestacy (*Hood v. Tel. Co.,* 162 N. C., 92), while under the Federal act, the damages recoverable are based on the pecuniary loss sustained by the beneficiaries. *Cobia v. R. R.,* 188 N. C., p. 493. Under the State law, the damages for the pecuniary worth of the deceased are to be ascertained by deducting the probable cost of his own living and usual or ordinary expenses from the probable gross income derived from his own exertions based upon his life expectancy. *Purnell v. R. R.,* 190 N. C., 573. And in ascertaining these damages, the jury is at liberty to take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for making money—the end of it all being to enable the jury fairly to determine the net income which the deceased might reason-

ably have been expected to earn, had his death not ensued. In *Benton v. R. R.,* 122 N. C., 1007, the following instruction was approved: "To enable the jury properly to estimate the reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, they should consider his age, habits, industry, means, business qualifications, skill, and his reasonable expectation of life." It is only the present worth of the pecuniary injury resulting from the wrongful death of the deceased that may be awarded the plaintiff. It is not the equivalent of human life that is to be given, nor is punishment to be inflicted, or anger to be appeased, or sorrow to be assuaged, but only a fair and just compensation for the pecuniary injury resulting from the death of the deceased is to be awarded. *Mendenhall v. R. R.,* 123 N. C., 275; *Russell v. Steamboat Co.,* 126 N. C., 961; *Watson v. R. R.,* 133 N. C., 188; *Gerringer v. R. R.,* 146 N. C., 32; *Ward v. R. R.,* 161 N. C., 186; *Gurley v. Power Co.,* 172 N. C., 695.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to occur on another hearing, we shall not consider them now. For the error as indicated, there must be a new trial, and it is so ordered.

New trial.

CENTRAL BANK & TRUST COMPANY ET AL., v. MRS. N. M. WYATT ET AL.

(Filed 27 January, 1926.)

1. Equity—Requisites of Estoppel in Pais.

It is necessary to an equitable estoppel *in pais* that the party claiming it has relied on the act of the party sought to be estopped, to his own disadvantage, which would not otherwise have occurred.

2. Tenants in Common—Partition—Title—Issues.

Unless put at issue by adversary claim, the title to lands is not involved in proceedings to partition lands among tenants in common, and a judgment therein does not estop the parties in respect thereto.

3. Same—Deeds and Conveyances—Minerals—Reservation in Deed—Tenants in Common—Lands—Partition—Estoppel—Title.

Where the parties claim as heirs at law of the original owner, or through certain mineral interests in lands reserved from his deed to another, and one of them has acted as a commissioner in proceedings partitioning the lands among them in which the title to such mineral interest was not involved: *Held,* the judgment in such proceedings does not estop him to claim his interest in the mineral rights reserved in the original deed.

4. Deeds and Conveyances—Registration—Judgment—Partition of Lands —Notice—Purchaser for Value—Equity—Statutes.

Where an heir at law of an original owner of lands has a reserved mineral interest in his recorded deed to lands, and is not estopped to assert his title by partition proceedings duly had, his successors in title are not estopped from asserting title thereto against subsequent purchasers from the other heirs at law, they having acquired with notice by registration of the original deed from the common source of title, and the proceedings in partition. C. S., 3309.

APPEAL by defendants from *Ragland, Emergency Judge,* at March Term, 1925, of YANCEY. Affirmed.

Special proceeding for sale of mineral interest in land for partition. Plaintiffs allege that they and defendants, own as tenants in common, the mineral interests in the tract of land described in the petition. Defendants deny that plaintiffs own any interest in or share of said minerals. Upon the trial it was admitted that plaintiffs and defendants claim from a common source, to wit, J. W. Higgins. It was further admitted that defendants rely upon their plea of estoppel, and that if said plea does not avail them, plaintiffs are owners of one-half said mineral interests and are entitled to have sale for partition, in accordance with the prayer of their petition.

The court held as a matter of law, upon the admissions and record evidence, that plaintiffs and defendants own the said mineral interests as tenants in common, and rendered judgment that same be sold for partition. From this judgment defendants appealed.

Watson, Hudgins, Watson & Fouts for plaintiff.
Charles Hutchins and A. Hall Johnston for defendants.

CONNOR, J. On 17 July, 1877, John W. Higgins and wife, by deed duly probated and registered in Yancey County, conveyed to Edward E. Wilson, a tract of land, containing about 200 acres, situate in said county. In the habendum clause of said deed, the grantors reserved "one-half of all the mineral found upon the premises." Upon the former appeal in this cause, we held that by virtue of said reservation, J. W. Higgins, notwithstanding the execution and delivery of said deed, remained the owner in fee of one-half of the mineral interests in the land conveyed therein. This is the same land as that described in the petition herein: 189 N. C., 107, opinion by *Justice Adams.*

Upon the death of Edward E. Wilson, the said land (except so much thereof as was sold and conveyed by him), descended to his heirs-at-law, among whom it was partitioned under a decree rendered in a special proceeding, to which all of said heirs were parties. J. W. Higgins was appointed by the court as one of the commissioners to divide said land;

he accepted said appointment, acted as such commissioner, and signed the report, in which shares were set apart and allotted to each of said heirs, in severalty. This report was confirmed, and each of said heirs entered into possession of his or her share. No reference is made in the petition, order for partition, or report of the commissioners to the reservation by J. W. Higgins of one-half the mineral interest in said land, in the deed under which Edward E. Wilson, claimed title thereto, or to any claim to the same by J. W. Higgins, by virtue of said reservation.

J. W. Higgins is dead; plaintiffs claim one-half the mineral interests in said land, under him, and rely upon the reservation of the same in his deed to Edward E. Wilson. Defendants now own the shares in said land, allotted to the heirs at law of Edward E. Wilson, in the partition made in the special proceeding by J. W. Higgins and others as commissioners. They contend that plaintiffs are estopped by the conduct of J. W. Higgins, as commissioner, to set up or assert title, under him, to the mineral interests in said land; that having signed the report, allotting to each of the heirs at law of Edward E. Wilson, a share of said land, without any reference to or mention of any claim to the said mineral interests, J. W. Higgins was estopped thereafter to claim title to said mineral interests under the reservation in his deed to Edward E. Wilson.

Plaintiffs, having derived their title from and succeeded to the estate of J. W. Higgins are privies in estate with him; and so, defendants are privies in estate, with the heirs at law of Edward E. Wilson. If by his conduct as commissioner in the special proceeding to partition the lands which descended to them from Edward E. Wilson, J. W. Higgins was estopped to assert, as against the heirs at law of Edward E. Wilson, title to the mineral interests in said land, under his reservation in the deed to their ancestor, then he and his privies are estopped to assert such title as against defendants, privies of said heirs at law. *Dudley v. Jeffries,* 178 N. C., 111; *Watford v. Pierce,* 188 N. C., 430. The question presented here is to be considered precisely as if it had arisen between J. W. Higgins, and the heirs at law of Edward E. Wilson. *Simpson v. Blaisdell,* 35 A. S. R. (Me.), 348, cited and approved by *Justice Adams* in *Watford v. Pierce, supra;* 21 C. J., 1109, sec. 108; Story's Eq. Jur., vol. 3, sec. 2014 (14 ed.).

All the right, title and estate of Edward E. Wilson, upon his death, descended to his heirs at law, as tenants in common. The effect of the partition of the land among them was simply to destroy the unity of their possession. It did not affect the title by which each heir held an undivided interest in the land before, and his share in severalty, after the partition. Neither of them acquired any greater title to or interest

in the land, as the result of the partition, than he had before as an heir-at-law. Neither gave any consideration for his share or changed his position in any respect by reason of the conduct of J. W. Higgins, as one of the commissioners who made the partition under the order of the court.

One of the requisites of an estoppel *in pais,* or an equitable estoppel, as stated in Pomeroy's Eq. Jur., vol. 2, sec. 805 (2 ed.), is that one who relies upon a plea of estoppel must show that he has relied and acted upon the conduct of the party sought to be estopped and that he has changed his position for the worse, because of such reliance. No man ought to be estopped from asserting a lawful right by one who has suffered no loss by reason of the conduct alleged and shown in support of the plea, except when it is invoked to promote justice. "The doctrine is founded upon equity and good conscience; and the party claiming the estoppel must have done something, paid something, or in some way changed his position for the worse, so that he will not be left, or cannot be put back, in his former condition, in case the other party is allowed to assert his original rights." Story's Eq. Jur., vol. 3, sec. 1898 (14 ed.).

Applying this principle, it cannot be held that an heir, to whom a share in the real estate, which descended to him and other heirs from his ancestor, as tenants in common, has been allotted, can avail himself of the plea of estoppel against the claim of one who acted as commissioner in partition proceedings, by which the real estate was partitioned and who thereafter asserts an interest in said real estate, which was valid as against the ancestor by reason of a duly recorded deed, because such commissioner did not disclose such claim at the time the real estate was divided. The heir has lost nothing by the conduct of the commissioner; he has not changed his position in reliance upon such conduct; neither equity nor good conscience requires that the commissioner shall be estopped from asserting his claim, which in the instant case, is admittedly rightful and lawful.

It does not appear whether defendants are purchasers for value from the heirs of Edward E. Wilson or not; if they are such purchasers, this fact does affect the question, for they purchased with notice, from the records of Yancey County, of the right of J. W. Higgins to one-half of the minerals on the lands, under the reservation in his deed to Edward E. Wilson. They are in no better position than they would be if they were claiming under a deed registered subsequent to the registration of a deed from their ancestor to J. W. Higgins for the said mineral interest. C. S., 3309.

Hutton v. Horton, 178 N. C., 548, does not sustain the contention of defendants in this case. It is true that in that case, the conduct of the defendant who was a chain bearer upon the survey of the lands, made

under an order in the special proceeding, for sale for partition, was held to estop him from asserting claim to the land adverse to plaintiff; but this was in favor of a purchaser, who bought at the sale and paid for the land. The distinction between a purchaser at a sale for partition who pays for the land, and an heir who takes his share in severalty by descent, is obvious.

There was no error in holding as a matter of law, upon the admissions and records offered in evidence, that plaintiffs were not estopped by the fact that J. W. Higgins, under whom they claimed, was one of the commissioners who signed the report in the special proceeding for partition, and that no reference was made in said special proceeding to his claim to one-half the mineral interests in said land. The judgment is

Affirmed.

C. A. PACE v. HENRY M. McADEN ET AL.

(Filed 27 January, 1926.)

1. Evidence—Declarations—Deeds and Conveyances—Title.

In order for the declarations of a predecessor in title to be competent upon the question of disputed boundaries to land, in favor of a claimant under him, it is necessary for the party to show that the declarant was dead when such evidence is offered, that he was disinterested at the time of the declaration, and that it was made *ante litem motam* or before any controversy had arisen which affected his title to the lands in dispute.

2. Same—Ante Litem Motam.

The declarations of a predecessor in title as to the disputed boundaries of land are incompetent, when at the time they were made another lot of the lands adjoining the *locus in quo*, and equally affected by the declarations, was in dispute.

3. Appeal and Error—Evidence—Unanswered Questions—Record.

Where a question has been ruled out upon the trial and excepted to, it is required that it be made to appear of record what the answer of the witness would have been, for it to be considered on appeal.

4. Deeds and Conveyances—Evidence—Boundaries—Location of Calls.

Where there are two identical points called for in the boundaries determining the *locus in quo*, the location of which is determinative of the issue, it is competent for a party to show in favor of his title the true location of the point called for.

5. Evidence—Hearsay—Questions for Jury.

Held, under the facts of this case, evidence was properly excluded which was to a fact without the personal knowledge of the witness, and which was within the province of the jury to determine.

PACE *v.* MCADEN.

APPEAL by defendants from *Finley, J.*, at June Term, 1925, of CHEROKEE.

Action to determine title to land and to remove a cloud from title. The issues were answered as follows:

"1. Is the plaintiff's grant 15831 located as contended for by the plaintiff as shown in yellow lines on the map? Answer: Yes.

"2. Is the defendant's grant located as contended for by the defendants as shown by the red lines on the map? Answer: No.

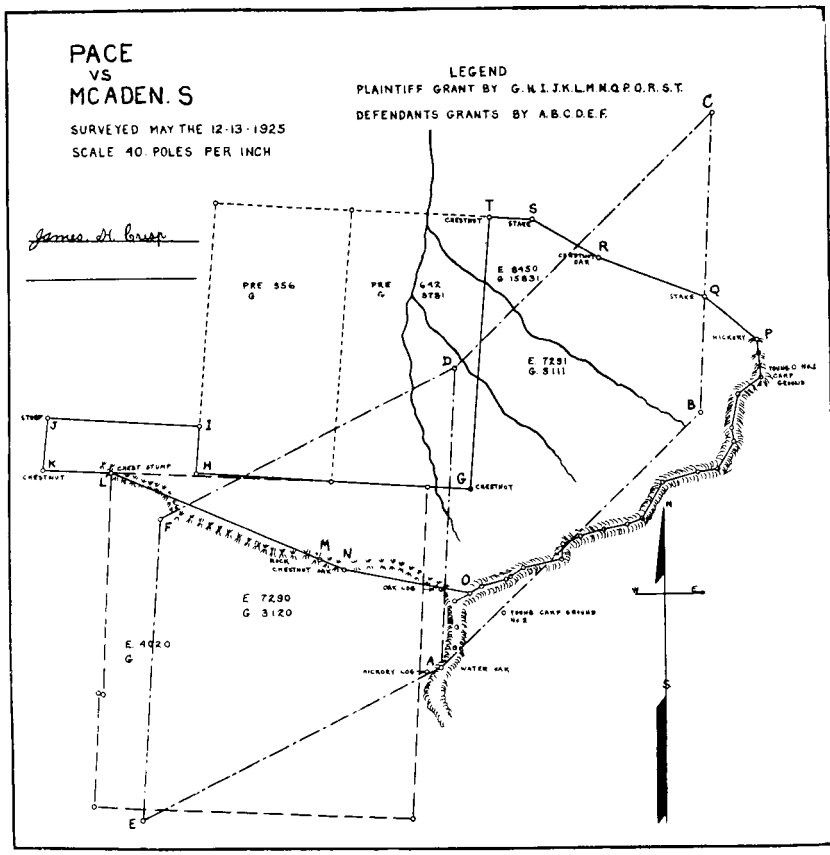
"3. It was adjudged that the plaintiff is the owner of the land described in the complaint as indicated on the plat by the yellow lines and that the defendants have no right, title, or interest therein. The defendants excepted and appealed.

Moody & Moody and R. L. Phillips for plaintiff.
M. W. Bell and Dillard & Hill for defendants.

ADAMS, J. The plaintiff claims title under a grant (No. 15831), issued to Eunice Postell on 28 March, 1903, and registered on 5 May next succeeding, and upon the trial he introduced mesne conveyances connecting his title with that of the grantee. The defendants claim under a grant (No. 3111), issued to E. B. Olmsted on 10 November, 1867, and registered 4 June, 1884, and upon the trial it was admitted that they have an unbroken chain of title and have succeeded to whatever title Olmsted acquired under this grant. It is therefore obvious that the point of divergence is the location of the grants from which the parties respectively derive their title. Practically all the exceptions taken by the defendants relate to this question.

E. C. Mease, a surveyor introduced by the plaintiff, testified that the platted distance of the first line in the Postell grant is 13 poles in excess of the length designated in the grant; and he was asked on cross-examination whether, if the line stopped at the distance called for, all the following calls shown by the yellow lines would not be changed. Upon objection by the plaintiff the answer was excluded and the defendants excepted. The witness would have answered, "We then ran the remainder of the calls from this point at H, which was 13 poles further than the grant calls." If it be granted that the proposed answer was responsive to the question, an assumption which is not undisputed, it was inadmissible. The line begins "on the southeast corner of tract 642 and runs with the line of said number and No. 356 west 180 poles to the southwest corner of No. 356." The location of the line involves both law and fact, for if the jury should find the southwest corner of No. 356 to be where the plaintiff contends it is, the line would be extended to this corner. For this reason it was not competent to show that the line would neces-

sarily be deflected at the end of 180 poles. *Gilchrist v. McLaughlin,* 29 N. C., 310; *Miller v. Cherry,* 56 N. C., 24; *Bowen v. Gaylord,* 122 N. C., 816; *Lumber Co. v. Bernhardt,* 162 N. C., 460; *Gray v. Coleman,* 171 N. C., 344; *Miller v. Johnston,* 173 N. C., 62. The first exception is overruled.



The beginning corner of the defendants' land is at "a water oak, a corner of No. 7290, on the county line." For the purpose of showing the corner of No. 7290 the defendants introduced a grant to Olmsted purporting to convey the land in No. 7290 and calling for its beginning corner on a water oak west of Young's camp. It is contended that the beginning corner of both the Olmsted grants is at this oak. The defendants proposed to ask their witness, James H. Crisp, whether William Young had pointed out to him the location of Young's camp. Young was

then dead and had had no interest in the land. At that time a suit was pending between McAden and one Wright, and the witness surveyed both the Olmsted grants under an order of court. Young's declaration was excluded and the defendants excepted. Exceptions 3 and 4. Whether both the Olmstead grants were then in controversy is immaterial, for they have a common beginning corner, and the location of this corner would affect, if not determine, the location of each tract.

The requirements for the admission of unsworn declarations are that the declaration be made *ante litem motam,* that the declarant be disinterested when it is made and that he be dead when it is offered in evidence. *Yow v. Hamilton,* 136 N. C., 357; *Hemphill v. Hemphill,* 138 N. C., 504; *Sullivan v. Blount,* 165 N. C., 7; *Hoge v. Lee,* 184 N. C., 44; *Tripp v. Little,* 186 N. C., 215, 218. In the case last cited it is said the term *"ante litem motam"* does not apply merely to the suit then being tried, but refers also to the origin of the controversy between the parties or their predecessors in title, which resulted in the suit. And in *Rollins v. Wicker,* 154 N. C., 559, the commencement of the controversy is defined to be "the arising of that state of facts on which the claim is founded"; and it is therein held that evidence of this character should refer to a period "when this fountain of evidence was not rendered turgid by agitation."

When the proffered declaration of William Young was made in the presence of Crisp, the location of the beginning corner of No. 7290 (grant 3120), was in controversy; this corner, as we have said, is a corner of No. 7391 (grant 3111); and the situation of Young's camp had a direct bearing upon the location of the beginning corner of the two Olmsted grants. A controversy then existed between the defendants or their predecessor and Wright and the excluded declaration was not made *ante litem motam.* Defendants, however, cannot complain, because the witness afterwards testified that in 1915 Young pointed out to him the location of Young's camp.

The evidence to which the fifth exception relates was correctly excluded; its admission would have been an invasion by the witness of the province of the jury. There is no evidence that the witness was present when the line was run or that his proposed evidence was based on his personal knowledge.

The sixth, seventh and eight exceptions also are untenable as will appear from what we have said in the discussion of the third and fourth; and as to the ninth and tenth the record does not disclose the anticipated answer of the witness, and we cannot assume that it would have been favorable to the defendants. *Snyder v. Asheboro,* 182 N. C., 708; *S. v. Collins,* 189 N. C., 15.

On the plat are two points referred to as Young's camp ground. The plaintiff insisted on one as the correct location and the defendants on the other. The plaintiff contended that a corner of grants 3020 and 3111 had been changed by the Legislature at the instance of the defendants or those under whom they claim title, and on the cross-examination he attempted to show that a witness for the defendants had found a hickory near the camp at the head of Trail Ridge. The defendants excepted to the admission of this evidence (exception 11), but in our opinion it was competent, as was also the evidence on the same question which is the subject of the sixteenth exception. There are two or three other exceptions, but they must be overruled under principles which are familiar and require no discussion.

We find

No error.

J. W. LATHAM v. STATE HIGHWAY COMMISSION, PASQUOTANK HIGHWAY COMMISSION ET AL.

(Filed 27 January, 1926.)

Government — State Highway Commission — Torts — Trespass — County Highway Commission.

The State Highway Commission is an unincorporated agency of the State to perform specific duties in relation to the highways of the State, and is not liable in damages for the torts of its subagencies, and an action may not be maintained against it or a county acting thereunder in trespassing upon the lands of a private owner, or for the faulty construction of its drains, or the taking of a part of the lands of such owner for the use of the highway, the remedy prescribed by the statute being exclusive.

APPEAL by plaintiff from *Cranmer, J.*, at January Term, 1925, of PASQUOTANK.

Civil action instituted in the Superior Court of Pasquotank County to recover of the defendants damages for causes alleged in the complaint as follows:

1. For that the defendants have wrongfully, unlawfully and wilfully trespassed upon plaintiff's lands and "cut out a ditch through a part of the lands of the plaintiff, said ditch so cut out by them being at the public road aforesaid and extending through a part of the lands of the plaintiff and coming to an abrupt stop about the center of plaintiff's farm," and wrongfully accumulated and ponded water thereon.

2. Because defendants have wrongfully and unlawfully trespassed upon the lands of plaintiff and "taken from this plaintiff a strip along

one side of his farm bordering on said public road, containing about one quarter of an acre, more or less, and have made said strip so taken a part of the public road."

At the close of plaintiff's evidence, there was a judgment as of nonsuit entered on motion of the defendants, and from this ruling the plaintiff appealed.

Aydlett & Simpson and Geo. J. Spence for plaintiff.
W. L. Cohoon, W. L. Small and Ehringhaus & Hall for defendants.

STACY, C. J. This case was before us at a former term (185 N. C., 134), on plaintiff's appeal from a judgment sustaining a general demurrer interposed by the defendants and which was reversed because of the presence of the individual defendant and the broad allegations of the complaint. *Hipp v. Ferrell,* 169 N. C., 551, *S. c.,* 173 N. C., 167. Doubtless the demurrer should have been sustained as to the other defendants, especially the State Highway Commission. *Carpenter v. R. R.,* 184 N. C., 400. But however this may be, in view of the evidence offered on the hearing, we have experienced no difficulty in concluding that the present judgment of nonsuit should be sustained; not only as it relates to the State Highway Commission and its agent, the Pasquotank Highway Commission (*Jenkins v. Griffith,* 189 N. C., 633), but also as it concerns the individual defendant, T. L. Higgs. *Hyder v. Henderson County,* 190 N. C., 663; *Noland Co. v. Trustees,* 190 N. C., 250. There is no evidence on the instant record sufficient to render any of the defendants liable in damages to the plaintiff on either cause of action set out in the complaint. The State Highway Commission was the moving spirit in all that was done, and it is not liable to suit for trespass or tort such as the plaintiff has instituted here. *Mabe v. Winston-Salem,* 190 N. C., 486.

In *Carpenter v. R. R., supra,* it was held (1) that the State Highway Commission is not an incorporated body with the right to sue and be sued generally, but that it is an agency of the State, charged with the duty of exercising certain administrative and governmental functions (C. S., 3846); (2) that a state cannot be sued in its own courts or elsewhere unless it has expressly consented to such suit by legislative enactment or in cases authorized by the organic law; and (3) that, generally speaking, a state cannot be held liable for torts committed by its officers or agents in the discharge of their official duties unless it has voluntarily assumed such liability. And we may add that where a state agency, like the State Highway Commission, is created for certain designated purposes and a statutory method of procedure provided for adjusting or litigating claims against such agency, the remedy set out

in the statute is exclusive and may alone be pursued. *McIntyre v. R. R.*, 67 N. C., 278; *Parks v. Comrs.*, 186 N. C., 490; *Jones v. Comrs.*, 130 N. C., 452; *Dargan v. R. R.*, 131 N. C., 623; *Durham v. Rigsbee*, 141 N. C., 128; *Luther v. Comrs.*, 164 N. C., 241; *Pharr v. Comrs.*, 165 N. C., 523; *Shute v. Monroe*, 187 N. C., 683; *Allen v. R. R.*, 102 N. C., 381.

The line of cases, beginning with *Mason v. Durham*, 175 N. C., 638, and including among others, *Fleming v. Congleton*, 177 N. C., 186, *Keener v. Asheville, ibid.*, 1, *Sawyer v. Drainage District*, 179 N. C., 182, *Rouse v. Kinston*, 188 N. C., 1, strongly relied on by plaintiff, is not at variance with our present position for the very good reason, *inter alia*, that in each case going to make up this line of decisions, the action was against a municipal or *quasi*-municipal board or corporation charged with the exercise of ministerial, as well as governmental, functions, and not against an unincorporated agency of the State, as in the instant case. *Moody v. State Prison*, 128 N. C., 12; *Jones v. Henderson*, 147 N. C., p. 125. And, too, in the *Mason case* and others, there was a denial of title, making it necessary for plaintiff to resort to the Superior Court for a determination of the question of ownership and the right to claim damages.

On the record, the defendant's motion for judgment as of nonsuit, made at the close of plaintiff's evidence, was properly allowed.

Affirmed.

SOUTHERN ENGINEERING COMPANY v. T. F. BOYD.

(Filed 27 January, 1926.)

Judgments—Consent Judgments—Estoppel—Principal and Surety—Contracts—Material Furnishers.

Where the surety on a bond of a contractor for the erection of a building has taken for his protection a note payable to the contractor in a certain sum, and thereafter has transferred the note to a material furnisher for whose account he was liable as such surety, and thereafter in an action to which he was a party has agreed to the entry of a consent judgment allowing him a credit in a smaller amount: *Held*, a consent judgment being the agreement of the parties entered into with the sanction of the court, he is estopped from claiming as a defendant as surety in an action upon the contractor's bond, that he was entitled to a credit in a larger sum in accordance with the amount paid on the note he had taken and assigned to the materialman, the plaintiff in the instant case.

APPEAL by plaintiff from *Lane, J.*, at May Term, 1925, of MECKLENBURG.

Civil action to recover of the defendant, T. F. Boyd, as bondsman for the Liberty Engineering and Construction Company, the sum of $5,594.75 with interest from 25 October, 1920, the amount admittedly due the plaintiff by the Liberty Engineering and Construction Company on said date.

Plaintiff furnished the Liberty Engineering and Construction Company certain materials to be used by it in the erection of a high school building at Wilmington, N. C. The defendant, T. F. Boyd, was bondsman for the construction company.

On 25 October, 1920, the plaintiff being anxious to collect its debt, learned of a $5,000 note due 20 April, 1921, owned by the construction company, executed by the trustees of the Maysville, N. C., graded school for work done on a building there, and which had been turned over to the defendant Boyd in order that he might discount it at the Bank of Hamlet. With the consent of the officers of the construction company, which is now insolvent and out of business, the defendant Boyd turned this note over to the plaintiff as partial security for its debt, and as it was only worth $4,875 at that time, it being a noninterest-bearing note, the following receipt was executed and delivered to the defendant:

"Charlotte, N. C., 10-25-20.

"Received of Mr. T. F. Boyd, one note for $5,000, payable 20 March, 1921. This note is made payable to the Liberty Engineering and Construction Company and is made by the school board of the town of Maysville, N. C. This note is to apply on our account for steel and iron furnished for the New Hanover High School building being erected at Wilmington, N. C., by the Liberty Engineering and Construction Company. This note to be discounted at 6 per cent, leaving a net credit of $4,875. Very truly yours,

(Signed) L. G. BERRY, *President,*
Southern Engineering Company.

"Any interest which this note may bear from now until 20 March, 1921, is to be paid to the Liberty Engineering Company."

Prior to the institution of the present suit, the makers and endorsers of the note mentioned in this receipt, brought an action in the Superior Court of Jones County against the plaintiff herein and all others interested in the collection of said note, including the defendant, T. F. Boyd, to restrain the collection of same and to declare said note void. A consent judgment was finally entered in the action pending in the Superior Court of Jones County in which it was adjudged that the sum of $3,250 collected on said note by the plaintiff herein should inure to

the benefit of the defendant, T. F. Boyd. This judgment was entered at the instance and with the approval and consent of the defendant Boyd.

The present suit, therefore, is to collect the difference between $3,250 the amount received on said note, and $5,594.75, the amount admittedly due the plaintiff by the Liberty Engineering and Construction Company on 25 October, 1920, and for which the defendant Boyd is liable by reason of his suretyship.

The defendant Boyd contends that by reason of the receipt above set out he is only liable to the plaintiff for the difference between $4,875 and the amount admittedly due the plaintiff by the Liberty Engineering and Construction Company.

Judgment was entered below in accordance with the defendant's contention, and from this ruling the plaintiff appeals.

Preston & Ross for plaintiff.
McNinch, Whitlock & Dockery for defendant.

STACY, C. J., after stating the case: The appeal presents but a single question, and it is this: What amount is the defendant, T. F. Boyd, entitled to credit as against the plaintiff on account of the note executed by the school board of the town of Maysville and turned over to the plaintiff as partial security for its debt on 25 October, 1920?

The defendant contends that by reason of the receipt given at the time, he is entitled to a credit of $4,875 for said note. For this position, he relies upon the following authorities: *Grubb v. Lohay,* 145 N. W. (Wis.), 207; *Symington v. McLin,* 18 N. C., 298; *Gordon v. Price,* 32 N. C., 385; *Terry v. Robbins,* 128 N. C., 140; *Ralston v. Aultman Miller & Co.,* 66 S. W. (Tex.), 746.

The plaintiff unquestionably had the right to take this note and discharge the defendant from any or all liability as bondsman, but we do not think the receipt, above set out, should be so construed, or that such interpretation would be in keeping with the intention of the parties. It is conceded that under the consent judgment, entered in the suit pending in the Superior Court of Jones County, and to which T. F. Boyd was a party, the plaintiff received only $3,250 on said note.

The defendant Boyd having been a party to the suit instituted in Jones County after the execution of the above receipt and in which the validity of this very note was at issue, and having procured and consented to a judgment decreeing that the sum of $3,250 paid thereon should inure to his benefit as bondsman or surety for the Liberty Engineering and Construction Company, we think it is but proper to hold that he is bound by the terms of said consent judgment, and that he may

not again litigate the same matter in the present suit. A consent judgment is in truth a decree of the parties, entered of record with the sanction of the court. It is their act, their contract, their decree, and binding upon them as such. *Distributing Co. v. Carraway,* 189 N. C., p. 423, and cases there cited. On the instant record, therefore, the plaintiff is entitled to recover with interest the difference between $3,250, the amount received on said note, and $5,594.75, the amount admittedly due the plaintiff by the Liberty Engineering and Construction Company on 25 October, 1920, and for which the defendant Boyd is liable by reason of his suretyship.

The cause will be remanded, to the end that judgment may be entered in conformity with this opinion.

Error and remanded.

M. L. DAVIS v. STATE HIGHWAY COMMISSION AND PASQUOTANK HIGHWAY COMMISSION.

(Filed 27 January, 1926.)

Government—State Highway Commission—Highways—Detours.

The State Highway Commission, as a governmental agency, is not subject to an action in tort for damages by the owner for the temporary taking of a part of his lands for a necessary detour for travel upon the State's highway. *Jennings v. State Highway Commission,* and *Latham v. State Highway Commission,* applied.

APPEAL by plaintiff from *Cranmer, J.,* at January Term, 1925, of PASQUOTANK.

Civil action in tort, instituted in the Superior Court of Pasquotank County, to recover of the defendant damages for the temporary use, pending the construction of a bridge on the State highway, of a right of way through plaintiff's farm, as a detour, said detour following an old road to plaintiff's pasture, and then across his pasture and out through his front gate back to the State highway.

On the hearing, it was admitted, for the purposes of this suit, "that plaintiff owns the land described in the complaint, and that the detour established over the lands by the defendants was a lawful act on their part in constructing the road named in the pleadings and provided a proper detour while said main highway was closed."

At the close of plaintiff's evidence, there was a judgment as of nonsuit, entered on motion of the defendants, from which plaintiff appeals.

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

STACY, C. J., after stating the case: The judgment of nonsuit sustaining the demurrer to the evidence must be affirmed on authority of *Jennings v. Highway Com.*, 183 N. C., 68, and *Latham v. Highway Com., ante*, 141.

Affirmed.

D. W. LOWMAN v. W. C. ABEE, FRANCIS GARROU AND J. G. BERRY, BOARD OF COMMISSIONERS OF LOVELADY TOWNSHIP, BURKE COUNTY, AND LOVELADY TOWNSHIP, W. C. ABEE, FRANCIS GARROU AND J. G. BERRY.

(Filed 27 January, 1926.)

1. Condemnation—Highways—Township Statutes—Sand and Gravel from Owner's Other Lands—Actions—Trespass.

Where a public-local act gives to a particular township the right to condemn lands for a public highway, and prescribes a method by which the damages to the owner shall be ascertained, but is silent as to the taking of top-soil, etc., for the road construction from the owner's lands outside of the right of way thus obtained, an action by the owner to recover damages for the taking of the top-soil outside of the right of way may be maintained under the general statutes on the subject. C. S., 1712. (C. S., 3668, 3748(a), vol. 3, not applicable.)

2. Same—Commissioners—Individual Liability.

Under the allegation in this case the individual members of a township road commission are not liable, as such, for a trespass in taking the sand and gravel from the lands of the owner adjoining a highway, when acting within the scope of their official duties.

3. Pleadings—Demand—Recovery.

The amount of recovery in the present action is limited to the specific sum demanded in the complaint when particularly stated, and may not be extended to that claimed in a general prayer for a larger amount.

APPEAL by defendants from *Harding, J.*, at October Term, 1924, of BURKE. Affirmed as to board, reversed as to individuals.

The plaintiff brings this action against the defendants (1) As Board of Commissioners of Lovelady Township, Burke County, and Lovelady Township, (2) W. C. Abee, Francis Garrou and J. G. Berry, individually.

Plaintiff alleges that he is a resident of Lovelady Township and owns certain lands, describing them. That defendants are residents of and

the duly elected road commissioners of Lovelady Township, under the provisions of chapter 426, Public-Local Laws 1915. That "at and during the time of the *wrong* hereinafter alleged," kept and maintained a large force of laborers, teams, etc., for the purpose of grading, laying out and changing the public roads of said township, etc.

Plaintiff further alleges:

"That during the year 1919 or fall of 1918, the said defendants entered the premises of the plaintiff above fully described and took and appropriated for said public road certain parts of the plaintiff's said land in widening and changing the said public road as aforesaid, and located and appropriated a right of way over the plaintiff's lands for the said road.

That in taking and appropriating a part of the plaintiff's said lands as aforesaid for a right of way for said road, the defendants entered his said premises with a force of hands and laborers and teams and road implements and graded the same down, and also entered other parts of plaintiff's said lands outside of the right of way so laid off over said lands as aforesaid, and took the topsoil thereof, plowing it up and hauling it away for topsoil for the said road as aforesaid.

That in the taking of topsoil from the plaintiff's said premises, his fences were cut and removed and his pasture fence destroyed and his growing crop destroyed and tramped down, and in places his cultivated fields invaded, and timber cut and removed.

That such entry by the defendants on the premises of the plaintiff as above alleged, outside of the right of way for the said road, as plaintiff is advised and verily believes, was unlawful and wrongful, being over the protest of the plaintiff and without his consent, and such entry and trespass without warrant and authority of law.

That by reason of such unlawful entry and trespass and the taking of his topsoil as aforesaid, the plaintiff has suffered great damage in the sum of $300.

Wherefore, plaintiff prays judgment for $1,000 damages, for costs and such other and further relief as to the court may seem just and the facts warrant."

Defendants admit in their answer "that in constructing the highway they used a large force and that they took certain topsoil for building said highway."

Defendants say "That all the acts done and performed by these defendants were done in the official capacity as road commissioners of Lovelady Township and that they are not individually liable therefor.

That section 4 of said chapter 426, Public-Local Laws of 1915, provides the method and the time within which landowners shall proceed to collect such damages as they may be entitled to recover for the taking

of their lands for highway purposes; that it is provided in said section of said act that all claims for damages shall be filed 'within six months from the completion of such change or new road, but not later,' and defendants allege that plaintiff failed to so file his claim for damages within six months from the completion of said change or new road; and defendants hereby specially plead said act and plaintiff's failure to file his claim within six months after the completion of said change or new road in bar of the plaintiff's recovery in this action.

Defendants are advised and believe and so allege, that the method for the recovery of damages by a landowner as prescribed in chapter 426, Public-Local Laws of 1915, aforesaid, is exclusive, and that plaintiff's remedy, if any, is that prescribed in section 4 of said act; and none other; and defendants especially plead said act and particularly section 4 thereof in bar of plaintiff's recovery in this action.

That the complaint does not state a cause of action against the defendants for that it appears upon the face of the complaint that defendants are the duly constituted board of road commissioners of Lovelady Township under the provisions of chapter 426, Public-Local Laws of 1915, and that the court will take judicial notice of the fact that under the provisions of said act the sole and exclusive remedy of the plaintiff, if any, is that prescribed by section 4 of said act, and that this action cannot be maintained by plaintiff."

The following judgment was rendered by the court below:

"This cause coming on to be heard upon the demurrer *ore tenus* of the defendant to the complaint on the grounds that the complaint does not set out facts sufficient to constitute a cause of action against the defendant; after hearing argument the court is of opinion that the complaint does set out facts sufficient to constitute action against defendants, and overrules demurrer, and defendants except, and this is defendant's exception No. 1. The defendants then move the court to dismiss the action for that the proper method prescribed by the statute has not been followed. Motion overruled. Defendants except, and this is defendants' exception No. 2. Defendants individually move to dismiss the action as to them individually, on the ground that there is no *cause* of action set up in the complaint against them as individuals. Motion is overruled and defendants as individuals except, and this is defendants' exception No. 3."

All the defendants duly assigned error upon the exceptions and appealed to the Supreme Court.

Spainhour & Mull for plaintiff.
Avery & Ervin for defendants.

CLARKSON, J. The learned counsel for plaintiff, no doubt advertent to the decisions of this Court, drew his complaint to be sure of one cause of action—trespass in taking "topsoil" off the land of plaintiff and putting it on the improved road. The road board of Lovelady Township, under Public-Local Laws 1915, ch. 426, part sec. 4, had the power "that the board shall in all cases, where they deem it necessary to make changes or lay out new roads, have the power of eminent domain, to take such lands as they may deem necessary for such changes or new roads, and they shall not be enjoined or stopped in such work by any landowner, but such landowner may, if he thinks himself damaged, file a claim for such damages at any time within six months from the completion of such change or new road, but not later," etc. The act further provides how claim for damages shall be paid—assessment by arbitration with right of appeal.

There is nothing in the act giving the road board of Lovelady Township the power of authority to go on plaintiff's land and take "topsoil," to put on the changed or new road. The remedy that the defendants say is sole and exclusive, given by the statute, can have no application when the statute does not authorize the taking of "topsoil."

There is a provision under "Eminent Domain," C. S., 1712, as follows: "For the purpose of constructing and operating its work and necessary appurtenances thereof, or of repairing them after they shall have been made, or of enlarging or otherwise altering them, the corporation entitled to exercise the powers of eminent domain may, at any time, enter on any adjacent lands, cut, dig, and take therefrom any wood, stone, gravel, water or earth, which may be deemed necessary: *Provided,* that they shall not, without the consent of the owner, destroy or injure any ornamental or fruit trees."

Under Public Laws 1921, chapter 2, sec. 22, large powers are given the State Highway Commission: "The State Highway Commission is vested with the power to acquire such rights of way and title to such land, gravel, gravel beds, or bars, sand, sandbeds or bars, rock, stone boulders, quarries, or quarry beds, lime, or other earth or mineral deposits or formations, and such standing timber as it may deem necessary and suitable road construction, maintenance and repair, and the necessary approaches and way through, and a sufficient amount of land surrounding and adjacent thereto, as it may determine to enable it to properly prosecute the work, either by purchase, donation or condemnation, in the manner hereinafter set out," etc. *Wade v. Highway Com.,* 188 N. C., 210. There are no such broad and explicit powers in the road act for Lovelady Township. We do not think the courts should go beyond the language of the statute.

In *Clifton v. Highway Com.*, 183 N. C., 211, it was said: "It will be observed that this act contains no such limitations as is provided in the statutes hereinbefore referred to with respect to dwellings, trees or yards. In the absence of constitutional or statutory restriction, the power of the State to appropriate private property to public use extends to every species of property within the territorial jurisdiction."

This decision was rendered on the facts that there was a building in the highway as laid out and it could be removed to build the road. This right is restricted in some statutes and if so the statute must be followed.

The plaintiff, as we construe the complaint, presents definitely a cause of action in taking the "topsoil." In the complaint he speaks "of the wrong hereinafter alleged" and definitely sets out the wrong, taking the "topsoil," and asks for fixed damages of $300. In the prayer he asks for $1,000 damages. Our practice is liberal, but we cannot put in the complaint language that the pleader has not. We can only hold on the complaint that the action is for trespass in taking the "topsoil" and that is the only action definitely alleged.

Under Roads and Highways, chapter 70, article 4, C. S., 3668, (see, also, sections 3817, 3818), right is given to township road board to take "topsoil," but the remedy is different from the Lovelady Township road law.

C. S., 3668, *supra,* is as follows: "The county road commission created by this article, or any other road commission or board, or the board of county commissioners, having charge of the road work in any county, township, or road district, or the State Highway Commission, is hereby authorized through its agents to enter upon any land in said county, to cut and carry away any timber except trees or groves on improved land planted or left for shade or ornament, dig or cause to be dug and carry away any gravel, sand, clay, dirt, or stone which may be necessary for the proper repair and construction of roads in said county, and make or cause to be made such drains or ditches upon any land adjoining or lying near any road in said county that the said commission or board may deem necessary for the better condition of the road; and the drains and ditches so made shall not be obstructed by the occupants of such land or any other person; and any person obstructing such drains and ditches shall be guilty of a misdemeanor. Before entering upon land as authorized by this section, it shall be the duty of the said commission or board, through its representatives, to serve notice upon the owner or owners of said land, notifying them that certain material authorized to be taken by this section is required for the road work."

Volume III, C. S., 3748a, applies to "road commission or other road authorities in any county," not to Lovelady Township. See C. S., chap. 70, Art. 7, and Public Laws, Ex. Session, 1920, chap. 60.

The defendant road board gave no notice under 3668, *supra,* before taking the "topsoil." C. S., 3670, says the owner "may present to the authorities" the claim. We think, taking into consideration all the statutes on the subject, the action is properly brought for "topsoil" in the Superior Court. Under the allegations in the complaint and the facts and circumstances of this case, we cannot hold the township road board individually liable. *Templeton v. Beard,* 159 N. C., 63; *Hipp v. Farrell,* 169 N. C., 551; *S. c.,* 173 N. C., 167; *Carpenter v. R. R.,* 184 N. C., 400; *Jenkins v. Griffith,* 189 N. C., 633; *Noland Co. v. Trustees,* 190 N. C., 250; *Hyder v. Henderson Co.,* 190 N. C., 663.

We think the judgment of the court below should be modified, and we hold, under the law as we construe it:

(1) That the complaint states a cause of action in trespass for the recovery of damages for "topsoil" and the Superior Court has jurisdiction.

(2) There is no sufficient allegation in the complaint to hold the road board individually liable.

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

Affirmed as to board.

Reversed as to individuals.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1926

IDA MAE SOUTHWELL, ADMINISTRATRIX OF H. J. SOUTHWELL, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 February, 1926.)

1. **Commerce — Courts — Concurrent Jurisdiction — Federal Employers' Liability Act—Federal Decisions.**

   Where the State court wherein the action was brought has concurrent jurisdiction with the Federal Court over the subject-matter under a Federal statute, as in this case, the Federal Employers' Liability Act, in interstate commerce, the decisions of the Federal Court will control.

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

   Under the Federal Employers' Liability Act the master is not held to the duty of an insurer in providing his servant a safe place to work, but only to exercise due care therein, which duty is nondelegable, and is only liable in its negligent failure to do so, proximately resulting in the injury.

3. **Same—Wrongful Death—Survival of Action.**

   Under the Federal Employers' Liability Act a cause of action survives the negligent killing of an employee, in behalf of the beneficiaries named in the statute.

4. **Courts — Jurisdiction — Evidence — Nonsuit—Trials—State Courts—Federal Courts—Federal Employers' Liability Act.**

   On defendant's motion as of nonsuit in an action brought in the State court under the Federal Employers' Liability Act, the rule in our jurisdiction that the evidence is to be construed in the light most favorable to the plaintiff applies.

5. Master and Servant — Employer and Employee — Negligence — Safe Place to Work—Homicide—Federal Employers' Liability Act—Evidence—Nonsuit.

In an action to recover damages from a railroad company for a wrongful death negligently caused to an employee in interstate commerce, there was evidence tending to show that the deceased was an engineer on defendant's train and was killed by another employee, assistant yardmaster, who also had been deputized as a special policeman during a strike, as the deceased was still on the defendant's premises and preparing to leave after he had completed his run, and that his coemployee and he had bad blood between them and threats had passed, with the knowledge of the defendant's vice principal, and under such circumstances that the vice principal could reasonably have anticipated the occurrence, and have prevented the killing; that he knew that the coemployee was armed with a pistol, and shot the deceased while unarmed, without provocation: *Held,* sufficient upon the defendant's actionable negligence in failing to supply the servant with a safe place for the performance of his duties, and to deny defendant's motion as of nonsuit.

6. Same—Issues—"Wanton and Wilful Killing."

Where an action for a wrongful death is made by the pleadings to rest solely upon the issue as to plaintiff's negligence, and the evidence is in conformity therewith, an issue submitted by the defendant as to whether the act was "wanton and wilful" is properly refused.

7. Evidence — Cross-Examination — Contradictory Statements of a Witness—Questions for Jury—Nonsuit.

Where a witness has testified on cross-examination contradictory of material matters theretofore testified on direct examination, the weight and credibility of the evidence is for the jury, and a motion as of nonsuit predicated thereon will be denied.

APPEAL by defendant from *Dunn, J.,* and a jury, at May Term, 1925, of NEW HANOVER. No error.

Civil action brought by plaintiff, administratrix of deceased, to recover damages for alleged negligence of the defendant that resulted in the death of plaintiff's intestate.

Defendant objected to the second issue and tendered the issue: "Was plaintiff's intestate killed by the wanton and wilful act of H. E. Dallas?" The court below refused to submit the issue. Defendant duly excepted and assigned error.

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

"1. Was the plaintiff's intestate, at the time of the killing engaged in interstate commerce? Answer: Yes.

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

"3. If so, what damage is plaintiff entitled to recover of the defendant? Answer: $12,000."

On the trial in the court below, the defendant introduced no evidence, but made numerous exceptions and assignments of error to admission and exclusion of evidence, to refusal to give its prayers for instructions and to certain excerpts from charge as given, and appealed to the Supreme Court.

L. Clayton Grant, Weeks & Cox and Dye & Clark for plaintiff.
Thomas W. Davis and Rountree & Carr for defendant.

CLARKSON, J. At the close of all the evidence plaintiff's counsel consented that the court might answer the first issue "Yes," and that the evidence of the defendant upon the question of the deceased being engaged in interstate commerce should be eliminated from the record on appeal. On the first appeal of this case, defendant made a motion for judgment as of nonsuit (C. S., 567), at the conclusion of plaintiff's evidence. Plaintiff appealed to the Supreme Court and the judgment of nonsuit was set aside and a new trial awarded. *Southwell v. R. R.*, 189 N. C., p. 417. From the finding on the first issue the alleged actionable negligence must be determined under the Federal Employers' Liability Act.

"In construing a Federal Statute, a State Court is bound by the construction placed on it by the Federal Courts." 7 R. C. L., p. 1013; 25 R. C. L., p. 955; Statutes, sec. 219; *Mangum v. R. R.*, 188 N. C., p. 694.

In *Barbee v. Davis*, 187 N. C., p. 83, we said: "The Federal Employers' Liability Act, enacted by Congress, has been held constitutional, under the power committed to it by the commerce clause of the Constitution, and all states are bound by its provisions. The Constitution of the United States is the 'golden cord' that binds the states together." 264 U. S., 588. *Second Employers' Liability Cases*, 223 U. S., 1; *Philadelphia B. & W. R. Co. v. Schubert*, 224 U. S., 603.

The Federal Employers' Liability Act (the first was declared unconstitutional), the second was approved 22 April, 1908, and declared constitutional by the Supreme Court of the United States, 15 January, 1912. *Second Employers' Liability Cases, supra.*

Roberts Injuries Interstate Employees, pp. 5, 6, 7, says: "The first section provides that every common carrier by railroad while engaged in interstate commerce, shall be liable to every employee while employed by such carrier in such commerce or in case of his death, to certain beneficiaries therein named, for such injury or death, resulting in whole or in part, from the negligence of the carrier, or its employees, or by defects or insufficiencies due to negligence in any of its equipments or property. The second section provides that every common carrier by railroad on lands of the United States other than streets shall be liable

in the same way to any of its employees. The third section provides that contributory negligence shall not bar recovery, but shall only diminish the damages, except that no employee injured or killed where the violation of a safety law for employees contributed to the injury, shall be held to have been guilty of contributory negligence. The fourth section provides that assumption of risk shall not be a defense, where the violation of a safety law contributed to the accident. The fifth section declares all contracts or devices intended to exempt the carrier from liability under the act to be void, except that the carrier may plead as a set-off any sum if paid to the injured employee as insurance or relief fund. Section six provides that any action under the act is barred after two years. Section eight provides that the act does not limit the obligation of a common carrier under any other Federal law or affect any pending suits under the 1906 act." At pp. 10, 11, it is said: "In 1910 Congress passed two important amendments to the Federal Employers' Liability Act. One provides that any action under the act may be brought in a circuit court of the United States in the district of the residence of the defendant, or in which the cause of action arose or in which the defendant shall be doing business at the time of commencing such action, and further provides that the jurisdiction of the courts of the United States *shall be concurrent with that of the courts of the several states,* and any case arising under the act and brought in any state court shall not be removable to any of the United States. The second amendment provides, that, 'any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employees, parents, and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.' "

"In construing the Federal Employers' Liability Act, the decisions of the national courts control over those of the state courts. For example, in determining when a carrier is guilty of negligence under the act; when an employee assumes the risk; what proof creates a dependency in death cases within the meaning of the act; whether there is any evidence tending to show liability sufficient for the case to be submitted to the jury; the measure of damages and instructions thereon, are all matters upon which the decisions of the national courts control. Where the decisions of the Federal courts on a question under the act are conflicting, then a state court will follow those decisions of the national courts which appear to it to rest on the better reason. . . . In all actions under the Federal Employers' Liability Act prosecuted in the state courts, the rules of practice and procedure are governed by the laws of the states where the cases are pending. Questions as to whether

amendments shall be permitted to petitions or answers; when motions to elect should be sustained or overruled; the rules of evidence; variances; excessiveness of verdicts and similar questions of practice and procedure, are matters to be determined solely by the state courts in accordance with the statutes of the state and their rules applying the same." Roberts, *supra,* pp. 15, 16.

"The first section of the Federal Employers' Liability Act provides that every common carrier by rail while engaging in interstate commerce and while the servant injured or killed is employed in such commerce, is liable *'for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier,* or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipments.' . . . The clause relating to negligence in the first section of the Federal act has two branches; one governing the negligence of any of the officers, agents or employees of the carrier, which abolishes the common-law fellow-servant doctrine; and the other relating to defects and insufficiencies due to negligence in the railroad's rolling stock, machinery, track, roadbed, works, boats, wharves, or other equipment. These two clauses, it has been held, cover any and all negligent acts of which the carrier could have been guilty under the common law. . . . Except that it abolishes the common-law rule of nonliability for injuries to employees within its terms due to negligence of fellow-servants, the first section of the Federal Employers' Liability Act which defines when a carrier is liable, adopts the common-law rule of negligence as to the two branches of liability mentioned. Under the act, the company is not a guarantor of the safety of the place of work or of the machinery and appliances of the company. *The extent of its duty to its employees is to see that ordinary care and prudence are exercised to the end that the place in which the work is to be performed* and the tools and appliances of the work may be *safe for the workmen.* To convict a defendant railroad company under the first section as to defects, the plaintiff must prove the existence of the defect complained of; that it was a defect of such a character as to cause its existence to be a negligent failure on the part of the defendant and that the defect was the proximate cause of the injury." (Italics ours), Roberts, *supra,* pp. 18, 19, 20.

One of the leading cases under the Federal Employers' Liability Act was that of *Seaboard A. L. R. Co. v. Horton,* 233 U. S., p. 501, reversing this Court (162 N. C., 424). *Mr. Justice Pitney* said: "It was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence. The common-law rule is

that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. *Hough v. Texas & P. R. Co.*, 100 U. S., 213; *Washington & G. R. Co. v. McDade*, 135 U. S., 554; *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S., 64, 67." Under the act the alleged negligence must be the proximate cause of the injury.

State laws, in so far as they cover same field were superseded by Employers' Liability Act of 1908. See cases cited in Rose's Notes on U. S. Reports, Revised Ed. Supplement, vol. 4 (1925), p. 1022.

In 20 Rose's Notes on U. S. Reports, p. 1079, to *Seaboard Air Line R. R. Co. v. Horton, supra,* is said: "Question whether railroad is negligent in leaving water crane so close to track as to injure brakeman on duty was for jury. *Renn v. R. R.*, 170 N. C., 139, holding railroad is under duty to furnish safe place to work and allowing recovery for injuries to pump repairer slipping on ice." In the *Renn case, supra,* this Court has discussed the U. S. cases and followed the negligence rule as laid down by the Supreme Court of United States in the *Horton case.* This is the well established rule of this Court and reiterated frequently at the present term. For example, speaking to the subject in *Barnes v. Utility Co.*, 190 N. C., p. 387, this Court held: "It is the duty of the master, in the exercise of ordinary or reasonable care, to furnish or provide his servant a reasonably safe and suitable place in which to work. This duty is primary and nondelegable. *Cable v. Lumber Co.*, 189 N. C., p. 840; *Riggs v. Mfg. Co., ante,* 256; *Paderick v. Lumber Co., ante,* 308." *Riggs case, supra*: "The master is not an insurer." The failure of the duty must be the proximate cause of the injury.

The defendant relies on its motion of judgment as of nonsuit. C. S., 567. In its brief it states: "The present trial was before Dunn, J., and defendant moved for nonsuit at the close of plaintiff's evidence, and also at the close of all the evidence, which motions were overruled, and verdict and judgment for plaintiff for $12,000 was rendered, and the defendant appealed from said judgment."

The accepted rule of actionable negligence in this State is that of the United States. The common-law rule.

The question here presented did defendant under *Horton case, supra,* "see that ordinary care and prudence is exercised to the end that the place in which the work is to be performed . . . may be safe for the workman," and was the failure the proximate cause of the injury?

"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; *Hancock v. Southgate,* 186 N. C., 282; *Oil Co. v. Hunt,* 187 N. C., 157; *Hanes v. Utilities Co.,* 188 N. C., 465; *Lindsey v. Lumber Co.,* 189 N. C., 119; *Baltimore & O. R. R. Co. v. Groeger,* U. S. Supreme Court (filed 5 January, 1925)." *Barnes v. Utility Co.,* 190 N. C., 385.

The language in the *Groeger case,* U. S. Supreme Court, *supra,* is: "The credibility of witnesses, the weight and probate 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."

Is there sufficient evidence under the law to be submitted to the jury, that discloses a failure by defendant to perform its duty which proximately caused plaintiff's intestate's death?

The facts, taken in a light most favorable to plaintiff, are as follows: Union Station in Wilmington, N. C., is so arranged that there is a concourse for passengers to go through leading to gates which one passes through as a passenger coming from or going to the trains, from Front Street in Wilmington. For employees, it is different. In going or coming from Front Street ordinarily the employees cross a concrete bridge, just west and north of the concourse for passengers, and enter through a gate to an enclosure to go to or return from the train sheds and railroad tracks, in the discharge of their duties. This enclosure is on the premises and under the control of defendant. At the time of the occurrence, the Lieutenant of Police office, claim agent office and office of station or yardmaster, were side by side and facing the enclosure inside the gate—the station or yardmaster's office, with a door faced the enclosure just inside and at the gate entrance. Inside the enclosure, not far from the gate fence entrance to station, and near to station or yardmaster's office door was the head of steps to lower yard. H. E. Dallas, on 18 July, 1922, occupied the position of assistant yardmaster and E. L. Fonville was general yardmaster in charge of all terminal employees working on Wilmington terminal. Dallas had authority under Fonville. The next superior officer above Fonville was the superintendent, W. H. Newell, Jr. As yardmaster, Fonville had authority, for failure to obey his orders, to hold an employee out of service and pass investigation to superior officer with recommendations, which are usually followed in such matters. Dallas was a special police officer sworn in by the mayor of Wilmington, at the request of the defendant, about ten days to two weeks before the shooting. H. J. Southwell, plaintiff's intestate, was an engineer and ran from Wilmington to Fayetteville and return. It was

customary for the engines to be left at the roundhouse when in from a run, and it was customary for the engineers to go to the wash house and change clothes before going off the premises. The wash house was near the train sheds, some distance from the exit and entrance gates of employees. At the time of the killing of Southwell by Dallas, there had been a strike among the shopmen and the property of the railroad was picketed. A. L. Kelly was Lieutenant of Police department, for the railroad at Wilmington, N. C. C. B. Holloman was a special officer under Kelly and their office was near the gate. The strike started 1 July, and between that time and the killing, on the 18th, Fonville had seen Dallas carrying a pistol on the premises of the railroad company. On 18 July, and for some time prior thereto he had been performing other duties additional to the ordinary duties of assistant yardmaster, in the nature of inspecting and working on outgoing and incoming trains, which carried him about different places on the yard, Smith Creek yard and Union Station. Dallas worked in the yard office under Fonville, he was car inspector at different places—worked as inspector under shed.

Southwell's attitude was antagonistic towards the strike-breakers. W. H. Newell, Jr., superintendent of defendant company, had discussed the difference between Southwell and Dallas with Southwell, prior to the killing, in the presence of C. S. Taylor, master mechanic and shop superintendent of defendant, cautioned him about the remarks he had made to Dallas—that if anything happened to Dallas, in view of his remarks it would not look good for him; he, Newell, would have little influence in getting him out of trouble. He told Southwell to go ahead about his work and keep his mouth shut and attend to his own business. Dallas had told Fonville (this was known to Newell) that while working out on the train on which Southwell was engineer he laid his raincoat down and when he went back to get it Southwell had removed it. Southwell asked him what he was looking for, he told him his raincoat. Southwell replied he would not need it he would need a wooden coat. And again, Dallas went in between two cars to adjust an air hose or stop a leak that the cars moved forward and when he came out he remarked to Southwell "You liked to have gotten me that time." Southwell said: "Better luck next time," and used abusive language. The tracks run east and west and are numbered 1, 2, 3, 4, 5, 6, etc., 6 being north of 1. Fonville saw Dallas near 7 o'clock, the evening of the killing. They were at Union Station together under the shed, about the butting block at railroad track No. 6, five to eight minutes before the killing. They went together in a westwardly direction on the premises ordinarily used by the employees—towards the front gate or outlet. Fonville's office was the first westwardly as you come in the entrance gate. From track 6 to the place of the killing was about 150 feet and about 30 feet from

Fonville's office door. Fonville saw a gun in Dallas' possession as they went along—38-calibre blue steel pistol. It came near falling out of his pocket. He had his arm around Dallas' waist at the time. Dallas had previously stated the incidents before related with Southwell. At the time Fonville had his arm around Dallas, in the conversation Dallas said: "I want to see Southwell and ask him to lay off of me and let me alone." To use his exact words, he said: "Cap, all I want to do is to ask Southwell to lay off of me and let me alone." This was said the second time at the gate just prior to the killing.

There was a difference how the shooting occurred. It took place on defendant's premises, which was practically enclosed, about 40 feet from the gate exit that Southwell was going to from work. About 12 or 15 feet from office of A. L. Kelly, Lieutenant of Police. He was there immediately after the firing. Southwell, freight engineer, had come in on his run, put his engine up and gone to the engineer's wash room. The wash room is not far from track 6, where Fonville and Dallas started on their way to Fonville's office at the gate. The time Southwell's train came in was known to both Fonville and Dallas. Fonville, on the way from track 6 to gate had his arm around Dallas, with knowledge of the blue steel 38-calibre pistol that Dallas had. Armed, Dallas, tells Fonville then at the gate that "All I want to do is to ask Southwell to lay off of me and let me alone." At the time Fonville knew the "wooden coat" and "better luck" incidents, told him by Dallas. According to Fonville, at the time he and Dallas parted at the gate, the exit for Southwell, Dallas again repeated "Cap, all I want to do is to ask Southwell to lay off of me and let me alone." He addressed his superior officer "Cap," acknowledging authority. Fonville, from what he said, did not restrain his subordinate. Both, standing at the gate. Southwell, the engineer, had come in on his run, put up his engine and had gone to the wash room, cleaned up and near 7 o'clock p. m. started to his home. He had in his right hand his engineer's bag, brown tin box made grip fashion, and to leave the defendant's premises started towards the gate to get on Front Street. He was shot by Dallas on the premises of defendant about 40 feet from the gate, and 6 or 8 feet of the superintendent's office building.

The testimony of Fonville that he and Dallas parted at the gate and he told Dallas not to see Southwell; that if he saw Southwell and talked to him it might bring about unpleasant circumstances, and went in the direction of his office—casually took a look to the right and saw Dallas and Southwell approaching each other, knowing there was enmity between the two turned back and went for the purpose to separate them. Got about 3 steps further in direction of parties and gun fired. After the shooting Dallas went immediately into Fonville's, the yardmaster's, office.

A. T. Peters testified, in part: "While standing there I saw two men pass, one had his arm around the other one; one was Mr. Dallas and he was on the right and they were going toward the gate that lets out on Front Street. The same walk goes out to Front Street and runs back to the express office, and is on the west side of the bridge. I saw Mr. Dallas when they tried the criminal case and he was the man I saw pass. The other man was kind of pulling him along going toward this gate when I seen them. I can't describe this other man but he was built like Mr. Fonville. He seemed to be trying to carry him and pull him off toward the gate there and his coat was up off of that gun and I happened to see the gun; at least a colored person coming from the express office said: 'Cap, you are about to lose your gun.' That's how come me to look at it and see it. Then I got behind the steel door and stayed behind it, I reckon, three or four minutes, I don't know exactly how long, but a short interval of time, and I heard the gun fire. I looked out and seen a man running, and this same man I had seen with the gun in his pocket following him."

Southwell, after he was shot, said: "Oh, Lord; Oh Lord; I am going to die," and told E. C. Marshburn immediately after the shooting; "I am shot, Dallas shot me through and through and I am going to die."

Ida Mae Southwell, his widow and plaintiff administratrix, testified that Southwell was 43 years old and in good health; earned $250.00 a month. They had two children—a boy and girl—8 and 11 years old; personal living expenses amounted to about $50.00 a month. Weighed about 175 pounds. He died following morning 3:30 o'clock after he was shot. 'Q. What did he say with reference to how he was shot?" Ans.: "Why he said he was coming from his engine on his way home, and just as he got in the concourse he saw two men come from behind a truck, and one went in the opposite direction from the other, and he said Mr. Dallas came up to him with the gun raised to his head and just as he approached him, he knocked it down, and the load went in his stomach, and that Dallas said: 'I am going to kill you; this is your last day,' and Mr. Southwell said: 'If we have any difference let's settle it another way.' He said the man that turned was Mr. Roy Fonville, Mr. E. L. Fonville, who testified here yesterday."

There was some evidence that Dallas was on duty as to railroad matters at the time, but it was admitted that Dallas was at the time of the killing a special police officer, sworn in at the request of defendant; taking meals three times a day in the dining car, was armed, inside the enclosure with the knowledge and with his superior, Fonville, and discussing the attitude of the engineer towards him, admittedly immediately before the killing.

The complaint was based on negligence and not a "wanton and wilful act," as contended by defendant. It is charged in the complaint "that the defendant negligently failed to discharge its duty to plaintiff's intestate in that it failed to (use due care) furnish him a safe place to work," etc. It then gives the details of the failure. The court below, in construing the complaint founded the issue on negligence and on this theory it was tried. The court below, without exception by defendant, charged the jury: "Therefore, gentlemen of the jury, it becomes necessary for the court to charge you as to what constitutes negligence. Negligence is the failure to do what a reasonably prudent man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or the doing of something which an ordinarily prudent man would not have done under the existing facts, or similarly situated. In determining whether due care has been exercised in any given situation by the party alleged to have been negligent, reference must always be had to the facts and circumstances of the case, and the surroundings of the party at the time, and he must be judged by the influence which those facts and circumstances and his surroundings would have had upon a man of ordinary prudence in shaping his conduct, if he had been similarly situated, but every negligent act does not, of itself, involve liability. The conduct of the party sought to be charged, or his failure to exercise proper care, must amount to what is known in law as actionable negligence, and in order to establish actionable negligence in the case at bar, and before you can answer the second issue 'yes' the plaintiff is required to show by the greater weight of the evidence, the burden being upon her, first, that there was a failure upon the part of the defendant company to exercise proper care in the performance of some legal duty which it owed to the plaintiff's intestate under the circumstances in which they were placed; proper care being that degree of care, which a reasonably prudent man would have exercised under like circumstances and when charged with a like duty, and, second, that such negligent breach of duty was the proximate cause of the death of plaintiff's intestate and, by proximate cause is meant the dominant, efficient cause, the cause without which an injury would not have occurred; the cause that produced the result complained of in continuous sequence, and one which any man of ordinary prudence could have foreseen would probably result under the facts as they existed. . . . Now the court charges you that a master owes a servant the same duty with respect to his person that it does to a third person, and is required to exercise due care for his safety; so, without regard to whether Dallas was or was not on duty at the time he shot and killed plaintiff's intestate, the court charges you that the defendant company owed Southwell the legal duty of protecting him from a sudden assault by H. E. Dallas

if, in the exercise of proper care and by doing what a reasonably prudent man would have done under the circumstances, it could have foreseen that an assault would probably have been made upon engineer Southwell by Dallas in time, by the exercise of ordinary care, to have prevented it. Now, the court charges you that if the plaintiff has satisfied you by the greater weight of the evidence that at the time of the killing of engineer Southwell, the defendant, through its officers, or agents, knew, or by the exercise of proper care, could have known, that Dallas intended to assault engineer Southwell, and, if the plaintiff has further satisfied you by the greater weight of the evidence that by the exercise of proper care the defendant through its officers and agents could have prevented the altercation which resulted in the death of plaintiff's intestate, and you further find, by the greater weight of the evidence, the burden being upon the plaintiff, that the defendant through its officers and agents, failed to exercise that care and take those precautions which an ordinarily prudent man would have exercised and taken under the existing circumstances to prevent the altercation between the two men which resulted in the death of engineer Southwell, then such failure on the part of the defendant company would be negligence and, if you are further satisfied by the greater weight of the evidence, the burden being upon the plaintiff, that such negligence was the proximate cause of the death of plaintiff's intestate, it would be your duty to answer the second issue 'yes,' for it is the duty of the master to take such precautions as a man of ordinary prudence, under similar circumstances, would have taken, for the purpose of protecting an employee against a peril of the transitory class." To the foregoing paragraph defendant excepted, because there was not sufficient evidence to go to the jury on the questions involved. We are of the opinion that the evidence was sufficient and the assignment of error cannot be sustained.

The first position of defendant is: "The court erred in admitting evidence of a telephone conversation by Dallas to ascertain if Middlebrook, a trainman, had left home to report for work, for the purpose of showing Dallas was engaged in the duties of his employment." We think, under all the evidence, the admission of this incident is not prejudicial.

The third position of defendant is: "The killing of Southwell by Dallas was a wilful act, wholly outside of the scope of the employee's authority and the defendant is not liable therefor." We do not think this position applicable under the facts and circumstances of this case. It is well settled that plaintiff cannot recover for "wilful injury," but only in case of negligence, on which theory the case was tried. Thornton's Fed. Employers Liability Act (3d ed.), sec. 196, and cases cited.

The fourth position of defendant is: "The court erred in submitting the question of negligence as the second issue, instead of the issue of

whether intestate was killed by the wanton and wilful act of Dallas, tendered by defendant." We do not think this position applicable under the pleadings and facts and circumstances of this case.

The gist of the controversy is defendant's second position: "There is no evidence in this record to authorize a finding that defendant was negligent in failing to protect Southwell from Dallas, or otherwise."

We think the facts and circumstances in the present appeal substantially those in which the motion as of nonsuit was overruled in the prior appeal to this Court. *Southwell v. R. R.,* 189 N. C., *supra.*

In *Wimberly v. R. R.,* 190 N. C., 447, it is said: "Animadverting on a similar situation in *Shell v. Roseman,* 155 N. C., 94, *Allen, J.,* 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." *Shaw v. Handle Co.,* 188 N. C., 236; *In re Fuller,* 189 N. C., 512.

Under all the facts and circumstances of the case, the defendant did not, as laid down in the *Horton case, supra,* 233 U. S., in "the extent of its duty to its employees see that ordinary care and prudence was exercised to the end that the place in which the work is to be performed . . . may be safe for the workman." *Southwell v. R. R.,* 189 N. C., at p. 420.

The court below charged the jury: "I am giving you this special instruction at the request of the defendant railroad company: 'If the jury shall find by the greater weight of the evidence that defendant has been guilty of actionable negligence, as heretofore defined in these instructions, then it will be necessary for you to consider what, if any, damages the plaintiff is entitled to recover. The rights and liabilities of the parties in this action are governed by an act of Congress known as the Federal Employers' Liability Act, and the amount of damages, if any, which may be recovered is fixed and limited by the provisions of that act as construed by the Federal Courts,' " etc. The court then gave defendant's request in its own language as to the measure of damages.

Under all the facts and circumstances of the case, both the direct and circumstantial evidence, we think that there was sufficient evidence to warrant the jury in finding that defendant was guilty of actionable negligence under the Federal Employers Liability Act. The general yardmaster at the Wilmington terminus knew, or in the exercise of reasonable care ought to have known, that the plaintiff's intestate, an engineer, had to pass out of the gate near his office about the time he approached the gate and was shot by defendant's employee, Dallas. By looking, there

was no obstruction, he could have easily been seen approaching the gate, for some distance by the yardmaster. The engineer came off his run and washed up and changed his clothes, and was approaching the gate, unarmed, with his engineer's bag in his right hand. The yardmaster knew Dallas, the employee under him, had a pistol. Dallas was in the passage way of the engineer going off duty and had had some previous difference with the engineer—known to the yardmaster. Immediately before Dallas shot the engineer he acknowledged the superiority of the yardmaster and addressed him as "Cap, all I want to do is to ask Southwell to lay off me and let me alone." The words "yardmaster" *ex vi termini,* indicate one in authority. The yardmaster had the authority to stop Dallas. The engineer, to go to and from his work passed in and out of the gate near the yardmaster's office. The yardmaster did nothing to restrain or stop his subordinate, with knowledge that Dallas was going to upbraid him, but allowed him, on the company's yard, as the engineer approached the gate exit, to shoot the engineer who was unarmed and on his way home. The engineer was "on duty" in defendant's enclosed yard. The employer is not an insurer and the care and diligence required in a particular case, the failure to exercise which is actionable negligence is that of an ordinarily prudent man under the same or similar circumstances. The evidence was sufficient to be submitted to a jury that defendant's company through its *alter ego,* the yardmaster, breached its duty to plaintiff's intestate.

We have carefully gone over the record and examined the assignments of error and see no prejudicial or reversible error. We examined defendant's able brief. The whole case is founded on whether there was sufficient evidence to be submitted to the jury as to actionable negligence. In the former case we thought there was (facts substantially the same) and we think the same in the present case. We can find

No error.

JESSE C. FOSTER v. ALLISON CORPORATION AND NEWTON TRUST COMPANY, A CORPORATION.

(Filed 17 February, 1926.)

1. Process—Summons—Service—Publication—Proceedings in rem.

Where process by publication has been duly made on nonresident corporations in a suit to set aside for fraud deeds to property situated in the jurisdiction of our courts, the proceedings are *in rem,* and affect only the title to the *locus in quo* and do not extend to the liability of the defendants beyond whatever interest they may have in the land in question.

2. Limitation of Actions—Judgments—Motions to Set Aside—Statutes—Notice.

And where service has been made by publication, upon defendant's motion to set aside a judgment by default in plaintiff's favor, within five years from its date, or one year after notice, it comes within the provisions of C. S., 492, and not C. S., 600.

3. Courts — Nonresident Owners of Property — Presumptions—Jurisdiction.

A nonresident owning property subject to the jurisdiction of our courts acquires and holds the title subject to our laws, and is affected with notice of an action involving the title from the issuance of the summons personally served, or the completion of the services by publication when the statute is applicable.

4. Process—Summons—Publication—Proceedings in rem—Constitutional Law.

Our statute as to publication of summons in an action *in rem* against a nonresident defendant is within the due process clause of our Constitution.

5. Judgments—Motions to Set Aside—Notice—Statutes.

C. S., 600, giving a party the right to have a judgment through his "mistake, inadvertence, surprise or excusable neglect," means personal knowledge, and applies to judgments regularly entered, and not to irregular judgments.

6. Courts—Proceedings—Parties—Presumptions.

Where a party has been brought into court by the personal service of a summons, or voluntarily does so as a party defendant, he is presumed to take notice of all the various legal steps in the proceedings, and when he seeks to have a judgment therein rendered set aside after notice, etc., he must show the surprise, mistake or excusable neglect necessary for his purpose within one year, under the provisions of C. S., 600.

STACY, J., concurring in result.

APPEAL by defendants from *Devin, J.*, at April Term, 1925, of ONSLOW. Affirmed.

This was an action brought by plaintiff against defendant, Allison Corporation, to set aside certain conveyances of land in North Carolina, made by plaintiff to it for fraud. The Newton Trust Company, the other defendant, had mortgages on the lands given by the Allison Corporation, and it is alleged by plaintiff that the mortgages of defendant Newton Trust Company, were taken with full knowledge and that it was party to the fraud of the Allison Corporation.

The plaintiff prayed: "That the conveyance from him to the defendant, Allison Corporation, be declared null and void, set aside and duly canceled of record in Onslow County, State of North Carolina. That the conveyance from the defendant, Allison Corporation, to the defendant, Newton Trust Company, be declared null and void, set aside

and canceled of record in the county of Onslow, State of North Carolina. That this plaintiff be declared the owner of and entitled to all the property, interest and estate described in the conveyances from him to the said defendant, Allison Corporation, free and clear of any and all encumbrance or encumbrances and in fee simple."

The defendants were foreign corporations. The plaintiff issued its summons against defendants and had it served by publication. On 19 January, 1925, the clerk rendered judgment in favor of the plaintiff, in accordance with prayer of the complaint.

The defendants, on 31 March, 1925, through its counsel, by "special appearance," gave notice to plaintiff and his counsel that on Saturday, 11 April, 1925, setting hour of day, a motion would be made before the clerk "to quash process and to set aside the judgment rendered herein as of 19 January, A.D., 1925, under section 600 of the Consolidated Statutes, on the ground that the defendants were taken by surprise and were guilty of no neglect whatever in failing to defend the action because of the fact that the pendency of the action had not come to their attention, directly or indirectly, until after 19 January, A.D., 1925." Accompanying this motion was a verified petition of defendants fully setting forth the grounds of its motion. The clerk found the facts and among them: "That this action was begun by summons which was returned by the sheriff with the notation as herein found, and service was thereupon had by publication, and that said return, affidavit, order of publication and notice of publication were regular and complete in every respect and as required by law. That the motion to quash process and petition to set aside judgment on account of surprise and excusable neglect was filed by the defendants' counsel within twelve months from the actual notice of the judgment entered on 19 January, 1925, and within five years of the rendition of said judgment. That the petition and affidavit of the defendants show that they have a meritorious defense to the action. And upon findings of fact, ordered and adjudged: That the motion to quash process filed by counsel for the defendants, be and the same is hereby denied and dismissed. That the judgment entered in this cause on 19 January, 1925, be, and the same is, set aside under section 492 of the Consolidated Statutes, and the defendants are allowed 60 days within which to file answer or other pleadings as they may be advised."

Defendants tendered an order finding certain facts which the clerk refused to sign and the counsel specially appearing appealed to the judge of the Superior Court from the judgment signed by the clerk. The matter having been heard, the judge made the following order: "This cause coming on for a hearing upon appeal of the defendants, and being heard by his Honor, W. A. Devin, judge, during April Term,

1925, of the Superior Court of Onslow County, said appeal of the defendants having been taken upon the refusal of the clerk to find facts and sign order as contended for by the defendants under C. S., 600 (the clerk having found facts and entered an order under C. S., 492, setting aside the judgment formerly entered in this cause by the clerk), and the court being of opinion that the motion of the defendants is controlled by C. S., 492, hereby affirms the findings of fact and the order heretofore signed by the clerk, with the following modifications, viz.:

"1. That the following findings of fact be added to those found by the clerk in said former order and inserted after paragraph 10:

" '10a. That neither of these defendants had any actual knowledge, notice or information whatever of the institution or pendency of this suit, nor of the publication of summons, until 27 January, A.D., 1925.'

"2. That the defendants be given till 1 August, 1925, within which time to file answer to the complaint heretofore filed in this cause or within which time to file such other pleadings as they may be advised.

"The defendants, through counsel, requested the court to include in the findings of fact above set out, the following: 'And the defendants were guilty of no laches or neglect in failing to file answer, but were, in fact, taken by surprise when they learned that the service of summons had been completed by publication and the clerk was about to sign the judgment,' which was declined by the court.

"To the foregoing order affirming the former order of the clerk on the ground that section 600 does not apply, and the adjudging that relief can only be given the defendants under the terms of section 492 of Consolidated Statutes, the defendants except, assign error and appeal to the Supreme Court."

I. M. Bailey and John D. Warlick for plaintiff.
Rountree & Carr and Nere E. Day for defendants.

CLARKSON, J. The defendants contend: "The court should have set aside this judgment for excusable neglect, under C. S., 600. That any party to a suit, in the courts of North Carolina, whether personal or corporate, whether resident or nonresident, who has a judgment entered against him by default had a right, when he has a meritorious defense and has been guilty of no inexcusable neglect, to have said verdict set aside if such motion is made in apt time."

This brings us to consider C. S., 492 and C. S., 600. Under C. S., Art. 8, "Civil Procedure," the procedure of obtaining service on foreign corporations by publication, manner, etc., is fully set forth. Then the manner of personal service on nonresidents, then C. S., 492, which is as follows: "The defendant against whom publication is ordered, or who is

served under the provisions of the preceding section, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent." It will be noted that in C. S., 492, is the following: "Title to property sold under such judgment to a purchaser in good faith is not hereby affected."

Counsel for defendants earnestly contends that in setting aside a judgment under C. S., 492, a bona fide purchaser may obtain title and property be taken without due process of law or a day in court, and argues that this would not be the case under C. S., 600. The contention is not tenable as to due process. When defendant, Allison Corporation, acquired land in this State and when the Newton Trust Company took a mortgage on the land, they took it with the law in force at the time in reference to foreign corporations.

It is said in 6 R. C. L., part sec. 445: "It is the duty of the owner of real estate, who is a nonresident, to take measures that in some way he shall be represented when his property is called into requisition, and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences. Such publication is due process of law as applied to this class of cases." The same principle is laid down in Freeman on Judgments, 3d vol., 5 ed., p. 2840.

In Cooley Const. Lim., 7 ed., p. 583, it is said: "Where a party has property in a State, and resides elsewhere, his property is justly subject

to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered." Statutes providing for service by publication in actions *in rem* is due process. See note 87 Am. St. Rep., 360.

In *Bernhardt v. Brown,* 118 N. C., p. 706, *Clark, J.,* said: "In proceedings under this class—proceedings *in rem*—it is not necessary, as in proceedings *quasi in rem,* to acquire jurisdiction by actual seizure or attachment of the property, but 'it may be done by the mere bringing of the suit in which the claim is sought to be enforced, which in law (in such cases) is equivalent to a seizure, being the open and public exercise of dominion over it for the purpose of the suit.' *Heidritter v. Elizabeth Oil Co.,* 112 U. S., 294. And as to this class of cases, the statute prescribes publication of the summons whether the defendant is a nonresident or a resident whenever, 'after due diligence he cannot be found in the State.' The Code, sec. 218 (4); *Claflin v. Harrison,* 108 N. C., 157."

In *Bynum v. Bynum,* 179 N. C., p. 16, this Court said: "The power of a court having jurisdiction, by proceedings, *quasi in rem,* and observing the statutory methods as to service of process, to make valid decrees affecting the status, condition, and ownership of real property, situate within the State, is fully recognized with us, and, in proper instances, the same may be made effective both against nonresidents and persons unknown. *Lawrence v. Hardy,* 151 N. C., 123; *Vick v. Flourney,* 147 N. C., 209; *Bernhardt v. Brown,* 118 N. C., 701." *White v. White,* 179 N. C., 592; *Bridger v. Mitchell,* 187 N. C., 374.

In the *Heidritter case, supra, Mr. Justice Matthews* says: "In *Cooper v. Reynolds,* 10 Wall., 308-318 (77 U. S., XIX, 931, 933), it is said by *Mr. Justice Miller,* delivering the opinion of the Court, that, in such cases, where there is no appearance of the defendant and no service of process on him, 'The case becomes, in its essential nature, a process *in rem,*" and that, p. 317, 'while the general rule in regard to jurisdiction *in rem* requires an actual seizure and possession of the *res* by the officer of the court, such jurisdiction may be acquired by acts which are of equivalent import and which stand for and represent the dominion of the court over the thing and in effect subject it to the control of the court.' This may be the levy of a writ, or the mere bringing of a suit. 'It is immaterial,' said this Court by *Mr. Justice McLean,* in *Boswell v. Otis,* 9 How., 336, 'whether the proceedings against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem.*'"

The suit brought by plaintiff is not a proceeding *quasi in rem*—such as an attachment, etc.—but a proceeding *in rem,* an equitable proceeding,

rescission and cancellation, to set aside certain conveyances for fraud, formerly a bill in chancery. Distinctions between forms of actions at law and suits in equity are abolished under our Constitution, but does not destroy equitable rights and remedies, nor does it merge legal and equitable rights. *Furst v. Merritt,* 190 N. C., 397.

Freeman on Judgments, vol. 3, 5 ed., p. 3123, well says: "The general rule that the jurisdiction of a court cannot extend to persons not citizens nor residents of the state or nation in which the court is held, if applied without limitation or exception, would result in nonresidents owning or making claims to property within the state or nation, without giving its courts any authority to determine the claims made to such property, or enforcing liens against it, or coercing the payment out of it of the obligations of its owners to residents of the state or others. This difficulty has been met by characterizing proceedings against nonresidents for the purpose of determining claims to or enforcing liens upon their property within the state, or of applying it to the payment of their debts, as *quasi* proceedings *in rem.* But the use of this and equivalent terms does not signify that the interest of any person not a party to the action is or can be affected by it, but rather that the judgment against the nonresident is restricted in its effect to his interest in the property, and binds him as to such interest, but in no other respect. A proceeding *quasi in rem* has been defined as one against a person in respect to property, as distinguished from one against property or a person only."

State courts are enforcing contracts by foreign claimants against its own citizens and corporations as it should do, but when the citizen has a suit against a foreign corporation or person, and it has no property in the State, the claim is frequently lost. If the foreign corporation or person has an agent, the cry or defense is frequently no authority or *ultra vires.* There should be no favorites. *Lunceford v. Association,* 190 N. C., 314; *R. R. v. Cobb, ibid.,* 375; *Kelly v. Shoe Co., ibid.,* 406.

The court below found as a fact that the procedure by publication, etc., was in all respects regular and in accordance with our statutory law. (Actions for divorce exception in the statute.) The court below also found that defendants had no "actual knowledge, notice or information whatever of the institution or pendency" of the suit or of the publication of summons until 27 January, 1925. We can see no error in the court below setting aside the judgment under C. S., 492, *supra.* The language of the statute allows this to be done "upon good cause shown." *Rhodes v. Rhodes,* 125 N. C., 191; *Bank v. Palmer,* 153 N. C., 501; *Page v. McDonald,* 159 N. C., 38; *Moore v. Rankin,* 172 N. C., 599.

C. S., 600, is as follows: "The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party

from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect, and may supply an omission in any proceeding." When a defendant is served personally, we think, C. S., 600, *supra,* is applicable.

It will be noted that the statute says: "through his mistake, inadvertence, surprise or excusable neglect." We think this language "through his" *ex vi termini* means personal knowledge, he can then apply for the relief as set forth in C. S., 600. This section applies to regular judgments entered according to the course and practice of the court, and has no application to irregular judgments. There may be some question as to what is an irregular judgment, but when that is determined the limitation of one year does not apply. *Becton v. Dunn,* 137 N. C., 559; *Calmes v. Lambert,* 153 N. C., 248; *Massie v. Hainey,* 165 N. C., 174; *Cox v. Boyden,* 167 N. C., 320; *Lee v. McCracken,* 170 N. C., 575; *Bostwick v. R. R.,* 179 N. C., 485; *Gough v. Bell,* 180 N. C., 268; *Duffer v. Brunson,* 188 N. C., 789; *Ellis v. Ellis,* 190 N. C., 422.

The authorities cited by Mr. Freeman when the relief was granted, all show that the party knew of the suit. Freeman on Judgments, vol. 1, 5 ed., sec. 241.

Relief from a judgment on the ground of mistake, inadvertence, surprise or excusable neglect must be sought "at any time within one year after notice thereof." What is meant by "notice?" When a party voluntarily comes into court as a plaintiff, or makes a voluntary appearance as defendant, or has been personally served with process in the manner required by law, he is in court for all purposes incident to the suit. He is then fixed with notice of everything that is regularly done, and he has notice of any judgment rendered; but if through circumstances constituting excusable neglect he failed to have actual knowledge of what was done, he may apply for relief at any time within a year from the rendition of the judgment. *McDaniel v. Watkins,* 76 N. C., 399; *Mabry v. Erwin,* 78 N. C., 45; *Askew v. Capehart,* 79 N. C., 17; *McLean v. McLean,* 84 N. C., 366; *Roberts v. Allman,* 106 N. C., 391; *Banking Co. v. Duke,* 121 N. C., 111. In some of the cases it is said that if the defendant has been personally served, he must make his motion within a year after the judgment is rendered; but if he has not been personally served though the return of the summons shows otherwise, or if he has been made a party without his knowledge, he may make the motion within a year after notice of the judgment. *McLean v. McLean, supra; Massie v. Hainey, supra; Jernigan v. Jernigan,* 178 N. C., 84.

In *Bank v. Palmer, supra,* at p. 503, *Hoke, J.,* said: "While the motion has been chiefly treated as a proceeding under section 513 (now

C. S., 600), of the Revisal that affording relief against a judgment on the ground of 'mistake, surprise or excusable neglect,' the summons having been only served by publication, the rights of these parties are more directly affected and controlled by section 449 (now C. S., 492), which, among other things, provides that when service of process has been made by publication 'the defendant or his representative may, upon good cause shown, be allowed to defendant after judgment or any time within one year after notice and within five years after its rendition on such terms as may be just."

We think the findings of fact by the court below supported by competent evidence, in such cases they are binding on us. *Turner v. Grain Co.*, 190 N. C., 331.

The judgment of the court below is

Affirmed.

STACY, C. J., concurring in result, but dissenting from the legal conclusion announced: Civil action instituted by plaintiff, a resident of Onslow County, against the defendants, nonresident corporations owning property in this State, to cancel certain deeds and mortgages. Service was obtained by publication, same being completed 26 December, 1924, and judgment by default, for the want of an answer, was entered as of 19 January, 1925. On 31 March, 1925, the defendants filed a motion to set aside the judgment, under C. S., 600, for surprise and excusable neglect, it being alleged that the defendants had no knowledge or information of the institution or pendency of said action prior to 27 January, 1925. The motion was denied under C. S., 600, but allowed under C. S., 492. Defendants appeal.

The only question sought to be presented by the appeal is whether a judgment rendered in an action where service is obtained by publication, upon sufficient cause shown, may be set aside under C. S., 600, as well as under C. S., 492.

An examination of the two statutes will disclose the importance of this question. It is provided in C. S., 492, but not in C. S., 600, that "title to property sold under such judgment to a purchaser in good faith is not thereby affected." *Page v. McDonald*, 159 N. C., 38; *Lawrence v. Hardy*, 151 N. C., 123. It is conceivable, therefore, that, in certain instances, the difference in the effect of proceeding under the one or the other of these two statutes might become capitally important. But there is nothing on the instant record to show the materiality of the question to the defendants in the present proceeding. Hence, I think the judgment should be affirmed, as it is in favor of the appellants, but with a disapproval of the holding that the motion could not be made

under C. S., 600 as well as C. S., 492, and remanded so that defendants may renew their motion, under the former statute, upon proper showing, if so advised.

In *McLean v. McLean,* 84 N. C., p. 370, a case arising under what is now C. S., 600, the following statement was made:

"When a summons is personally served upon a party, or he is a party plaintiff to an action by his own act or with his knowledge or consent, he is affected with notice of all that occurs in the progress of the cause, and must make his motion within a *year after the rendition of the judgment;* but when he has not been personally served with notice, or has been made a party to the action without his knowledge, then he may make his motion *at any time within one year after actual notice of the judgment.*"

This was approved in *Sluder v. Graham,* 118 N. C., 835, and *Jernigan v. Jernigan,* 178 N. C., 84. Indeed, the very language of the statute is that the judge shall, upon such terms as may be just, at any time within one year "after notice thereof," relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect.

Under our decisions, where the defendant is personally served with summons, he is fixed with notice of all that transpires during the orderly course of the litigation, including, of course, the rendition of the judgment, just as the plaintiff who brought the suit; and, in such cases, the expression, "within one year after notice thereof," used in the statute, perforce means within one year after the rendition of the judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. *Lee v. McCracken,* 170 N. C., 575; *Roberts v. Allman,* 106 N. C., 391; *Grant v. Edwards,* 88 N. C., 246. But where the defendant has not been personally served with summons, or where one has been made a party to the proceeding without his knowledge or consent, such expression, it would seem, must necessarily mean within one year after actual notice of the judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect. Such has been the interpretation of this section by judges on the circuit and by members of the profession generally. *Campbell v. Campbell,* 179 N. C., 413; *Turner v. Machine Co.,* 133 N. C., 381.

PRICE REAL ESTATE AND INSURANCE COMPANY v. A. C. JONES, TRUSTEE, AND J. C. M. VANN, ADMINISTRATOR OF THE ESTATE OF C. N. SIMPSON.

(Filed 17 February, 1926.)

1. **Bills and Notes—Negotiable Instrument—Possession—Presumptions—Due Course—Statutes—Executors and Administrators—Actions.**

Where a negotiable instrument has been endorsed to decedent and found among his papers after his death, nothing else appearing, he is prima facie presumed to have acquired it in due course, for value, under the provisions of our negotiable instrument law; and when this is in evidence in an action by the executor or administrator, it is sufficient to take the case to the jury, and deny defendant's motion as of nonsuit. C. S., 3040, 2989, 3010, 3026.

2. **Appeal and Error—Objections and Exceptions—Admissions.**

An assignment of error abandoned on appeal is taken as admitted.

3. **Evidence — Prima Facie Case — Rebuttal—Negotiable Instruments—Holder in Due Course.**

Where there is a prima facie case made out by one in possession of a negotiable instrument, that he is a holder thereof in due course, it is sufficient to take the case to the jury upon the issue, but this presumption may be rebutted by other evidence.

4. **Bills and Notes—Due Course—Evidence—Prima Facie Case—Fraud—Burden of Proof.**

Where the plaintiff in the action has made out a prima facie case as being a holder in due course for value, it may be rebutted by evidence of defendant that he acquired by fraud or with notice of a defect therein, and thereupon the burden of proof is on the plaintiff.

5. **Evidence — Deceased Persons — Transactions and Communications—Statutes.**

Where the administrator of the deceased claims that his intestate was a holder of a negotiable instrument in due course for value, and relies upon his intestate's possession to make out a prima facie case, it is not a personal transaction or communication with the deceased, prohibited by statute, for it may be shown in rebuttal, that after maturity it was seen in the possession of another claimant of the title. C. S., 1795.

APPEAL by plaintiff and intervener or interpleader, from *Francis D. Winston, Emergency Judge,* and a jury, June Special Term, 1925, of GASTON. New trial.

This was a civil action brought by plaintiff to restrain and enjoin A. C. Jones, trustee, from selling certain land under deed in trust. A. E. Woltz was an intervener in the action.

The facts from the record are:

Deed in trust from J. L. Price to A. C. Jones, trustee for R. F. Price, to secure a bond of $2,600, dated 5 September, 1914, due 1 November, 1915, interest from date, balance purchase money on certain land in Gastonia, N. C. Deed in trust duly recorded in the register of deeds office for Gaston County, Book 111, p. 339.

The note and endorsements are as follows:

"$2,600.00 Gastonia, N. C., 5 September, 1914.

"On or before 1 November, 1915, after date I promise to pay to the order of R. F. Price, two thousand and six hundred dollars, with interest at 6 per cent per annum from date payable annually. Value received. This bond secured by mortgage on real estate in Gaston County, N. C. Being part of purchase price of property described in attached deed of trust.

"Protest, presentment and notice of dishonor waived by all parties to this note. J. L. PRICE (Seal)."

"Witness: R. C. PATRICK."

Endorsements on the back:

"Pay to C. N. Simpson, 15 September, 1914, R. F. Price.

"Interest on this note paid to 5 September, 1915.

"$156.00. Paid one hundred and fifty-six dollars by J. L. Price 4 October, 1916.

"$156.00. Received one hundred and fifty-six dollars 16 August, 1917, balance due $2,597.58. Balance due 1-1-20 $2,983.11."

The same property was conveyed thereafter as follows:

(1) J. L. Price and wife, Dora E. Price to A. E. Woltz, 9 November, 1915, with full covenants of seizin and warranty. Deed recorded in the office register of deeds Gaston County, Book 114 p. 139, consideration $4,000.

(3) A. E. Woltz and wife, Daisy C. Woltz, to D. W. Mitchem, 14 April, 1917, with full covenants of seizin and warranty. Deed recorded in office register of deeds of Gaston County, Book 124, p. 135, consideration $5,750.

(4) D. W. Mitchem and wife, M. A. Mitchem, to plaintiff, 22 April, 1918, with full covenant of seizin and warranty, deed recorded in office register of deeds, Book ...., p. ...., consideration $5,750.

The plaintiff and A. E. Woltz, the intervener, alleged that the $2,600 note was paid and also set up the defense: "That as the plaintiff is informed and believes, if the said note was negotiated to the said C. N. Simpson, he had notice of the infirmity in the instrument of defect in the title of the person negotiating it, and the title to said judgment was defective and the same was obtained by fraud and unlawful means,

and was negotiated to said C. N. Simpson in breach of faith and under circumstances amounting to fraud, of which the said C. N. Simpson had actual knowledge, or knowledge of such facts that his action in taking the instrument amounted to bad faith for the reasons hereinbefore set out, and for the reason that as the plaintiff is informed and believes, the said R. F. Price obtained possession of such note by fraud and without the knowledge of the maker or holder thereof, and at the time the said C. N. Simpson got possession thereof or at the subsequent date thereto, such note was fully paid and satisfied, or there was no consideration for the execution of the same by the said R. F. Price, or such consideration was illegal, all of which both the said R. F. Price and C. N. Simpson knew, or had reasonable grounds to believe, and such note is null and void in the hands of the administrator of the said C. N. Simpson."

C. N. Simpson, the alleged owner of the note, is dead and J. C. M. Vann was duly appointed administrator of his estate and the defendant in this suit. The administrator denied the allegations of plaintiff and intervener and set up ownership of the note in his intestate, C. N. Simpson. In 1919, J. L. Price was adjudged a bankrupt. R. F. Price, the payee in the note, is dead.

The issues submitted and the answers thereto were as follows:

"1. What is the amount of the debt now due the estate of C. N. Simpson and J. C. M. Vann, administrator on account of the note for $2,600, set out in the pleadings? Answer: $2,600, with interest since 1 November, 1917.

"2. Is the interpleader, A. E. Woltz, entitled to a prior lien on said lands by reason of the note introduced in evidence and assigned to the said A. E. Woltz by E. H. Adams or his agent? If so, in what amount and from what date does said lien attach? Answer: Yes, $915.00, interest from 20 November, 1915, and the lien attaches since 14 June, 1914."

At the close of the interpleader's evidence, the defendant, J. C. M. Vann, administrator of C. N. Simpson, moved for judgment as of nonsuit. At the close of all the evidence the defendant, J. C. M. Vann, administrator, moved for judgment as of nonsuit. Motion was allowed as to plaintiff and overruled as to interpleader, A. E. Woltz.

The charge of the court below was as follows: "The court directs you to find as a matter of law this $2,600, with interest from 1 November, 1917, and you will so find under the charge of the court."

Under the charge of the court, the jury rendered the verdict above set forth. Judgment was rendered on the verdict. Numerous exceptions and assignments of error were made by plaintiff and intervener to the

admission and exclusion of evidence, judgment as in case of nonsuit and the charge of the court. The main ones, and other necessary facts, will be considered in the opinion.

S. J. Durham and Mangum & Denny for plaintiff and interpleader or intervener.

Gilliam Craig and J. F. Milliken for defendants.

CLARKSON, J. The verdict on the second issue was not appealed from by defendants.

The matters for our decision are in regard to the judgment as of nonsuit, the instructions of the court below on the first issue, and the admission and exclusion of certain evidence offered on the trial.

The deed in trust on the land in controversy from J. L. Price to A. C. Jones, trustee for R. F. Price, to secure bond for $2,600, was dated 5 September, 1914, and due 1 November, 1915, and duly recorded.

M. L. Flow testified, in part: "I live in Monroe. I knew the late R. F. Price. I knew the late C. N. Simpson. I am familiar with their handwriting. I have seen R. F. Price write. I saw J. L. Price sign his name a few times. I have seen 'Squire' C. N. Simpson write very often. I am thoroughly familiar with his handwriting. I have been connected with the administration of justice for about fifty years as former deputy clerk of court, notary public, U. S. commissioner, and justice of the peace." He testified to the handwriting of J. L. Price, the maker of the note and deed in trust in controversy, and R. F. Price the payee in the note and assignor of the note. He also testified that "Pay to—C. N. Simpson" and the notation of interest on the back of the note, etc., was in the handwriting of C. N. Simpson. J. C. M. Vann, administrator of C. N. Simpson, after testimony of Flow, stated the note and deed in trust came into his possession as administrator with other papers considered as assets of the estate of C. N. Simpson.

The exceptions and assignments of error to the above testimony of M. L. Flow (5, 6, 7, 8) were abandoned by plaintiff and intervener. The note sued on was a negotiable instrument. C. S., 2982, 2987.

C. S., 3040, defines who is deemed a holder in due course: "Every holder is deemed prima facie to be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." A note payable to a specific person, or his order is

negotiable (C. S., 2989). If payable to order, it is negotiated by the endorsement and completed by delivery (C. S., 3010).

C. S., 3026, is as follows: "Except where an endorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue."

Under the above negotiable-instrument law, when J. L. Price made the negotiable note in controversy to R. F. Price and R. F. Price endorsed and delivered it and it was in the possession of C. N. Simpson at his death, his administrator became prima facie the holder, he "is deemed prima facie to be the holder in due course." By due course is meant that C. N. Simpson became the holder before maturity; that he took the note for good faith and value and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. Nothing else appearing, this entitles the holder, the defendant J. C. M. Vann, administrator of C. N. Simpson to recover on the note. By presenting the note, proved to be signed by J. L. Price and proof of the endorsement of the payee R. F. Price (the method of proof in the present case the assignments of error abandoned, therefore admitted), Vann, administrator of Simpson, makes out a prima facie case, that is, a case sufficient to justify a verdict, but this prima facie case may be rebutted. How?—By plaintiff and intervener introducing evidence tending to show that the execution of the note had been obtained by fraud and tainted with illegality (infirmity in the note and defect in the title), and thereupon the burden devolved upon the holder in due course, Vann, administrator of Simpson, to show by the greater weight of the evidence, that he acquired the note before maturity, bona fide, for value, without notice of any infirmity in the note or defect in the title (fraud or illegality) of R. F. Price negotiating it. Such notice on the part of the holder means either actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the note amounted to bad faith. *Holleman v. Trust Co.*, 185 N. C., 49; *Hayes v. Green*, 187 N. C., 776; *Bank v. Felton*, 188 N. C., 386; *Proctor v. Fertilizer Co.*, 189 N. C., 243.

Plaintiff and the intervener, A. E. Woltz, allege and contend: (1) That C. N. Simpson was not a holder in due course, (2) payment in full of the note to R. F. Price, payee in the note, endorser and assignor to Simpson. The contention of payment to R. F. Price would not be good if C. N. Simpson was a holder in due course. The court below, under C. S., 567, on motion of Vann, administrator of Simpson, granted the motion for judgment as in case of nonsuit against plaintiff, Price Real Estate and Insurance Company, and, on the evidence in the case, directed the jury to render a verdict on the first issue in favor of Vann, ad-

ministrator of Simpson for $2,600, with interest from 1 November, 1917. In this we think there was error.

C. S., 1795, is as follows: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

A. E. Woltz testified, without objection, as follows: "In answer to your question to state when the men were in my office, will say it was sometime in November, I should say, I was cleaning up the record and trying to get the mortgage out of the way. It probably was dated 9 November, 1915. I was getting up the encumbrances. J. L. Price and R. F. Price were there. Q. At the time you were there, did you see in his possession, of R. F. Price, a note and mortgage given by J. L. Price? Answer: I did, and he took it and promised to have Mr. Jones cancel it." The Jones referred to was defendant A. C. Jones, trustee in the deed in trust securing the $2,600 note.

A. E. Woltz was speaking about the $2,600 note and deed in trust in controversy that J. L. Price made to R. F. Price. This evidence of Woltz was not objected to by Vann, administrator of Simpson. We do not think this evidence "a personal transaction or communication between the witness and the deceased person," etc. It was competent evidence, unobjected to; its probative force was for the jury.

In *Lane v. Rogers,* 113 N. C., 171, it was held that the witness might say she saw the book in the hands of the deceased, at the time and place in question, but not that the deceased handed her the book. *Gray v. Cooper,* 65 N. C., 183; *March v. Verble,* 79 N. C., 19; *McCall v. Wilson,* 101 N. C., 598; *Sawyer v. Grandy,* 113 N. C., 42; *McEwan v. Brown,* 176 N. C., 249; *In re Bradford,* 183 N. C., 6; *In re Harrison,* 183 N. C., 460.

The authorities are to the effect in this jurisdiction that a witness may testify to a substantive, independent fact. This testimony would indicate that on 9 November, 1915, after maturity of the $2,600 note, that

J. L. Price gave R. F. Price, and now claimed by Vann, administrator of Simpson as a holder in due course, was in the possession of R. F. Price. If this be true, the probative force is for the jury. It is some evidence that Vann, administrator of Simpson, is not a holder in due course and the note in the hands of Vann, administrator, is subject to any equities that the plaintiff and Woltz can show by competent evidence, either direct or circumstantial.

There was error in granting the nonsuit as to plaintiff and the charge as given by the court below.

New trial.

J. G. ELMORE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 17 February, 1926.)

1. Actions—Torts—Contracts—Appeal and Error.

Whether an action has been brought and tried on contract or tort, will be determined on appeal from the allegations of the complaint and the evidence introduced on the trial.

2. Torts—Civil Liability—Contracts.

A tort is an act or omission giving rise in virtue of the common law jurisdiction of the court to a civil remedy which is not an action of contract.

3. Same—Actions.

Where the master without assault, threat, force, trespass or slander discharges his employee under an imputation of dishonesty, ordinarily an action in tort cannot be maintained.

4. Same—Railroads—Master and Servant—Employer and Employee—Evidence—Nonsuit.

Where a railroad company through its superintendent discharges a conductor upon information and affidavits that he, in collusion with a local ticket agent, was selling tickets taken upon the train, without canceling them or turning them over to the company, and retaining the proceeds, and the superintendent acts in his office where he and the conductor were alone, and gives an appeal to the conductor, at his request and in conformity with the rules of the locomotive brotherhood, to the general manager of the road, who confirms the action of the superintendent; and no assault, trespass, threats, or violence or slander were used by the road's officials: *Held*, not an actionable tort.

5. Same—Breach of Contract of Employment.

The discharge of a servant by the master contrary to the terms of the contract of employment, is not alone sufficient to maintain an action in tort.

6. Master and Servant—Employer and Employee—Discharge of Servant—Torts—Actions.

The mere unlawful discharge of the servant by the master upon imputation of dishonesty, without force, etc., does not alone subject the latter to an action for damages in tort for trespass against the rights of the former.

7. Same—Humiliation—Damages.

Where a servant has brought his action in tort against the master for his wrongful discharge, which he cannot maintain, he may not recover damages for his humiliation after his discharge caused thereby.

APPEAL by defendant from *Devin, J.*, at March Term, 1925, of the Superior Court of HALIFAX County. Action for alleged wrongful discharge from service. Reversed.

Plaintiff alleged that for 28 years he had been in the defendant's service and on 2 October, 1923, was a conductor in charge of certain of its passenger trains operating between Norfolk & Goldsboro and between Norfolk and Rocky Mount; that at the date named the defendant falsely charged him with having taken up tickets of passengers and with having procured them, by collusion with the agent at Norfolk, to be resold as uncanceled tickets and with having divided with him the proceeds of the sales; and that these charges were false, wilful, and malicious. He alleged that while he was in charge of a train running between Goldsboro and Norfolk the defendant caused him to be discharged without warning or notice or an opportunity to be heard and in such way as to create the greatest possible notoriety; that he was 51 years old and unfitted for other work; and that he had been damaged in the sum of $200,000.

The defendant denied the material allegations of the complaint, and for a further defense alleged that the plaintiff had no personal contract of employment with the defendant but only by virtue of his membership in an organization known as the Order of Railroad Conductors; that he had not been employed for any definite time; that he had been charged with an infraction of the defendant's rules and, after his suspension, had requested and had been given a hearing in accordance with the rules of said order, first by the general superintendent, who permanently discharged him, and afterwards by the general manager, who approved and sustained the order of the superintendent; and that he then abandoned any other appeal. The defendant's motion to dismiss the action as in case of nonsuit was denied and the defendant excepted.

The following verdict was returned:

1. Did the defendant wrongfully discharge the plaintiff as alleged in the complaint? Answer: Yes.

2. If so, what compensatory damages, if any, is the plaintiff entitled to recover? Answer: $25,000.

3. What punitive damages, if any, is the plaintiff entitled to recover? Answer: .....

Judgment for the plaintiff. Exceptions and appeal by defendant.

Travis & Travis, Ashby Dunn and George C. Green for plaintiff.

Thomas W. Davis, V. E. Phelps, John H. Kerr and Spruill & Spruill for defendant.

ADAMS, J. The substantial ground of the plaintiff's action is his discharge by the defendant under the false and malicious accusation that by collusion with the agent at Norfolk he had procured the resale of "unpunched tickets" and had misappropriated funds arising from the sale. That the suit is in tort and that any contractual relation between the parties is incidental was clearly stated in this instruction to the jury: "The plaintiff is not basing his action upon a breach of contract. He is not alleging damages for being discharged. He is claiming nothing against the defendant because he was separated and removed from his position of railroad conductor. . . . But he bases his action upon an alleged cause of action for damages for a wrong alleged to have been done him by the defendant in the manner and form in which his employment was terminated, that is, under false charges, and in such a way as to cause him great humiliation and mental suffering. That is the sole question presented to you under the first issue."

His Honor gave the additional instruction that as the contract had been made for an indefinite term either party had a right to sever the relation at will,—a familiar principle repeatedly approved. *Edwards v. R. R.*, 121 N. C., 490; *Richardson v. R. R.*, 126 N. C., 100; *Currier v. Lumber Co.*, 150 N. C., 694; *Warden v. Hinds*, 25 L. R. A. (N. S.), 529 and note; Lawson's Rights, Rem. & Pr., sec. 282. In the argument here it was suggested by the appellee that this instruction was incorrect because the Rules provide that "a conductor will not be discharged or suspended without cause." Assuming, certainly without deciding, that the appellee's position is correct, a breach of the provision would be *ex contractu*, while the plaintiff's grievance as stated in the complaint is *ex delicto*. The dismissal was wrongful, it is contended, because the charges preferred were not true.

In treating the motion for nonsuit we must keep in mind, not only the allegations in the complaint, but the plaintiff's recital of the circumstances under which his discharge was brought about. W. H. Newell, whose office was in Rocky Mount, was the defendant's general superin-

tendent; F. W. Brown was its general manager, with headquarters at Wilmington. The plaintiff testified: "At the time I was discharged I was running between Goldsboro and Norfolk. I was coming from Goldsboro to Norfolk, and I got a message to report at Mr. Darrow's office at 9:30 a. m. and that I would be relieved of my train at Rocky Mount. This was on 2 October, 1923. I reported at Mr. Darrow's office and was told that Mr. Newell would handle the case. I then went to Mr. Newell's office and he said: "Here are some charges." He first said: "I can stand irregularities, I can stand drunkenness, but I cannot and will not tolerate dishonesty." We were then in the general superintendent's office. He had reference to the batch of affidavits which he then began to read to me. I asked him who were these people who made these statements and he answered that they were passengers on my train. I asked him to give me the names of the men who had made these affidavits and he made no answer to me. He asked me if these were true statements, and I told him that he knew that they were not true. . . . He gave me to understand that I was fired and I have been since then. . . . The charges he read against me were that tickets had been turned in by other conductors which were sold specifically for my train; these tickets, they claimed, were bought by people leaving Norfolk and surrendered to me, and in several instances these same tickets were sold again and turned in by other conductors with their punch marks and their reports. I refer to the charges in the affidavits; these charges were that tickets had been bought for my train and that they were turned in later, some on my train and some on others. He accounted for the fact that some of these tickets had been taken back and resold by saying that I had taken them back to agent Starke and he had resold them. . . . I was taken off the train at Rocky Mount that day and had to wear my uniform to my home in Norfolk. . . . I had no extra clothes with me. The fact that I had to go home in my uniform as a passenger on the train I was supposed to be conductor on naturally attracted the attention of the passengers and the public, and I was asked, not only by passengers, but by other conductors what I was doing riding in my uniform. Everybody wanted to know and of course I had to tell them. . . . It was very humiliating to be continually asked these questions. I was very humiliated and hurt in every respect."

The conversation between the plaintiff and the superintendent took place in the latter's office; no one else was present; no other heard what was said. Afterwards the plaintiff called for an investigation under the rules of the company, and, in his own words, "Mr. Newell still held out that I was fired"; and the former decision was not changed. Another hearing was had before the general manager in

Wilmington and the first decision was again approved. No other appeal was prosecuted; and in explanation of his suit, the plaintiff testified: "The one reason I am suing is that I had to travel back home in my uniform and the other is that I was wrongfully discharged."

The plaintiff's narration contains a fair statement of the theory upon which the action was prosecuted and proposes the vital question whether the complaint and the evidence have laid an adequate foundation for a suit in tort.

Actions *ex delicto* form an individual branch of the law. They have been classified fundamentally as breaches of duty by wrongful means, as fraud; culpable accident, as negligence; malice, illegal acts, etc. Bigelow on Torts (8 ed.), 35; Jaggard on Torts, sec. 141 *et seq.* They are divided by Pollock into three groups: (1) Personal wrongs which affect (a) the safety and freedom of the person; (b) personal relations in the family; (c) reputation; and (d) those which affect one's estate generally, as slander of title or malicious prosecution. (2) Wrongs to possession and property. (3) Wrongs to person, estate, and property, such, for example, as nuisance, or negligence. Pollock on Torts (12 ed.), 6.

It is apparent that the present suit cannot be placed in either of the last two groups; we must therefore determine whether it falls within the first.

A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract. Pol. (1 ed.), 4. Jaggard says that this definition, while a negative one, seems to be least unsuccessful and unsatisfactory. "It is evident," he remarks, "that there are two main ideas set forth by this definition: the conduct which constitutes a tort and the redress which the law provides for the wrong done,—the cause of action and the remedy. . . . A tort or a wrong may be spoken of either as a breach or violation of a duty or an infringement of a right." 1 Jaggard on Torts, 2.

Inquiring then, whether the plaintiff has shown an infringement of his rights or the defendant's breach of a duty actionable in tort, we recur to Pollock. With respect not so much to the effect as to the nature of the act or omission he says: "In Group A (the first group), generally speaking, the wrong is wilful or wanton. Either the act is intended to do harm, or being an act evidently likely to cause harm, it is done with reckless indifference to what may befall by reason of it. Either there is deliberate injury, or there is something like the self-seeking indulgence of passion." Torts (12 ed.), 8.

The word "trespass" is sometimes used in a broad sense as synonymous with "tort"; but trespass in a restricted sense is treated as a

separate tort—technically under the second group as an actionable wrong to goods or land. It implies force. Also, in the sense of a trespass to the person, if considered under the first group, the word involves the idea of force or the direct character of an injury, remediable at common law by the action of trespass *vi et armis,* and not the idea of injuries which are consequential, resulting, for instance, from negligence or nonfeasance, and remediable by the old action of trespass on the case. 3 Bl., 120 *et seq.;* 26 R. C. L., 930 *et seq.*

With these principles in mind, we have failed to discover anything in the evidence to indicate or connote the defendant's wrongful application of force to the person or property of the plaintiff, or, indeed, the display or suggestion of any kind of force. There was no threat, no restraint, no intimidation, no element of an assault, and of course no battery. When the charges were preferred and the employment was brought to an end, the plaintiff and the superintendent were alone: there was no slander because there was no publication. (We may say incidentally that for slanderous words spoken by another employee of the defendant in relation to the charges set forth in the affidavits exhibited by Newell, the plaintiff has recovered damages in a former action in the sum of ten thousand dollars. *Elmore v. R. R.,* 189 N. C., 658.) So it is argued, not without reason, that neither Newell's statement to the plaintiff of the cause for which he was discharged, even if false, nor the discharge for the cause assigned constitutes an actionable civil injury, and that in the absence of evidence tending to show defamation or assault or trespass to person or property, the action cannot be maintained.

The plaintiff devotes elaborate argument to two propositions which in our opinion cannot avail him on the present record. It is an actionable wrong, he first contends, to procure the breach of an existing contract of employment. Granted that this doctrine applies to the wrongful interference by a stranger with the relation of master and servant, how is it pertinent in the case before us? The railroad company, the employer, is the only defendant. Those who made the affidavits, according to the plaintiff's testimony, "all worked for the Coast Line." So, in like manner with the superintendent, they represented the company; and it is difficult to perceive how the company under the allegations in the complaint tortiously procured or induced itself to interfere with the relation existing between itself and the plaintiff. We need not discuss the next proposition which is addressed to the plaintiff's inability to find other work and to the doctrine of interference with another's trade or calling, for a cursory reading of the record will show that these subjects are unrelated to questions presented for decision. But there is a third proposition. The plaintiff says in substance that his dismissal under

false charges, with its consequent humiliation and mental suffering, is itself an actionable wrong. To avoid confusion just here we must note the distinction between diverse principles which are frequently applied in suits growing out of the master's wrongful discharge of his servant. We have said that a contract of employment for an indefinite term may be terminated at the will of either party. But when the contract is for a definite term it cannot be terminated at an earlier period unless the right to end it is reserved in the contract, or unless there is a general custom authorizing an earlier termination. When the servant is employed for a definite time and the master without justification severs the employment at an earlier period, the discharge is wrongful in the terminology of the law of contracts; but it is not a tort. If the parties agree that the master may put an end to the contract if the services are not satisfactory, and, though they are satisfactory, the master feigns dissatisfaction and dismisses the servant, the discharge in a contractual sense may be wrongful; but is it ground of an action *ex delicto?* Take another case. A servant is employed for a definite period; his compensation is to include the use of a house and garden belonging to the master; he is discharged in breach of the contract and notified to vacate the premises; he refuses to remove and is forcibly evicted; thereupon he brings suit, the gravamen being the master's wrongful eviction of his servant by force. An action in tort may be maintained on the ground of the master's unlawful act *vi et armis.* These illustrations serve to draw the distinction between a wrongful discharge in tort, attended by actual or constructive force, and a wrongful discharge without force in breach of contract. See, in connection, *Wilson v. Wilderness Farm,* 82 At. 9 (N. J.), 517; *Beissel v. Elevator Co.,* 12 L. R. A. (N. S.) (Minn.), 403; *Mackenzie v. Minis,* 23 L. R. A. (N. S.) (Ga.), 1033; *Schmand v. Jandorf,* 44 L. R. A. (N. S.) (Mich.), 680; *American Stores v. Kussel,* 64 L. R. A. (1916 F), 882.

We understand the underlying principle to be that the mere discharge of a servant under an imputation of dishonesty will not support an action in tort. It is thus stated by *Stephen, J.,* in *Walton v. Tucker,* 45 J. P. (Exch. Div.), 23, which is cited in 1 Labatt's Master & Servant, 1166: "It seems to me that, if we gave way to the argument of the plaintiff, it would introduce an extensive and undesirable change in the law. There are few actions more frequently brought than actions for wrongful dismissal, and it must have happened upon many occasions that the dismissal must have been considered as grievous to a servant, not so much from the monetary loss as from the slur cast upon his character. No case, however, binding upon this Court has been produced, where such injuries as are now sought to be compensated have been so compensated. I think, therefore, that no such damages

can be given, and it seems to me right that it should be so, because if any further damage is due, that further damage must be caused by something which is in itself an actionable wrong. For instance, if the plaintiff had been expelled by violence, a count for assault might have been added; or if he had been abused, or the cause of dismissal had been stated needlessly, so as not to have been within the privilege, an action for slander or malignment would lie. As in this case the plaintiff was neither assaulted nor slandered, he ought not to recover more than the actual result of the breach of contract." *Comerford v. Street Ry.,* 164 Mass., 13, was an action for slander, the fifth count alleging that the defendant wantonly and recklessly dismissed and discharged the plaintiff from its employ and falsely and publicly charged him with being dishonest therein. The Court said: "If it (the fifth count) be construed as a count for discharging the plaintiff from its employ under such circumstances as to impute to him a charge of dishonesty, the count must fail. An action of tort does not lie against an employer for discharging a servant."

A wrongful discharge from employment becomes the basis of an action in tort when accompanied by a wrongful act which amounts to a technical trespass with actual or constructive force. A malicious motive disconnected with the infringement of a legal right (even if there were evidence in this case to disclose it) cannot be the subject of a civil action. *Richardson v. R. R., supra; S. v. Van Pelt,* 136 N. C., 634, 660; *Bell v. Danzer,* 187 N. C., 224.

As we have said, the plaintiff has shown no assault, no slander, no force, no trespass to his person or property; indeed, no act, which disjoined from the mere termination of the employment constitutes an independent cause of action; and in our opinion the present suit cannot be maintained. An employer should not be subjected to the jeopardy of a suit for damages for the bare reason that in dismissing an employee he assigns the true ground of the discharge, although the reason given may be equivalent to an imputation of dishonesty.

But the plaintiff says that he had to return to Norfolk in the uniform of a Conductor; that in response to questions he had to give the reason; that he was humiliated; and the redress of this wrong he assigns as one object of his suit. That this circumstance is not an independent cause of action needs no argument. That it is not an element of damages is equally obvious. The discharge in the office ended the employment; no part of the contract authorized the plaintiff to designate time or place. When the contractual relation was broken the company was no more responsible for the plaintiff's garb than for the disclosure he made to inquiring friends. Under these conditions the law imposes

upon the defendant no liability for the remote and collateral consequences resulting from inferences or deductions that may have been drawn by the public from the situation of the plaintiff. *Berlin v. P. L. Cusachs, Ltd.,* 114 La., 743, 759.

We are of opinion the defendant's motion for nonsuit should have been allowed. The judgment is therefore

Reversed.

FIRST NATIONAL BANK OF SPRING HOPE v. MRS. LIZZIE MITCHELL, MRS. ADDIE GRIFFIN, MISS CORNELIA LOUISE EDWARDS, MISS FLORENCE EDWARDS AND MISS FLORENCE EDWARDS, ADMINISTRATRIX OF THE ESTATE OF S. C. EDWARDS, DECEASED.

(Filed 17 February, 1926.)

1. Judgments—Consent—Contracts—Courts—Modification.

A consent judgment is the agreement of the parties entered of record with the sanction of the judge, and in the absence of fraud or mutual mistake cannot be modified by the court without a like consent, and must be enforced in accordance with its provisions.

2. Same—Executors and Administrators—Statutes—Creditors—Distribution.

Where a consent judgment provides that a commissioner appointed for the purpose sell certain lands of a deceased person, and pay the net proceeds to the administratrix of the deceased to pay the debts of his estate, the distribution of these proceeds are thereunder to be made under the provisions of C. S., 93, providing the order of payment, and a judgment ordering them to be paid to a lien of a judgment cerditor on the lands of the estate, adjudging it a prior lien, is reversible error.

APPEAL by defendants from *Cranmer, J.,* at December Term, 1925, of NASH. Error.

On 16 August, 1922, H. R. Edwards, S. C. Edwards, S. B. Griffin and J. N. Griffin, made and executed their joint note to the plaintiff, First National Bank of Spring Hope, due at 90 days for $1,650. The note was unpaid at maturity and was renewed by the same parties maturing 1 January, 1923. The plaintiff, on 10 March, 1923, sued the parties who signed the note and obtained judgment thereon. Execution was issued on the judgment and returned unsatisfied. Thereafter S. C. Edwards died and Florence Edwards was appointed administratrix of his estate. She and the other defendants are the heirs at law of S. C. Edwards. Plaintiff brings this suit to set aside certain conveyances, made by S. C. Edwards.

It is charged in the complaint that while S. C. Edwards was indebted as aforesaid to plaintiff, he made a voluntary conveyance of certain land to his daughters, defendants in this case, without retaining sufficient property to pay his debts, etc. Plaintiff prayed that the deed be set aside and declared void, etc.

Defendants answer, and, among other things, say: "It is absolutely denied that the said S. C. Edwards ever owned in fee simple any of the tracts of land set out and described in article 10 of said complaint, except the first tract, consisting of tracts A, B and C, and this was conveyed and deed delivered by the said S. C. Edwards to Mrs. Lizzie Mitchell, one of said defendants prior to the execution of any of the notes as set out in said complaint and she is now the owner in fee simple of said tract of land, free and clear from any lien by reason of the matters and things set out in said complaint. That it is absolutely denied that the said S. C. Edwards at any time owned a fee-simple interest in tracts 2, 3 and 4, as is described in article 10 of plaintiff's complaint. But that the said tracts or parcels of land were owned in fee simple by Mrs. Nancy Edwards, mother of the defendants; and the said S. C. Edwards only owned a life interest in the said tracts or lots of land by curtesy. That these defendants allege that the same is owned by the parties therein set out in fee simple and free and clear from any lien by reason of said notes; same having descended to them from their mother, Mrs. Nancy Edwards. That tracts 2, 3 and 4, as above stated, were owned in fee simple by Mrs. Nancy Edwards at the time of her death. That these defendants allege upon information and belief, and so avers, that the said S. C. Edwards owned no real property at the time he executed either of the said notes as set out in said complaint, and they absolutely deny that he was the owner of either of the said lots on said date as described in said complaint. These defendants further deny that there is any lien upon either of the said lots by reason of his having executed, if he did, the said notes therein set out." Defendants pray that the deeds be not set aside, etc.

The following judgment was agreed to and signed by attorneys for plaintiff and defendants: "This cause coming on to be heard and it being made to appear to the undersigned clerk of the Superior Court that by agreement of I. T. Valentine and Battle & Winslow, attorneys for plaintiff, and Finch & Vaughan, attorneys for defendants, that the first tract as described in article 10 of the complaint in said action, the said tracts being designated as A, B and C, were owned in fee simple by S. C. Edwards at the time of his death; that the other tracts described in said complaint as second, third and fourth, were not the property of the said S. C. Edwards at the time of his death, but belonged to his deceased wife; that S. C. Edwards *et al.,* are indebted to plaintiff as

alleged in the complaint; that in order to make assets to pay the indebtedness of the estate of the said S. C. Edwards, it is necessary that the first tract be sold, same being bound and described as follows (the tracts A, B and C, are described by metes and bounds). It is now, therefore, ordered, adjudged and decreed by agreement between plaintiff and defendants that S. C. Edwards was the owner in fee simple of those certain tracts or parcels of land above described; and that Miss Florence Edwards be and she is hereby appointed commissioner to sell the lands described above on 30 November, 1925, at the courthouse door in Nash County to the highest bidder at public auction for cash, after advertising as required by law, and the said commissioner shall report her proceedings to this court. This cause is retained for further order. This 31st day of October, 1925. J. N. SILLS, C. S. C."

Florence Edwards sold the land, as commissioner, for $1,425, and filed her report 9 December, 1925.

Cranmer, J., on 12 December, 1925, rendered the following judgment: "It appears from the record that by consent a part of the land described in the complaint was adjudged to be sold by a commissioner, the commissioner to report her proceedings to this court, and that the judgment failed to make any provision for the disbursement of proceeds of sale. The plaintiff, at this term, moved for a supplemental judgment directing the commissioner, after payment of necessary expenses of sale, including such allowance as might be made by this court as compensation to the commissioner, to pay the proceeds of sale to the plaintiff to the extent of the plaintiff's indebtedness as alleged in the complaint, in satisfaction of the plaintiff's alleged equitable lien upon the property sold. It appears that no one other than the plaintiff has made any claim in this action to any lien on the property by judgment, mortgage or otherwise. The defendants contend that the commissioner be ordered to retain the fund in her hands as administratrix of the estate of S. C. Edwards, deceased, to be disbursed as assets of said decedent, in payment of costs of administration, attorneys' fees and debts of S. C. Edwards, in the order provided by statute. The court being of the opinion, upon the record, that the plaintiff is entitled to priority over the claims of all other creditors of S. C. Edwards to the extent of the net proceeds of sale of the land sold in this action, allows the plaintiff's motion and denies the defendants' motion. It is now, therefore, ordered, adjudged and decreed that the commissioner, after paying the expenses of the sale as fixed by the court, pay the surplus of proceeds of sale to the plaintiff as far as it will go in satisfaction of the plaintiff's indebtedness as alleged in the complaint, and the remainder thereafter, if any, be

retained by Florence Edwards, administratrix of S. C. Edwards, deceased; let petitioners pay costs of this proceeding."

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

Battle & Winslow and I. T. Valentine for plaintiff.
Finch & Vaughan and Manning & Manning for defendants.

CLARKSON, J. In the consent judgment of 31 October, 1925, signed by J. N. Sills, C. S. C., it was expressly agreed: "That in order to make assets to pay the indebtedness of the estate of the said S. C. Edwards, it is necessary that the first tract be sold," etc.

The judgment of 12 December, 1925, which says: "To pay the proceeds of sale to the plaintiff to the extent of the plaintiff's indebtedness as alleged in the complaint, in satisfaction of the plaintiff's alleged equitable lien upon the property sold," is contrary to the plain language of the consent judgment.

Walker, J., in *Massey v. Barbee,* 138 N. C., p. 88, said: "The rights of the parties must be determined solely by the judgment to which they have assented. 'The judgment, or as it is termed the decree, is by consent the act of the parties rather than of the court, and it can only be modified or changed by the same concurring agencies that first gave it form, and whatever has been legitimately and in good faith done in carrying out its provisions must remain undisturbed.' *Vaughan v. Gooch,* 92 N. C., 524. And in *Edney v. Edney,* 81 N. C., 1, *Dillard, J.*, says for the Court: 'A decree by consent as such must stand and operate as an entirety or be vacated altogether, unless the parties by a like consent shall agree upon and incorporate into it an alteration or modification. If a clause be stricken out against the will of a party, then it is no longer a consent decree, nor is it a decree of the court, for the court never made it.' The law will not even inquire into the reason for making a decree, it being considered in truth the decree of the parties, though it be also the decree of the court, and their will stands as a sufficient reason for it. *Wilcox v. Wilcox,* 36 N. C., 36. It must therefore be interpreted as they have written it and not otherwise."

It is well settled in this jurisdiction: If parties have the authority, a consent judgment cannot be changed, altered or set aside without the consent of the parties to it. The judgment, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement made between the parties and a matter of record by the court, at their request. The judgment, being a contract, can only be set aside on the ground of fraud or mutual mistake. *Massey v. Barbee, supra; Deaver v. Jones,* 114 N. C., 650; *Lynch v. Loftin,* 153 N. C.,

270; *Bank v. McEwen,* 160 N. C., 414; *Gardiner v. May,* 172 N. C., 192; *In re Chisholm,* 176 N. C., 211; *Morris v. Patterson,* 180 N. C., 484; *Walker v. Walker,* 185 N. C., 380; *Distributing Co. v. Carraway,* 189 N. C., 423; *Smith v. Smith,* 190 N. C., 764; *Coburn v. Comrs., ante,* 68.

No shadow of fraud or mutual mistake is suggested by the record. Florence Edwards sold the land as commissioner. She is also administratrix of the estate of S. C. Edwards. After the report is confirmed, deed made and purchase money collected, she must make her report (C. S., 765), and the balance in her hands she must account for as administratrix. According to the consent judgment, the land was sold "in order to make assets to pay the indebtedness of the estate of S. C. Edwards." This being the agreement, the fund going into her hands as administratrix must be paid to creditors in accordance with C. S., 93, providing the order of payment of debts of a decedent.

In the judgment of the court below, there was

Error.

RACHEL WOODARD, R. L. PINNER, MARTHA OVERTON, VIOLA PINNER, JAMES A. PINNER (THE LAST FOUR BY VIOLA CAHOON, THEIR GUARDIAN), v. B. R. HARRELL, WILLIAM BRYANT AND JOSH SWAIN.

(Filed 17 February, 1926.)

1. Deeds and Conveyances—Boundaries—Evidence—Questions for Jury.

Where the true dividing line between adjoining owners of land is in dispute in locating the *locus in quo*, and the call therefor in the deeds is clear and unambiguous, it only leaves for the determination of the jury, upon the evidence, the location of the line according to the boundary given in the instrument.

2. Same—Dividing Line—Compromise—Evidence—Contracts—Writing—Statute of Frauds.

Where the parties have not agreed upon the true dividing line between their adjoining lands, but have compromised by parol upon a dividing line to be observed, evidence of this agreement is incompetent in an action subsequently brought in which the true dividing line is at issue, it being required that the agreement as to the line settled on be reduced to writing under the Statute of Frauds.

3. Same—Ejectment—Actions—Burden of Proof—Title.

The plaintiff in ejectment must recover, if at all, upon the strength of his own title under the evidence, and not upon the weakness of the evidence of that of his adversary.

WOODARD *v.* HARRELL.

APPEAL by plaintiffs from *Sinclair, J.*, at December Term, 1925, of TYRRELL. No error.

The plaintiffs claim to be the owners and in possession of certain swamp land—described in the complaint—and defendants are trespassers. Plaintiffs pray that defendants be restrained and enjoined from cutting any timber, etc.

Defendants deny that they are in possession of any of plaintiff's land and pray that the action be dismissed, etc.

On motion of defendants, judgment as of nonsuit was rendered and plaintiffs duly excepted and assigned error, and also excepted and assigned error to the exclusion of certain evidence offered on the trial, and appealed to the Supreme Court. The material assignments of error and necessary facts will be considered in the opinion.

T. H. Woodley, Aydlett & Simpson for plaintiffs.
McMullan & LeRoy for defendants.

CLARKSON, J. It is not necessary to cite authorities that the rule in this jurisdiction is well settled that a plaintiff in ejectment must recover, if at all, upon the strength of his own title and not upon the weakness of his adversary.

"At the trial it was admitted that plaintiffs owned the land on the north, or northwest, and that defendants owned the land on the south, or southwest, of the true dividing line between them; and that the only questions in controversy were, (1) the location of the true dividing line, and (2) whether defendants had cut timber on plaintiffs' side thereof. Both parties claim that the true dividing line between the Wynn-Norman-Pinner land, owned by plaintiffs and the Tarkenton, McCleese, Combs land, a part of which is owned by defendant Harrell, ran from a point at or near Rolling Bridge to a cypress on the river. The plaintiffs claim the true dividing line to be a line D-A-Z-Y-X. The defendants claim it to be the line C-B-G. The land in dispute is swamp land."

In the present case, from the admissions of record: The only dispute—the plaintiffs claim the true dividing line to be the line D-A-Z-Y-X. The defendants claim it to be C-B-G. Both claim that the *true dividing line* ran from a point at or near Rolling Bridge to a cypress on the river. The burden was on the plaintiffs to prove by competent evidence the true dividing line. Plaintiffs introduced in evidence the following deeds: J. F. Davenport, executor of Joseph Wynn to Samuel Norman, dated 28 January, 1850, and recorded in Book 20, page 263. Also deed, same description, from Mark Majette, commissioner, to J. W. Pinner, dated 16 February, 1906, recorded in Book 54, at page 63: "Beginning at a cypress on the river below the Schallop's landing, a corner tree of

Joshua Tarkenton's new survey, running up the swamp binding on said Tarkenton's line to a gum at Rolling Bridge," etc. The Samuel Norman heirs were all made parties in the proceeding when the land was sold by Mark Majette, commissioner.

Plaintiffs claim to be the owners of the land through Wynn, Norman and Pinner. The plaintiffs are the heirs at law of J. W. Pinner, who is dead.

We think, from a careful examination of the record, the only material assignment of error is 17. The record on that assignment of error is as follows: "At the conclusion of plaintiff's testimony, the defendants moved to strike out all the testimony, introduced by plaintiffs tending to show that James Pinner, under whom plaintiffs claim, and John Combs, under whom defendants claim, made and marked a line in 1907, from D-A-Z, on the map and entered into a parol agreement at the time, by way of compromise, that said line should thereafter be recognized as the true dividing line between the parties. After extended argument by counsel, for both plaintiffs and defendants, the court in ruling upon said motion, entered the following order, viz.: 'It appearing to the court that each and every portion of said testimony was admitted over defendant's objection, with exceptions duly entered, and that same has been admitted subject to the final ruling of the court as to its competency, and that the motion to strike out was entered in apt time, it is ordered: That said testimony and each and all thereof, be stricken from the record.' The defendants thereupon moved for judgment as of nonsuit. Whereupon, the defendants, through their counsel, having briefly presented their views, contending that, with the above testimony stricken out, as above stated, the plaintiffs had offered no evidence sufficient to take the case to the jury, the court called upon the plaintiffs to present their views as to the sufficiency of testimony to take the case to the jury, after the motion to 'strike out' had been allowed. Whereupon, counsel for plaintiffs formerly announced that plaintiffs had nothing to say in opposition to the motion for judgment as of nonsuit. The court thereupon allowed the motion."

Surveyor appointed by the court in the case, C. W. Tatem, testified, in part, as follows: "At the time I ran this line, 1907, there were no marked trees along it. Mr. (John B.) Combs and Mr. (James W.) Pinner marked them that day. The line that was marked that day, is the line D-A, and up to the dotted line, is shown on the map. . . . Mr. Combs claimed that day, that the line we ran was not the true dividing line between these tracts, that the true dividing line ran to a point at Rolling Bridge, at or near G. The point G, at which I had designated the gum, is near Rolling Bridge, as claimed by defendant

Harrell. The line which I ran that day represented a compromise line of the contentions, as to where the true line was, as asserted at the outset."

The plaintiffs claim under the Pinner spoken of and the defendants claim under the Combs spoken of in the testimony of Tatem. It appears from the record that Pinner and Combs, in 1907, compromised and attempted to make a new line between them. This was not done in writing, but by parol. If Combs and Pinner were *locating* the *true dividing line,* the evidence is admissible, but if they were changing the *true dividing line,* the evidence was not admissible.

There is no ambiguity in the calls of the deeds introduced by plaintiffs: "Beginning at a *cypress* on the river below the Schallops Landing, a corner tree of Joshua Tarkenton's new survey, running up the swamp binding on said Tarkenton's line to a *gum* at the Rolling Bridge." The true dividing line was not proved by plaintiffs, the burden being on them, but their witness, Tatem, testified that Combs, the day the line was being run, claimed it was not the *true dividing line*—the line ran represented a *compromise line.*

The true principle is laid down by *Smith, C. J.,* in laconic language in *Davidson v. Arledge,* 97 N. C., p. 185: "The rejected evidence should have been competent to fix an uncertain and controverted boundary, but not *to change* that made in the deed that *distinctly defines it.*"

Avery, J., in *Shaffer v. Gaynor,* 117 N. C., 23, said: "Admissions made in progress of a survey subsequent to the date of the deed executed to George Guilford or even a parol agreement to mark the lines and corners in a certain way, would not have been competent to show that a line or corner was located otherwise than where a definite description contained in the deed would locate it, because the effect would be to contradict or vary a written contract, upon its face free from ambiguity, by a subsequent verbal agreement entered into without consideration. *Caraway v. Chancy,* 6 Jones, 361; *Buckner v. Anderson,* 111 N. C., 572; *Shaffer v. Hahn,* 111 N. C., 1." *Presnell v. Garrison,* 122 N. C., p. 596.

In *Haddock v. Leary,* 148 N. C., p. 380, *Brown, J.,* said: "For nothing is better settled in this State than that if the calls of a deed are sufficiently definite to be located by extrinsic evidence, the location cannot be changed by parol agreement, unless the agreement was contemporaneous with the making of the deed. And this is all that the authorities cited by the learned counsel for plaintiff establish, as we read them. *Caraway v. Chancy,* 51 N. C., 361; *Shaffer v. Hahn,* 111 N. C., 1; *Buckner v. Anderson,* 111 N. C., 577; *Roberts v. Preston,* 100 N. C., 243; *Shaffer v. Gaynor,* 117 N. C., 23, 25."

In *Boddie v. Bond,* 158 N. C., 206, *Hoke, J.,* speaking to the subject, said: "It is well understood in this State that boundary lines as contained in written deeds, dividing or other, may not be changed by parol evidence except in the one case where contemporaneously with the execution of a deed, the physical boundaries are actually run and marked for the purpose of making the deed and are thereby given a different placing."

This rule is recognized in cases cited by plaintiffs. *Hanstein v. Ferrall,* 149 N. C., 240; *Kirkpatrick v. McCracken,* 161 N. C., 198; *Wiggins v. Rogers,* 175 N. C., 67; *Taylor v. Meadows,* 175 N. C., 377.

"What the line is, is necessarily a question of law. Where the line is, is a question of fact." *Geddie v. Williams,* 189 N. C., 336-7. The evidence of Tatem and others show that the line claimed by plaintiffs was a *compromise* or *new line* made by parol and not the *true dividing line.* The calls in plaintiffs' deeds were fixed, certain and well defined. No ambiguity. Combs and Pinner, in making a compromise or a new line, should have had their agreement reduced to writing. The evidence as to the compromise or new line was incompetent. With this evidence excluded, from a critical examination of the record, it shows that plaintiffs had no sufficient evidence to be submitted to the jury and judgment as of nonsuit was proper. There was no sufficient evidence to show that defendants trespassed on plaintiffs' land.

From the view we take, the other exceptions are immaterial and are not considered. There is

No error.

LEE A. DENSON AND WIFE, JEANIE SAUNDERS DENSON, v. PINE STATE CREAMERY COMPANY.

(Filed 17 February, 1926.)

Wills—Trusts—Power of Sale—Deeds and Conveyances—Intent—Investment of Proceeds of Sale.

Where it is expressed in a will that the trustee therein appointed shall have unrestrained power to sell lands of the estate, and invest and reinvest the proceeds without requirement on the part of the purchaser to see to the proper application of the funds, it is not required of the trustee in conveying the lands to expressly refer to the power contained in the will, if it clearly appears from the interpretation of the conveyance that it was the intent to make the deed thereunder, and the grantee therein for value gets a clear title when such intent appears, though the proceeds of sale are not invested in conformity with the trusts imposed.

APPEAL by defendant from *Midyette, J.,* at Second November Term, 1925, of WAKE. Affirmed.

This is a controversy without action. It concerns the will of Jane Claudia Johnson, who died 10 March, 1900. The will is duly exemplified and recorded in Wake County, Record of Wills, Book D, at p. 341, *et seq.* Two items of the will, six and ten, are involved in the controversy.

Bradley S. Johnson, trustee, and individually, on 15 September, 1916, executed and delivered a deed to certain land in fee simple, to plaintiff, Lee A. Denson, in consideration of $3,000. Bradley S. Johnson did not account for or reinvest any part of said three thousand dollars ($3,000) as belonging to the trust estate created by item six of said will of his mother. The land is part of the land set forth in items six and ten of Jane Claudia Johnson's will. The deed is recorded in the register of deeds office of Wake County, in Book 307, p. 271. The defendant, for $11,000 contracted and agreed to purchase from Lee A. Denson a part of the land deeded Lee A. Denson by Bradley S. Johnson, trustee and individually, but has refused to perform its contract, contending that Lee A. Denson did not have a fee-simple title to the land that it agreed and contracted to purchase. This action is brought to determine if Denson could convey the defendant a fee-simple title.

There is no controversy that as to the land devised under item 10 of the Johnson will, Bradley S. Johnson had a right to convey to Lee A. Denson a fee-simple title, it is contended that as to the land in item 6, if he had a right, the power given by the will was not exercised as required by law.

Item 6 of the will is as follows: "I devise to my son, Bradley S. Johnson, and his heirs, the two lots on which my brother Col. William J. Saunders has for years resided in Raleigh, North Carolina, in trust for the use of my said brother and wife, during their lives, and for the use of the survivor, and after the death of the survivor, for the use of my niece Jeanie C. Saunders, with power to said trustee to sell and reinvest the same, whenever he shall think best, and direct also that this trust shall not be destroyed nor executed so as to divest, and for the purpose of perfecting and preserving it, I direct that on the death of my niece, Jeanie, without issue living at the time of her death the said property shall pass to my grandson and his right heirs. And I direct that the said property after the death of my brother and his wife, shall be held by the said trustee for the sole use of the said niece free from the control of any husband she may have and without liability for his debts or contracts, and with power to her to devise the same by last will, but if she die intestate and without issue surviving her, then the property is to pass to my grandson and his right heirs as above directed."

The material part of item 10, is as follows: "I give, devise and bequeath all the rest and residue of my property of every description, and wheresoever situate, over which I have any power or testamentary con-

trol, whether by virtue of the provisions of any deed or independent of any such provisions, to my son, Bradley S. Johnson, his heirs, executors and administrators, in trust," etc. . . . "And in order that the said trust may better be carried into effect, I hereby authorize and empower my said son as such trustee, to sell and convey the whole or any part of the property so devised and bequeathed to him in trust, for the purpose of investment or reinvestment, with the consent of my said husband without liability on the part of any purchaser to see to the proper application of the purchase money. And from and after the death of my said husband, it is my will that the said trust shall cease, and the said property and any interest or investment thereof, freed of the said trust, shall pass to and devolve upon my said son, Bradley S. Johnson, if then alive, in fee simple as to the realty, and absolutely as to the personalty; and if not then alive, it is my will that the same shall pass to his heirs at law, distributees and next of kin." That Bradley T. Johnson, the husband of the said Jane Claudia Johnson, mentioned in the said will, died on or about 14 February, 1903. That William J. Saunders, mentioned in said will died on or about 16 November, 1906; and his wife died on or about 10 January, 1913; and that their niece Jeanie C. Saunders, mentioned in item six of said will is now the wife of the said Lee A. Denson and is a plaintiff in this action. That Bradley S. Johnson, the trustee named in the sixth and tenth items in said will, died on or about 10 May, 1917, after having made the deed to Lee A. Denson on 15 September, 1916. His son, Bradley T. Johnson, and who is the grandson referred to in item six of the will, became the trustee under said item six of the will, and thereafter, by authority of a special proceeding before the clerk of the Superior Court of Wake County, said Bradley T. Johnson resigned as trustee and Claude B. Denson was appointed trustee under said item six of said will.

The court below rendered the following judgment: "This controversy without action duly coming on to be heard and being heard before the undersigned judge, the court is of the opinion and finds and adjudges that the deed in controversy conveyed a good title to Lee A. Denson and that the deed tendered by the plaintiffs to the defendant is a good and sufficient deed to convey the land therein described to the defendant in fee simple; and that the defendant be, and it is required to accept said deed and pay to the plaintiffs the purchase price of $11,000."

The defendant excepted to the judgment, assigned error and appealed to this Court. The material language in the Bradley S. Johnson deed to Lee A. Denson, will be considered and set forth in the opinion.

Robert N. Simms for plaintiffs.
Biggs & Broughton for defendant.

CLARKSON, J. It is contended by defendant that the deed from Bradley S. Johnson, individually and as trustee, to plaintiff Lee A. Denson, did not convey a perfect title for any lands which passed to Bradley S. Johnson, trustee, by virtue of item 6 of the will, for the reason that the said land does not refer to the power under the will conferred by item 6. In item 10, the trustee is given power to sell and convey *"the whole or any part"* of the property, "without liability on the part of any purchaser to see to the proper application of the purchase money." While in item 6, the sole provision is "with power to said trustee to sell and reinvest the same whenever he shall think best." Bradley S. Johnson did not account for or reinvest the fund under item 6.

The pertinent portions of the deed showing the exercise of power in the deed to Lee A. Denson, as to the land in item 6, are as follows:

(1) "This deed made this 15 September, 1916, by Bradley S. Johnson and wife, Nannie R. Johnson, and *Bradley S. Johnson, trustee, under the will of Mrs. Jane Claudia Johnson,* of Goochland County, Virginia, parties of the first part, and Lee A. Denson, of Raleigh, Wake County, North Carolina, party of the second part":

(2) "Witnesseth: That the said Bradley S. Johnson and wife, Nannie R. Johnson and *Bradley S. Johnson, trustee, under the will of Mrs. Jane Claudia Johnson,* in consideration of one hundred dollars and other valuable considerations," etc.

(3) "Being lots one, two, three, four and five, and the irregular shaped alleyway, shown on the map, survey and plat of R. G. Ball, engineer, recorded in Book of Maps, 1915, at page 40, in the office of the register of deeds of Wake County, *and being part of the lands devised to Bradley S. Johnson and Bradley S. Johnson, trustee, under the will of Mrs. Jane Claudia Johnson* in Book D, at page 341, register of deeds office of Wake County."

(4) "In testimony whereof, the said Bradley S. Johnson and wife and *Bradley S. Johnson,* trustee, have hereunto set their hands and seals the day and year first above written.

BRADLEY S. JOHNSON (Seal)
NANNIE R. JOHNSON (Seal)
BRADLEY S. JOHNSON, *Trustee.* (Seal)"

Under item 10 of the Jane Claudia Johnson will, Bradley S. Johnson was the owner in fee of the land at the time he conveyed a part of the land willed to him under item 10 to Lee A. Denson—he did not have to exercise the power contained in that item. The trust had ceased, and he was the fee-simple owner of the land. There can be no contention that Lee A. Denson has from the deed of Bradley S. Johnson and wife, Nannie R. Johnson, a fee-simple title to this land. He could only convey

the land under item 6 to Lee A. Denson, under the power and authority given in item 6. Did he do this? We are of the opinion that he did. We think the above excerpts from the deed show a clear intention. The fact that he conveyed it as trustee shows that the power under item 6 was exercised. In fact, under item 6, he could only convey as trustee. In item 10 he could only convey as an individual. In the deed he distinctly recites in three places *"Bradley S. Johnson, trustee under the will of Mrs. Jane Claudia Johnson."* He also defined the land as "being part of the land devised to Bradley S. Johnson and Bradley S. Johnson, trustee," etc. Any other construction would make these words surplusage, senseless and meaningless.

Perry on Trusts, vol. 2 (6 ed.), part sec. 511c, lays down the well accepted rule: "The donee of a power may execute it without expressly referring to it, or taking any notice of it, provided that it is apparent from the whole instrument that it was intended as an execution of the power. The execution of the power, however, must show that it was intended to be such execution; for if it is uncertain whether the act was intended to be an execution of the power, it will not be construed as an execution. The intention to execute a power will sufficiently appear,—(1) When there is some reference to the power in the instrument of execution; (2) where there is a reference to the property which is the subject-matter on which execution of the power is to operate; and (3) *where the instrument of execution would have no operation, but would be utterly insensible and absurd, if it was not the execution of a power."* (Italics ours.)

Mr. Justice Story, in *Blagge v. Miles,* 1 Story, 426, lays down the following rule: "The main point is to arrive at the intention and object of the donee of the power in the instrument of execution, and that being once ascertained, effect is given to it accordingly. If the donee of the power intends to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. I agree that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful, under all the circumstances, then that doubt will prevent it from being deemed an execution of the power. All the authorities agree that it is not necessary that the intention to execute the power should appear by express terms or recitals in the instrument. It is sufficient that it should appear by words, acts or deeds demonstrating the intention."

This position of *Mr. Justice Story* is followed by the Supreme Court of the United States, in *Warner v. Conn. Mutual Life Ins. Co.,* 109

U. S., 357, *Matthews, J.*, speaking to the question; *Willier et al. v. Cummings et al.*, 91 Neb., 571; *Funk v. Eggleston*, 92 Ill., 515.

Ashe, J., in *Taylor v. Eatman*, 92 N. C., p. 607, says: "As a general rule, in executing a power, the deed or will should regularly refer to it expressly, and it is usually recited; yet it is not necessary to do this, if the act shows that the donee had in view the subject of the power at the time. 2 Washburn on Real Property (4 ed.), 658." *Siler v. Ward*, 4 N. C., 161; *Exum v. Baker*, 118 N. C., 545; *Kirkman v. Wadsworth*, 137 N. C., 453; *Carraway v. Moseley*, 152 N. C., 351; *Matthews v. Griffin*, 187 N. C., 599.

Brown, J., in *Kadis v. Weil*, 164 N. C., p. 87, speaking to the subject, says: "The contention of the defendant that it was the duty of the plaintiff to see to the application of the proceeds derived from the sale to him, and see that the same was reinvested in real estate by the trustee, cannot be sustained. It was so held in England, but is not the law here as to a bona fide purchaser for value. *Hauser v. Shore*, 40 N. C., 357; *Whitted v. Nash*, 66 N. C., 590; *Grimes v. Taft*, 98 N. C., 198; *Hunt v. Bank*, 17 N. C., 60; 39 Cyc., pp. 378 and 379; A. & E. (2 ed.), vol. 28, pp. 1130 and 1131."

The language in item 10 relieving the purchaser from liability to see to the application of the purchase money, construed with item 6, does not change the law that a bona fide purchaser for value is not required to see to the application of the purchase money when the sale was made under the power conferred in item 6.

From the record, the judgment of the court below is

Affirmed.

MRS. ROSA M. MERCER ET ALS. v. D. W. DOWNS.

(Filed 17 February, 1926.)

1. Estates—Wills—Remainders—Contingent Limitations—Title—Vested Interests—Deeds and Conveyances.

Where there is a devise of an estate in remainder, a deed by the life tenant and remainderman will not convey an indefeasible title, where the title is not vested in the remainderman at the death of the testator, but is contingent upon their surviving the testator, the interest of those who are dead limited over to their heirs.

2. Estates—Remainders—Vested and Contingent Interests.

A limitation over by devise creates a vested remainder, when the remainderman takes a present estate; and a contingent estate when the remainderman takes the possibility or prospect of an estate thereunder.

3. Same—Heirs.

A devise of an estate for life to the testator's wife "and at her death to go to our surviving children or their heirs": *Held*, the children or takers in remainder, take an estate contingent upon their surviving their mother, the interest of those who may predecease her going to their respective "heirs."

4. Same—Takers Under the Will—Descent and Distribution.

Where substitute or alternate remainders to the testator's children are created by a will, upon the happening of the contingency terminating the devise as to some, the ulterior takers as heirs of the deceased child take under the will, and not by descent.

CONTROVERSY without action, heard by *Cranmer, J.*, at November Term, 1925, of EDGECOMBE.

The record discloses the following facts: W. R. Mercer died in 1905, possessed in fee simple of a certain tract of land in Edgecombe County, containing about five hundred acres, having made a last will and testament which was duly probated and recorded in said county on 21 September, 1905. At the time of his death the said W. R. Mercer left him surviving a wife, Mrs. Rosa M. Mercer, and three children, to wit: Elizabeth Mercer Marrow, W. Redmond Mercer and Rosa Moye Mercer, all of whom were living and of age at the commencement of the action. In August, 1925, Mrs. Rosa M. Mercer, E. H. Marrow and wife, Elizabeth Mercer Marrow, W. Redmond Mercer and Rosa Moye Mercer contracted with the defendant to sell and convey to him the trees standing and growing upon the land of W. R. Mercer, deceased.

The only pertinent item of the will of W. R. Mercer is item second thereof, which is as follows: "I give and devise to my beloved wife, Rosa M. Mercer, the tract of land on which I now reside, containing five hundred acres, more or less, for her lifetime, and at her death to go to our surviving children or their heirs."

Under and by virtue of said will the plaintiffs, who are the children and widow of W. R. Mercer, contend that they can convey said timber and trees in fee simple to the defendant. The defendant refused to accept the conveyance on the ground that under said item of said will plaintiffs cannot convey a fee-simple title to said timber trees.

His Honor held "that the plaintiffs are unable to convey the said timber to the defendant in fee simple as agreed in the said contract," from which judgment the plaintiffs appealed.

Henry C. Bourne for plaintiff.
James Pender for defendant.

BROGDEN, J. The determinative question is whether or not the remainder created by item second of said will is vested or contingent. If said item creates a vested remainder, then the plaintiffs can convey a fee-simple title; and, upon the other hand, if the remainder is contingent, then the plaintiffs cannot convey such a title.

A vested remainder is thus defined in Tiffany Real Property, (2 ed.), sec. 135: "A vested remainder is an estate which is deprived of the right of immediate possession by the existence of another estate created by the same instrument." The same author defines a contingent remainder as follows: "A contingent remainder is merely the possibility or prospect of an estate which exists when what would otherwise be a vested remainder is subject to a condition precedent or as created in favor of an uncertain person or persons."

In substance the difference between the two is that a vested remainder is a present estate, whereas a contingent remainder is a possibility or prospect of an estate. In *Witty v. Witty,* 184 N. C., 378, *Stacy, J.,* says: "It is undoubtedly the general rule of testamentary construction, that in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, an estate limited by way of remainder to a class described as the testator's 'heirs,' 'lawful heirs,' or by similar words descriptive of those persons who would take his estate under the canons of descent, had he died intestate, vests immediately upon the death of the testator, and at which time the members of said class are to be ascertained and determined."

The reason for the rule is that the law favors the early vesting of estates. However, this rule is subject to the controlling rule of interpretation that the intent of the testator is paramount, provided, of course, that it does not conflict with the settled rules of law. It will be observed that this devise provides that at the death of the life tenant the property should go to "our surviving children or their heirs." This raises the question as to whether or not the remaindermen are to be ascertained as of the death of the testator or as of the death of the life tenant, Rosa M. Mercer.

In the case of *Bowen v. Hackney,* 136 N. C., 187, the devise under discussion was as follows: "I now declare that, with the advancements already made and specially given in this will, in my judgment, equality is made to all my children, so that at the expiration of the life estate of my wife, that which is given to her for life shall be equally divided between all my children, share and share alike, the representatives of such as may have died to stand in the place of their ancestors." The Court held that this language created a contingent remainder. The opinion of *Walker, J.,* quotes with approval Gray on Perpetuities as

follows: "The true test in limitations of this character is that, if the conditional element is incorporated into the description of the gift to the remainderman, then the remainder is contingent, but if after the words giving a vested interest a clause is added divesting it, the remainder is vested. Thus, on a devise to A. for life, remainder to his children, but if any child die in the lifetime of A. his share to go to those who survive, the share of each child is said to be vested, subject to be divested by its death. But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent." In *Irvin v. Clark,* 98 N. C., 445, it is held: "If the devise had been to those children living at the death of their mother, there would have been a contingent and not a vested remainder in either, for until that event occurred it could not be known who would take."

In our opinion the language of the will creates substitute or alternate remainders. As expressed in the case of *Bowen v. Hackney, supra,* the testator evidently had in mind the possibility that one or more of his children might die during the lifetime of his wife, and, with this in mind, provided for such contingency by giving the share of such deceased child to his or her heirs. Obviously the testator intended that the gift should take effect absolutely according to the state of his family as it existed at the death of his wife. It follows, therefore, that the persons entitled to the estate were to be ascertained as of the death of the life tenant, Rosa M. Mercer, who is now living. The language "our surviving children or their heirs" indicates that the death of the life tenant and not the death of the devisor was the time fixed for the ascertainment of the remaindermen.

Under this construction, if any of the children should die before the mother, his remainder would be at an end, and another remainder to his or her heirs is substituted therefor, and the remainderman thus substituted would take nothing from his father or mother, but directly from the devisor, and therefore take by purchase under the will instead of by descent. *Starnes v. Hill,* 112 N. C., 1; *Whitesides v. Cooper,* 115 N. C., 570; *Bowen v. Hackney, supra; Witty v. Witty,* 184 N. C., 375; *Latham v. Lumber Co.,* 139 N. C., 9. Indeed the prevailing rule seems to be that if an estate is given by will to the survivors of a class to take effect on the death of the testator, the word "survivors" means those living at the death of the testator; but if a particular estate is given and the remainder is given to the then survivors of a class, the word "survivors" means those surviving at the termination of the particular estate. Michigan Law Review of February, 1926, p. 399, citing numerous authorities in the United States and England; *Sullivan v. Garesche,* 129 S. W., 949; 23 R. C. L., 542. It necessarily follows, therefore,

that the remaindermen could not be ascertained with certainty until the termination of the life estate.

Under the principles of construction established by authoritative decisions we hold that the remainder was contingent and that the plaintiffs cannot convey a fee-simple title to said property to the defendant. The judgment of the lower court, therefore, must be

Affirmed.

PETER FENNER, SR., ADMINISTRATOR OF PETER FENNER, JR., v. RICHMOND CEDAR WORKS AND LONNIE SPRUILL.

(Filed 17 February, 1926.)

Removal of Causes—Federal Courts—Diversity of Citizenship—Tort—Pleadings—Petition—Severable Controversy — Fraudulent Joinder—Courts—Jurisdiction.

Upon a motion to remove a cause from the State to the Federal Court under the Federal statute for diversity of citizenship and wrongful joinder of a resident defendant with the movant, a nonresident defendant, and the complaint alleges a joint tort, the allegation of the complaint will control in passing upon the motion, unless the movant makes it clearly to appear from the matters alleged in his petition and not his conclusions therefrom alone, that the controversy was severable, and that the resident defendant was joined in fraud of the jurisdiction of the Federal Court.

CIVIL ACTION instituted by the plaintiff against the defendants for damages for the wrongful death of plaintiff's intestate. After the complaint was filed the defendant, Richmond Cedar Works, filed a petition for removal together with a good and sufficient bond as provided by statute.

From the order of removal made by *Sinclair, J.*, the plaintiff appealed.

W. L. Whitley for plaintiff.

Thompson & Wilson for defendant Richmond Cedar Works.

BROGDEN, J. The sole question presented by the record is whether or not this cause is removable, and the answer to this question depends upon the construction of the complaint and the determination of whether or not the petition is sufficient to defeat the jurisdiction of the State court. The petition for removal rests upon two contentions:

(1) That the controversy is separable.

(2) That there is a fraudulent joinder of a resident defendant.

The pertinent decisions of this Court and of the Federal Courts are to the effect that the complaint is the basis for determining the question of separability: *Timber Co. v. Ins. Co.*, 190 N. C., 801; *Hollifield v. Tel. Co.*, 172 N. C., 714; *Crisp v. Lumber Co.*, 189 N. C., 733; *Railway Co. v. Thompson*, 200 U. S., 206; *Ill. Central R. R. Co. v. Sheegog*, 215 U. S., 308.

It is established law that the complaint is the sole basis for determining the nature of the cause of action against the various defendants and that a joint tort is not separable: *Hough v. R. R.*, 144 N. C., 692; *Crisp v. Lumber Co., supra; Timber Co. v. Ins. Co., supra; Ill. Central R. R. Co. v. Sheegog, supra.*

An action in tort is joint or several as the pleader may choose to make it, and a defendant has no right to put asunder as several, an action which the plaintiff has elected to make joint.

The pertinent allegations of the complaint are in substance as follows:

(1) That there was an agreement between the nonresident defendant, Richmond Cedar Works, and the resident defendant, Lonnie Spruill, whereby the apparent relationship of independent contractor was established, but that this was a scheme or device and not in good faith, to enable the Cedar Works to escape liability for injury to employees, and that the Cedar Works furnished supplies and equipment to the defendant, Spruill, to enable him to carry out the logging operations described in the complaint.

(2) That the Richmond Cedar Works, the nonresident defendant, was negligent in failing to exercise ordinary care to select a reasonably competent and careful independent contractor.

(3) That in June, 1925, the said Peter Fenner, Jr., while in the discharge of the duties assigned him in the course of his employment, was killed by the negligence of the defendants in cutting down a tree and causing it to fall directly across the track where the deceased was engaged in the discharge of his duties, and that the death of the plaintiff was caused solely by the recklessness and negligence of the defendants in their failure to exercise ordinary care, to furnish a reasonably safe place to perform the duties required and in failing to exercise ordinary care in selecting reasonably suitable and skillful agents and employees upon the work, and failing to instruct the deceased and to promulgate and enforce proper and suitable rules for the prosecution of the work.

It is apparent, therefore, that a joint tort is alleged in the complaint against both defendants. In *Hough v. R. R.*, 144 N. C., 692, *Justice Walker,* in summarizing the principles deduced from the decisions of this Court and of the Supreme Court of the United States, sets out the proposition thus:

"An action in tort is joint or several as the pleader may choose to make it, unless the defendants were sued jointly as a device and with a fraudulent purpose of defeating the right of removal, when in fact no cause of action existed against the resident, and the assertion of his liability to the plaintiff is a mere sham or pretense. *But this must be alleged and proved by the defendant in his petition for the removal of the cause.*"

The nonresident defendant, however, takes the position that if the cause is not separable there has been a fraudulent joinder of the resident defendant, Lonnie Spruill, and for this reason the action should be removed to the District Court. It therefore becomes necessary to determine the essential elements of fraudulent joinder, or in other words, to determine what constitutes fraudulent joinder.

In the case of *Chesapeake and Ohio R. R. Co. v. Cockrell,* 232 U. S., 146, the Court points out the elements of fraudulent joinder as follows: "So, when in such a case a resident defendant is joined with the nonresident, the joinder, even although fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal; but the showing must consist of a statement of facts, rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the 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.*" It has been further held that the joinder is not without right or made in bad faith unless it was without any reasonable basis. *Chicago Rock Island Ry. v. Whiteaker,* 239 U. S., 425.

So that, in order for the petitioning defendant to work a removal on the ground of fraudulent joinder, the petition must allege and prove that the joinder is without right, made in bad faith, and without any reasonable basis, and that the statement of facts constituting the fraudulent joinder must be full, concise and explicit to such degree as to compel the conclusion that the resident defendants were joined in bad faith.

The State court, under the law, must assume that the facts set out in the petition are true, but it has jurisdiction to determine the question of their sufficiency. The petition alleges "that your petitioner furnished specifications for said work and hauled the iron which belonged to it into the woods." It does not appear what these specifications were or what effect, if any, they had in determining the control of the work. It is also alleged in the petition that the defendant Spruill constructed said logging railroad and switches at a fixed contract price per yard and that the employees of said Spruill were "paid out of the contract price paid him for said work." While it is true the petition alleges that the defendant Spruill was "freed from any

superior authority in it to say how the specified work should be done," and further "that said Spruill did the work according to his own judgment and methods and without being subject to your petitioner except as to the result of the work with respect to its compliance with the specifications when completed," yet as to whether these are deductions of the pleader or a statement of facts depends upon the terms of the contract existing between the defendants. If deductions of the pleader, they are not sufficient. In the absence of a full, concise and direct statement of the terms of the contract existing, we are unable to ascertain from an inspection of the petition whether they are facts or deductions, and the burden of showing this, from the petition, is upon the defendant.

As the case has not been tried upon its merits, we deem it inadvisable, in fairness to the litigants, to discuss the principles involved in the law of independent contractor. We are of the opinion and so hold that the petition does not meet the requirements of the law necessary to effect a removal. Therefore, the order of removal is

Reversed.

STATE v. LEN LASSITER AND DENNIS BALLARD.

(Filed 17 February, 1926.)

1. Evidence—Hearsay—Declarations.

The testimony of a witness is hearsay and incompetent when its credibility depends upon the credibility of another, who is not a witness in the case, and the statement has not been made in the presence of a party to the action whose interest is thereby prejudiced.

2. Same—Corroborative Testimony.

Incompetent hearsay evidence cannot be rendered competent as corroborative, when contradictory of the testimony it is offered to corroborate.

3. Same—Principal and Agent.

In order to render competent declarations of a supposed agent, the agency must be shown *aliunde*.

CRIMINAL ACTION tried by *Cranmer, J.*, at March Term, 1925, of GATES.

From a judgment imposing a prison sentence the defendant Ballard appealed. New trial.

The defendants, Len Lassiter and Dennis Ballard, were indicted for offering a bribe to one J. A. Eason, a justice of the peace of Gates County. The said justice of the peace issued a warrant against the de-

fendant, Dennis Ballard, charging the possession and sale of liquor in October or November, 1924. While the case was pending before said justice of the peace the State contends that the defendant, Ballard, through Len Lassiter, approached the witness, J. P. Blanchard, who clerked in the store of Eason, and told Blanchard "that Ballard had requested him (Lassiter) to deliver a message to Mr. Eason and tell Eason that if he would dismiss the case against Ballard that Ballard would pay him one hundred dollars. Ballard was not present at the time Lassiter made this statement to Blanchard, the clerk of Eason, and Eason was not present, having gone to Norfolk on business. The only substantive evidence offered at the trial was the testimony of Len Lassiter, which is as follows: "I live in Gates County and know the defendant, Ballard. I live some distance from him. His home was raided by officers looking for whiskey. A warrant was issued for him by Mr. Eason. The trial was set for Saturday. On Wednesday before the trial Ballard was passing my home and I hailed him and had him to take a barrel of sweet corn to the station to be shipped to Norfolk. While there I told Ballard I did not believe he was guilty of having liquor for sale. I told Ballard that I thought it was a case that a justice could dispose of. On Thursday before the trial I was in Gatesville and went to see Mr. Eason. He was not at home. I saw Mr. Blanchard and asked him about Mr. Eason. Blanchard asked me if I wanted to see him about anything particularly, and I told him no, that Dennis Ballard had a case to be tried on Saturday and wanted to find out from Mr. Eason if the case could be disposed of by compromise or payment of a fine of fifty or one hundred dollars. On Saturday, the morning of the trial, I again saw Mr. Blanchard and asked if he had seen Mr. Eason, at which time he said that he had, and that Mr. Eason said it was not a matter he could dispose of. Ballard was not present. He never gave or offered me any money or any other thing of value. I had no intention of bribing Mr. Eason or doing any wrong. Ballard did not know that I went to Mr. Blanchard or Mr. Eason. I went as a friend to the negro, believing at the time it was a case that the justice had final jurisdiction over, and for no other purpose."

Thereupon the State offered J. P. Blanchard as a witness, and he was permitted to testify that Lassiter told him (Blanchard) to tell Eason that if he (Eason) would dismiss the case against Ballard that Ballard would pay Eason one hundred dollars. The defendant, Ballard, objected to this evidence. The objection was overruled, the court stating that the testimony was admitted for the sole purpose of corroborating the witness Lassiter.

The State also offered J. A. Eason, who was permitted to testify that Blanchard told him that Lassiter had told Blanchard "that Dennis Bal-

lard said that if he (Eason) would throw the case on the charge of liquor against Ballard out of court that Ballard said he would pay Eason one hundred dollars, and that he (Lassiter) knew it would be paid." The defendant, Ballard, objected to this testimony. The objection was overruled. The court admitted the testimony for the sole purpose of corroborating the testimony of the witnesses, Blanchard and Lassiter.

The defendant contends that the testimony objected to was hearsay and incompetent. The State contends that the testimony was competent not as substantive, but as corroborative evidence.

Attorney-General Brummitt and Assistant Attorney-Generals Nash and Ross for the State.

Bridger and Eley for defendant.

BROGDEN, J. Hearsay evidence is defined in *King v. Bynum,* 137 N. C., 495, as follows: "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." In the case of *Mima Queen v. Hepburn,* 7 Cranch, 290, *Chief Justice Marshall* held the principle to be that hearsay evidence is incompetent to establish any specific fact in its nature susceptible of being proved by witnesses who speak from their own knowledge. It is a rule of evidence that hearsay is in its own nature inadmissible, that this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground of its exclusion. Its intrinsic weakness, its incompetence to satisfy the mind of the existence of the fact, and the fraud that might be practiced under its cover, combine to support the rule that "hearsay evidence" is totally inadmissible. *Barker v. Pope,* 91 N. C., 165; *Redman v. Roberts,* 23 N. C., 479; *Daniel v. Dixon,* 161 N. C., 377; *S. v. Reid,* 178 N. C., 745; *Merrill v. Whitmire,* 110 N. C., 367. The inherent vice of hearsay testimony consists in the fact that it derives its value not from the credibility of the witness himself, but depends upon the veracity and credibility of some other person from whom the witness got his information.

It is apparent therefore that the testimony of Blanchard and Eason as to declarations of Lassiter, not in the presence of the defendant, is incompetent and constitutes prejudicial error.

However, it is urged that this testimony was admitted by the court not as substantive but as corroborative testimony. What, therefore, is corroborating testimony? Black's Law Dictionary defines corroborate as follows: "To strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence." Corroborating evidence is sup-

plementary to that already given and tending to strengthen or confirm it. *S. v. Mongeon,* 108 N. W., 554; *Radcliffe v. Chavez,* 110 Pac., 701.

If the testimony of Blanchard and Eason is not competent as substantive evidence, it is not rendered competent because it tends to corroborate some other witness. *Holt v. Johnson,* 129 N. C., 138; *S. v. Springs,* 184 N. C., 768. Indeed, the evidence of Blanchard and Eason in nowise tends to strengthen or confirm the testimony of Lassiter or add to its weight or credibility, but on the contrary the testimony given by them tends to destroy the credibility of Lassiter and to greatly reduce the weight of his testimony by reason of the fact that both Blanchard and Eason unequivocally contradict Lassiter. In no aspect of the law of evidence can contradictory evidence be used as corroborating, strengthening or confirming evidence.

It is further urged that Lassiter was the agent of the defendant, Ballard. There was no proof of agency disclosed in the record except the mere declaration of the alleged agent. It is a rule of universal application in this jurisdiction that agency cannot be proved by the mere declaration of the agent. Lockhart Handbook of Evidence, sec. 154; *Summerrow v. Baruch,* 128 N. C., 202; *Daniel v. R. R.,* 136 N. C., 517; *Hunsucker v. Corbitt,* 187 N. C., 503. Of course, the agent may testify under oath as to the agency. *Sutton v. Lyons,* 156 N. C., 3.

However, Lassiter, the alleged agent, denied the agency under oath, and there was no other proof thereof except his declarations to third parties in the absence of defendant.

Upon the whole record, therefore, for the errors indicated, there must be a

New trial.

STATE v. MARY HOWARD AND ERNEST W. HARTSELL.

(Filed 17 February, 1926.)

Criminal Law—Evidence—Participation—Nonsuit.

Evidencce that the defendant was in the company of others who burglarized a store, and participated or aided therein while waiting on the outside during the time when the felonious act was committed, is sufficient to deny defendant's motion as of nonsuit, the jury to pass upon and determine its weight and credibility.

APPEAL by defendants from *Calvert, J.,* at November Term, 1925, of PERQUIMANS. No error.

From judgment upon verdict that defendants are guilty of burglary in the second degree, as charged in the indictment, defendants appealed to the Supreme Court.

STATE *v.* HOWARD.

Attorney-General Brummitt and Assistant Attorney-General Bailey for the State.

Carl Weigand and McMullan & LeRoy for defendants.

PER CURIAM. Defendants rely chiefly upon their appeal to this Court upon their assignment of error based upon exception to the refusal of the court to allow their motion for judgment as of nonsuit at the close of all their evidence. We have read the evidence with care, and cannot sustain this assignment of error. Defendants admit that they were present at the time the dwelling-house of the State's witnesses was broken into and entered by Lewis Powell and Sam Lougee, who had accompanied them in an automobile from Norfolk to the home of Townsend Chappell in Perquimans County, North Carolina; that both Powell and Lougee, after entering the house, about 10 o'clock, during the nighttime, while Townsend and wife—the only occupants of the house—were at the store nearby, where they had gone at the request of defendants, left with them, in the automobile and rode with them to Suffolk, Va., where they were all arrested. It is not contended by the State that these defendants entered the house, but it is contended that they entered into a conspiracy with Powell and Lougee, by which they were to get Chappell and his wife out of the house, into the store, so that Powell and Lougee could break and enter into the dwelling-house during their absence for the purpose of stealing the money of Chappell and his wife. There was sufficient evidence to be submitted to a jury tending to sustain this contention. It is true that there is evidence tending to establish facts which contradict and rebut inferences and conclusions which the State contended arose upon all the evidence, and that Sam Lougee testified that neither of the defendants knew of the purpose of Powell and himself to break into and steal from the house of the Chappells. The evidence tending to show a knowledge by defendants of the purpose of their companions to commit the crime, and their participation in the commission of the crime is sufficient to raise more than a suspicion or conjecture of their guilt. It was properly submitted to the jury. It is the function of the jury to determine the credibility of testimony, and the probative force of evidence.

The evidence admitted over the objection of defendants was competent for the purpose of identification. The fact that defendants might have been prejudiced before the jury by this evidence, or that arguments were made to the jury by the solicitor upon this evidence which might have prejudiced their defense, does not render the evidence incompetent. Assignments of error based upon exceptions to the rulings of the court upon defendants' objections to this evidence cannot be sustained. There is

No error.

J. W. WATTS v. J. G. STATON ET AL.

(Filed 17 February, 1926.)

Appeal and Error — Fragmentary Appeals — Judgments — Dismissal— Clerks of Court—Statutes.

An appeal to the Supreme Court on the question as to whether the clerk of the court had the statutory power to determine his authority to permit the plaintiff to file a prosecution bond upon defendant's motion to dismiss, which was unexercised, is not a final judgment, and the appeal will be dismissed as fragmentary.

APPEAL by defendants from *Barnhill, J.*, at Chambers in Rocky Mount, 22 August, 1925. From MARTIN.

From a refusal to dismiss this action, together with several others of a similar character which were consolidated for the purposes of the present motion, the defendants appeal.

Lamb & Coble and Winston & Matthews for plaintiff.

Martin & Peel, Dunning & Moore and Stephen C. Bragaw for defendants.

STACY, C. J. The defendants, appearing specially, moved before the clerk to dismiss this action and several others, consolidated for purposes of the present motion, upon the ground that the individual sureties on the plaintiffs' prosecution bonds had not justified before the clerk as required by Rule 2 of the rules of practice in the Superior Courts (185 N. C., 807), in fact, that there were no justifications of said bonds at all. The plaintiffs in the several suits resisted the motion and offered to have their individual bondsmen justify before the clerk then and there, agreeable to the requirements of the rule.

Some question having arisen as to whether the clerk had the power to allow the justifications, after summonses had been issued and complaints filed, "it was agreed by both sides that all that should be decided was whether the clerk had the right to allow such justifications; whether the act was mandatory or not." In accordance with this agreement, the clerk decided that he "had the right to act in the premises and to allow said bonds to be justified" or not, in his discretion, though his discretion has not yet been exercised, and thereupon denied the motion to dismiss, holding that if his authority to decide the question be sustained, he would then require the sureties to justify and overrule the motion to dismiss or deny the plaintiffs the right to have their individual bondsmen justify and sustain the motion to dismiss.

On appeal to the judge of the Superior Court, the clerk's judgment was affirmed and the causes remanded with direction that the clerk proceed to act in the matters.

It is clear that this appeal was prematurely taken and must be dismissed. *Christian v. R. R.,* 136 N. C., 321; *Cooper v. Wyman,* 122 N. C., 784. No appeal lies from a refusal to dismiss an action under circumstances like the present. *Bradshaw v. Bank,* 172 N. C., 632; *Williams v. Bailey,* 177 N. C., p. 40. The question sought to be presented is purely academic. The clerk's judgment was in no sense final; he simply decided that he had the power to act, but has not yet acted; his judgment determined no rights of the parties.

Appeal dismissed.

JOHN R. MERCER AND J. F. PROCTOR ET AL. v. JOHN B. BULLOCK ET AL.

(Filed 17 February, 1926.)

Landlord and Tenant—Leases—Rents—Mortgages—Purchaser at Foreclosure Sale.

The purchaser at a foreclosure sale of lands subject to a lease is entitled to all rents becoming due under the lease from and after the time of his purchase.

APPEAL by interveners from *Cranmer, J.,* at September Term, 1925, of EDGECOMBE.

Civil action by landlord to recover of his tenant rent for the year 1923. Purchasers at a mortgage sale intervened and set up title to the rent, and from judgment apportioning same between plaintiffs and interveners, the latter appeal, assigning errors.

E. B. Grantham for plaintiff.
Battle & Winslow for interveners.

STACY, C. J. During the year 1923, the defendant was a tenant on plaintiffs' farm, the rent for which amounted to $900 and became due and payable 1 November of that year. On 10 September, 1923, the farm in question was sold under mortgage, and the interveners, trustees of the estate of R. H. Ricks, became the purchasers at said sale, deed for same being delivered to them on 21 September, 1923, and duly registered seven days thereafter. Who is entitled to the rent which fell due 1 November, 1923, the plaintiffs or the interveners? This is the question for decision.

It is established by the decisions in this and other jurisdictions that, in the absence of a statute governing the matter, when mortgaged lands are in the possession of a tenant, and a foreclosure is had during the

term of the lease, nothing else appearing, the mortgagor is entitled to collect all the rent that is due at the time of sale, and the purchaser is entitled to collect all that subsequently falls due. *Page v. Lashley,* 15 Ind., 152. The title to the rent is dependent on that of the property, hence a sale of the demised premises passes title to the accruing rent and gives the purchaser the right to collect the rent falling due after the purchase. *Mixon v. Coffield,* 24 N. C., 301; *Lewis v. Wilkins,* 62 N. C., 307; *Kornegay v. Collier,* 65 N. C., 69; *Rogers v. McKenzie, ibid.,* 218; *Lancashire v. Mason,* 75 N. C., 459; *Holly v. Holly,* 94 N. C., 674; *University v. Borden,* 132 N. C., p. 486; *Dixon v. Nicolls,* 39 Ill., 372; *Chisholm v. Spullock,* 87 Ga., 665.

Sections 2345 and 2346 of the Consolidated Statutes, relating to the apportionment of rent where the lease or right to payment is terminated by death or other uncertain event, have no application to the facts of the instant case. *Spruill v. Arrington,* 109 N. C., 195.

Nor is the case of *Pate v. Gaitley,* 183 N. C., 262, at variance with our present position, for there the rent accruing after sale was the subject of specific agreement between the parties.

There was error in apportioning the rent between plaintiffs and interveners; no part of it had accrued at the time of the sale under foreclosure; it all fell due, under the jury's finding, after the interveners became the owners of the land; they are entitled to the rent falling due after their purchase. Upon the verdict and facts agreed, the interveners are entitled to judgment for the entire rent.

Error.

JOHN L. ROPER LUMBER CO. v. COPPERSMITH ET AL.

(Filed 17 February, 1926.)

1. Injunction—Equity—Insolvency.

A restraining order for continuous trespass on the lands of another does not necessarily require that plaintiff allege and show insolvency of defendant.

2. Same—Trespass—Public Benefit—Injury—Damages.

Where the injury is not irreparable or comparatively insignificant, the courts will not interfere by injunction against the continuance of an enterprise of public interest, pending the final determination of an action for trespass.

APPEAL by plaintiff from an order of *Bond, J.,* modifying the terms of a restraining order previously granted, heard at April Term, 1925, of CAMDEN. Affirmed.

Thompson & Wilson for plaintiff.
W. I. Halstead for defendant.

ADAMS, J. The plaintiff, claiming to be the owner of a tract of land described in the complaint, alleges that the defendants have wrongfully entered thereon, have constructed a logging road, and have removed valuable timber, thereby causing the plaintiff irreparable damage. The defendants filed an answer, joining issue on the question of title or location. On 31 March, 1925, Judge Bond issued an order returnable in April by which he restrained the defendants from entering or in anywise trespassing on the land described in the complaint pending further orders. On the return day this order was modified and the defendants were permitted to operate the road already constructed. The plaintiff excepted and appealed.

It appears from the record that there is a controversy founded in good faith as to the plaintiff's title to the land on which the railroad is situated and as to the plaintiff's legal right to interfere with the defendants' operation of the enterprise; or if a technical trespass can be shown that it will probably be so slight as to preclude the exercise of the equitable jurisdiction of the court. To restrain the use of the railroad would probably result in serious damage to the defendant, and the courts are not alert to prevent the operation of a public utility or to suspend the business of a private industry pending the determination of the plaintiff's rights, when the alleged injury is not irreparable. While the insolvency of the defendants need not be shown if the trespass is continuous in its nature, it is against the policy of the law to interfere by preliminary injunction with industries and enterprises that tend to develop the country and its resources. *Griffin v. R. R.*, 150 N. C., 312; *Lumber Co. v. Wallace*, 93 N. C., 23. The judgment is

Affirmed.

F. L. VOLIVA HARDWARE CO. v. W. C. KINION.

(Filed 17 February, 1926.)

Contracts—Bills and Notes—Chattel Mortgages—Fraud—Parol Evidence.

Where the validity of a note secured by chattel mortgage is attacked for fraud in an action thereon, parol evidence is competent to prove the allegation, and is not incompetent under the objection that it tends to vary or contradict the writing.

APPEAL by defendant from *Calvert, J.*, at October Term, 1925, of BEAUFORT.

Civil action to recover on a note executed by defendant to plaintiff and to foreclose a chattel mortgage given to secure the payment thereof.

Upon denial of liability, based on an allegation of fraud in procuring the execution of said note and mortgage, there was a verdict and judgment for plaintiff, from which defendant appeals, assigning errors.

J. D. Paul, Tooly & McMullan and Manning & Manning for plaintiff.
Thomas S. Long and Wiley C. Rodman for defendant.

STACY, C. J. On 8 June, 1922, plaintiff held a judgment against the defendant for $200 upon which execution had been issued and was then in the hands of the sheriff of Beaufort County. Plaintiff testified that, in consideration of withdrawing the execution and as further security for its judgment debt, the defendant executed his note, on the date above mentioned, due 11 November thereafter, for $220.53, being the amount of said judgment with interest and costs, together with a chattel mortgage to secure the payment of same at maturity. This suit is to recover on said note and to foreclose the chattel mortgage given as security therefor.

The defendant alleges in defense and by way of counterclaim that the real consideration for said note and mortgage was the agreement on the part of the plaintiff to cancel its $200 judgment, which at that time was a lien against defendant's land, and thus enable him to negotiate a loan of sufficient amount to care for all his obligations including several mortgages on his farm, and that by reason of plaintiff's failure and refusal to carry out its agreement—which defendant alleges was fraudulently made as a means to induce him to execute the note and mortgage now in suit—the defendant was unable to negotiate the loan which he otherwise would have effected, and as a consequence of plaintiff's fraud and deceit the defendant alleges that he has lost several thousand dollars in not being able to save his farm from sale under mortgage, etc.

Most of the evidence offered by the defendant to show his defense and counterclaim was excluded on the hearing for the reason, we apprehend, that it was in conflict with the written instrument, and therefore thought to be incompetent, resting as it does in parol. *DeLoache v. DeLoache,* 189 N. C., p. 399; *Exum v. Lynch,* 188 N. C., 392. The rule that no verbal agreement between the parties to a written contract, made before or at the time of the execution of said contract, is admissible to vary its terms or to contradict its provisions (*Ray v. Blackwell,* 94 N. C., 10), well established and controlling in proper cases; (*Walker v. Venters,* 148 N. C., 388), has no application where the validity of the written instrument, as here, is challenged on the ground of fraud. *Furst v. Merritt,* 190 N. C., 397. The instrument itself is the subject of dispute.

There was error in excluding the defendant's evidence, in consequence of which a new trial must be awarded, and it is so ordered.

New trial.

JAMES B. WEBB AND WILLIAM H. PENNY v. MOURNING BATTLE.

(Filed 17 February, 1926.)

1. Deeds and Conveyances—Inconsistent or Vague Descriptions in Part—Reference to Former Deeds—Intent.

Where in an action to recover lands the right of a party depends upon a deed in his chain of title wherein a vague boundary given does not include the *locus in quo*, but in this deed reference is made to a description in a former deed in his chain of title, which does definitely include the *locus in quo*, the deed with these seeming contradictions will be interpreted to ascertain the intent of the parties, and effect will be given to the reference to the former deed, in determining the question of adverse possession under seven years color from a common source.

2. Same—Evidence—Location of Locus in Quo—Questions for Jury.

Where a definite call in a deed renders certain another and vague call therein, it is for the jury to determine whether the *locus in quo*, under the evidence, falls within the lands described in the conveyance.

3. Same—Lappage—Adverse Possession—Limitation of Actions—Superior Title—Burden of Proof.

Where the *locus in quo* is contained in a lappage in the description of the deeds of rival claimants, and one of them claims title by adverse possession under color, and the other shows a superior claim under his chain of title from a common source, the possession of the former is deemed to be under the title of the latter, and the burden is upon him to show title by adverse possession as claimed by him.

APPEAL by plaintiff from *Cranmer, J.*, at October Term, 1925, of NASH.

The complaint consists of the usual allegations in an action to recover land. The answer joins issue and sets up the defense of possession for thirty years under known and visible lines and boundaries and for twenty-one years and for seven years under color of title. Verdict:

1. Are the plaintiffs the owners of and entitled to the possession of the land described in the complaint? Answer: No.

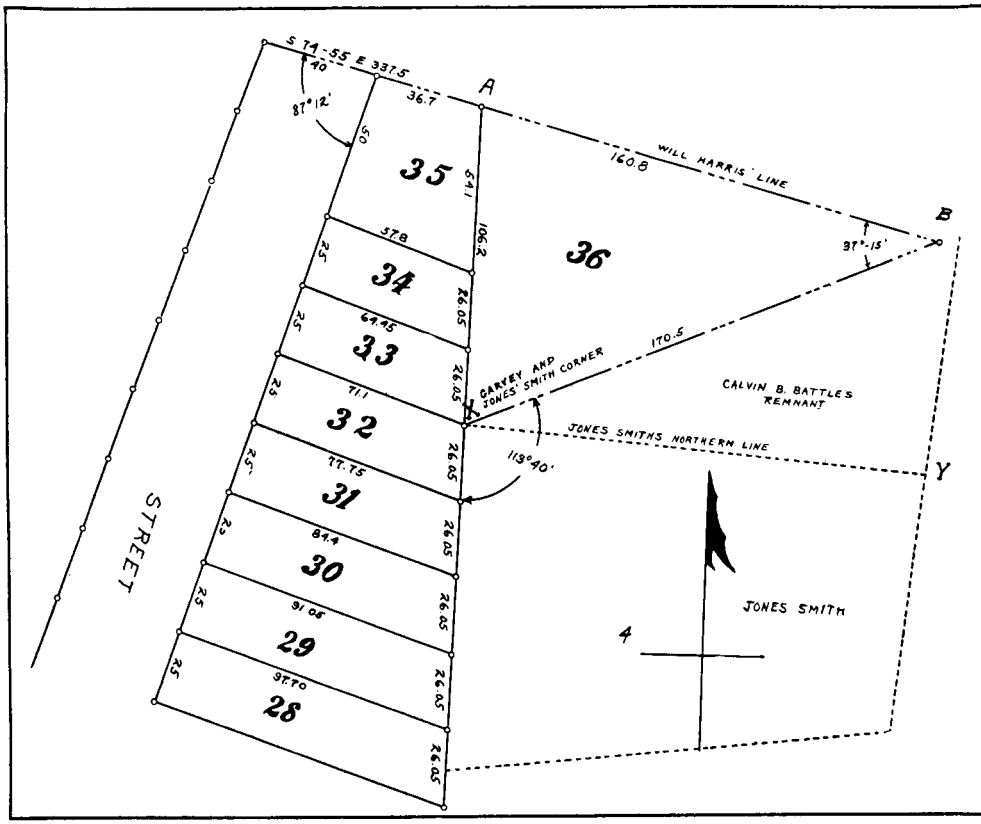
2. Does the defendant unlawfully withhold possession of said land? Answer: .....

Judgment for the defendant; appeal by plaintiffs upon errors assigned.

Battle & Winslow for appellants.

ADAMS, J. The plaintiffs brought this suit to recover the tract represented on the plat by the letters ABXA. The defendant claims to be the owner of the lot designated by the letters YBAXY; but the plaintiffs say that her boundaries are limited by YBXY. On the trial the plaintiffs offered record evidence tending to show that in 1855 William S.

Battle was the owner of a large tract of land including the *locus in quo;* that in 1865 he divided the tract into two parcels, conveying one part to T. H. Griffin and the other to Willie B. Ricks; that by mesne conveyance the plaintiffs acquired title under Griffin to ABXA and the defendant under Ricks to YBXY. After putting in evidence their own chain of title the plaintiffs, for the purpose of showing a common source,



introduced the deeds under which the defendant claims. The description in the defendant's deed is as follows: "Adjoining the land of Will Harris and Jones Smith and others, bounded as follows: Being in the section of Rocky Mount, known as Little Raleigh, and beginning at a stake in the southern line of Grace Street, Jones Smith corner; thence in a northern direction with the western line of Grace Street, 64 feet to a stake, Will Harris corner; thence along Will Harris line 185 feet, more or less, to Garvey and Jones Smith corner; thence with Jones

Smith's northern line 120 feet, more or less, to the beginning, and being all of the land formerly owned by Calvin Battle, between the northern line of Jones Smith and the southern line of Will Harris, see deed from Jones Smith and wife to John Battle, Book 154, page 228, Nash County Registry."

The defendant contends that this description embraces YBAXY and takes in the disputed land; that the deeds under which she claims are color of title; that she and her predecessors held possession under known and visible lines and boundaries and under colorable title for seven years before the institution of the action; and that the plaintiffs are thereby barred. C. S., 428. On the other hand the plaintiffs say that the defendant's deed does not include ABXA and that the defendant could not have had color of title to this lot. These inconsistent positions require an interpretation of the defendant's deed. In *Quelch v. Futch,* 172 N. C., 316, it is said: "We have in the deed in question a description by metes and bounds in which the land in controversy is not conveyed, and also a description which refers to another deed duly recorded by book and page, which gives a definite description covering the land in controversy. It must be admitted that if the first or specific description entirely is eliminated from the deed, according to the evidence, the second or general description is sufficient, and covers the land described in the complaint. It matters not that the last description follows the warranty. The whole deed must be so construed as to give effect to the plain intent of the grantor, and the parts of the deed will be transposed if necessary. *Triplett v. Williams,* 149 N. C., 394; 13 Cyc. 627. The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should be regarded as inserted for a purpose, and should be given a meaning that would aid the description. Every part of a deed ought, if possible, to take effect, and every word to operate. A reference to another deed may control a particular description, for the deed referred to for purposes of description becomes a part of the deed that calls for it. 13 Cyc., 632; *Brown v. Rickard,* 107 N. C., 639; *Everitt v. Thomas,* 23 N. C., 252." In the defendant's deed the description by metes and bounds is followed by the phrase,—"being all the land formerly owned by Calvin Battle, between the northern line of Jones Smith and the southern line of Will Harris." If as contended by the plaintiffs, Calvin Battle, before executing his deed to Jones Smith (4 August, 1906), conveyed all the land devised to him by his father except YBXY and the northern boundary of the Calvin Battle line is XB, the words "between the northern line of Jones Smith and the southern line of Will Harris" apparently would include no land north of XB. If this be admitted or established, the next question will be whether the remaining description extends the defendant's northern line

to AB. It will be observed that two "calls" in the deed are inconsistent: —"thence along Will Harris line" and "to Garvey and Jones Smith corner." A line from B along the Harris line will not reach the Garvey and Jones Smith corner; a line from B to this corner will not run with the Harris line. If the boundaries in the defendant's deed by their terms exclude the *locus in quo* the mistaken call for the Harris line would not extend them. *Ferguson v. Fibre Co.* 182 N. C., 731. The plaintiffs insist that the defendant's lot is enclosed by three lines and is therefore triangular. As to the line YB there is no controversy; the next extends from B to the Garvey-Smith corner; and the third is between this corner and the beginning. The defendant's contention that the line should be run from B to A and thence to X would convert the triangle into a quadrilateral and would disregard the Garvey-Smith corner as the terminus of the second line. The more reasonable and the only consistent interpretation leads to the conclusion that the mistaken call, "along Will Harris line," cannot control the more definite description in the deed. The principle is thus stated by *Chief Justice Ruffin in Proctor v. Pool,* 15 N. C., 370; "It is a general rule that if the description be so vague or contradictory that it cannot be told what thing in particular is meant, the deed is void. But it is also a general rule that the deed shall be supported, if possible; and if by any means different descriptions can be reconciled, they shall be; or if they be irreconcilable, yet if one of them sufficiently points out the thing, so as to render it certain that it was the one intended, a false or mistaken reference to another particular shall not overrule that which is already rendered certain." The same writer reannounces the principle in *Mayo v. Blount,* 23 N. C., 283: "It is admitted to be a sound rule of construction that a perfect description, which fully ascertains the *corpus,* is not to be defeated by the addition of a further and false description." See, also, *Shaffer v. Hahn,* 111 N. C., 1; *Peebles v. Graham,* 128 N. C., 222; *Harper v. Anderson,* 130 N. C., 538, 540; *S. c.,* 132 N. C., 89; *Hurley v. Ray,* 160 N. C., 376, 379; *Williams v. Bailey,* 178 N. C., 630; *Dill v. Lumber Co.,* 183 N. C., 660; *Quelch v. Futch, supra.*

If it is shown that the northern boundary of the Calvin Battle land was XB at the date of his conveyance to Jones Smith, it will follow as an inference of law that the defendant's lot is bounded by the three designated lines, that is (1) the line extending from the beginning corner in the southern line of Grace Street with the western line of the street to Will Harris' corner; (2) the line running thence to the Garvey-Smith corner; and (3) the line running thence to the beginning—the location of course to be determined by the jury.

As to the title and the burden of proof the jury were instructed as follows: "The burden is upon them (the plaintiffs) to show that they

have been in possession of the land inside of the seven years, within the seven years, or that their deeds cover the land and that the defendant has not been in possession of the land within the seven years. To make it plain to you, the defendant pleads the statute of limitation and therefore the burden is upon the plaintiffs and not upon the defendant to satisfy you that they have the title to the land."

This instruction was erroneous. "It is settled that where the title deeds of two rival claimants to land lap upon each other, and neither is in the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in him who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. *Green v. Harman,* 15 N. C., 158; *Williams v. Miller,* 29 N. C., 186; *Scott v. Elkins,* 83 N. C., 424; *Dobbins v. Stephens,* 18 N. C., 5; *Smith v. Ingram,* 29 N. C., 175; *Kitchen v. Wilson,* 80 N. C., 191. But if both have actual possession of the lappage, the possession of the true owner, by virtue of his older title, extends to all not actually occupied by the other." *McLean v. Smith,* 106 N. C., 172.

The plaintiffs offered evidence tending to show a common source of title (if the defendant's deed should include the *locus in quo*) and that their claim was superior to that of the defendant. Under these circumstances it was incumbent upon the defendant to show by the preponderance of the evidence that she and those under whom she claims had held adverse possession for seven years under color of title. In *Land Co. v. Floyd,* 171 N. C., 543, the Court said: "The statute, Revisal, sec. 386, (C. S., 432), places the burden upon the defendant to show his color and adverse possession, for otherwise his occupation shall be deemed to have been under and in subordination to the legal title." *Vanderbilt v. Chapman,* 175 N. C., 11; *Shermer v. Dobbins,* 176 N. C., 547.

New trial.

NANNIE PERKINS v. DR. W. B. SHARP.

(Filed 17 February, 1926.)

1. Clerks of Court—Pleadings—Extensions of Time to File Answer—Statutes.

The jurisdiction of the clerk conferred by C. S., 505, to extend time for filing pleadings for good cause shown, may be exercised by him from time to time, when in conformity with the conditions of the statute: and *Held,* under the facts of this case, such successive orders for a period over two years from the service of the summons was within the proper exercise of the powers conferred.

2. Judgments—Motion to Set Aside—Excusable Neglect—Laches.

Where at the instance of the defendant the time for filing pleadings had been extended for more than two years from the service of the summons, under an agreement that he was to pay from time to time certain amounts to plaintiff as a compromise, and upon his failure to do so he had been duly notified that plaintiff would pursue her rights in the action: *Held*, upon defendant's failure to make the agreed payments, an entry of judgment by default upon failure to file answer to the complaint accordingly and aptly filed was not taken through defendant's surprise or excusable neglect.

3. Judgments—Pleadings—Default and Inquiry—Actions and Defenses—Damages.

Where a judgment by default has been taken by plaintiff in her action of tort, it is open to defendant to resist a recovery for the amount of damages, etc., as claimed by plaintiff, upon the inquiry.

APPEAL by defendant from *Calvert, J.*, at November Term, 1925, of PASQUOTANK. Affirmed.

Motion to set aside judgment by default and inquiry, rendered at September Term, 1925, upon the ground that the court was without jurisdiction of and that the judgment was a surprise to defendant. In her complaint filed on 9 April, 1925, plaintiff alleges a cause of action for damages resulting from malpractice of defendant, as a physician and surgeon. No answer was filed by defendant. From order denying motion, defendant appealed to the Supreme Court.

W. L. Small for plaintiff.
P. H. Bell for defendant.

CONNOR, J. Summons in this action was issued on 31 August, 1922, and served on defendant on 1 September, 1922. Before time for filing complaint had expired, a settlement of matters in controversy was agreed upon by the parties, by which defendant agreed to pay plaintiff $400, in installments of $50 each, in satisfaction of her claim for damages. It was agreed that pending the payment of said installments, no complaint should be filed by plaintiff. Upon motion of plaintiff, at the request of defendant, orders were made from time to time, by the clerk of the Superior Court, extending the time for filing complaint. The clerk was advised of the agreement of the parties, and held that good cause had been shown for each extension.

Defendant, in accordance with his agreement, paid to plaintiff, in December, 1922, the sum of $50; he has made no other or further payments. Plaintiff, through her attorney, made repeated demands on defendant for compliance with his agreement, and defendant promised

from time to time to make the payments in accordance with said agreement. In February, 1925, plaintiff's attorney notified defendant that if further payments were not made within thirty days, he would file complaint and proceed with the action. No payment having been made by defendant, complaint was filed on 9 April, 1925, pursuant to order of the clerk. At September Term, 1925, no answer having been filed, upon motion of plaintiff, judgment by default and inquiry was rendered. Defendant moved at November Term, 1925, that said judgment be set aside for that the clerk was without authority to allow the filing of the complaint after the lapse of two years, seven months and eight days from the issuance of summons, and further for that said judgment by default and inquiry was a surprise to him.

Authority is expressly conferred upon the clerk of the Superior Court, for good cause shown, to extend the time for the filing of a complaint in an action begun by the issuance of a summons returnable before him. C. S., 505. Such authority is not exhausted by one such extension; successive orders may be made by the clerk, extending the time for filing complaint, upon good cause shown for each order. The successive orders in the instant case were made at the request of defendant, who stated that the filing of a complaint in this action would injure his professional reputation. There was no error in the order of the clerk allowing plaintiff to file complaint on 9 April, 1925, although two years, seven months and eight days had elapsed since the issuance of the summons. The court retained jurisdiction of defendant, acquired by service of summons on 1 September, 1922, by the successive orders for the extension of time for filing complaint.

There was no error in the refusal of the court to set aside the judgment on the ground that defendant was taken by surprise. He was expressly notified by plaintiff's attorney that the complaint would be filed at the expiration of thirty days. He cannot complain that after indulgence for more than two years, plaintiff availed herself of her rights under the law. It does not appear that he had a meritorious defense to her cause of action; or that an opportunity now to be heard by answer would avail him. The court has adjudged that plaintiff has cause of action against defendant, as alleged in the complaint; the amount which she is entitled to recover of defendant as damages must be determined by a jury; defendant may be heard upon this issue, notwithstanding he has not filed answer.

There is no error and the order denying the motion is

Affirmed.

MRS. ALMA S. GRIFFIN v. C. M. GRIFFIN, THE NATIONAL BANK OF ROCKY MOUNT, AND J. P. BUNN, TRUSTEE.

(Filed 17 February, 1926.)

1. Dower—Inchoate and Consummate Right.

The right of dower of the wife in the lands of her husband is inchoate during his life, which becomes consummate in his widow at his death.

2. Same—Deeds and Conveyances—Mortgages—Collateral Security for Husband's Debt.

The wife by joining in her husband's mortgage given on his lands, may convey as additional security to his debt, her inchoate right of dower. C. S., 4102.

3. Same—Foreclosure.

A deed of trust given by the husband and joined in by the wife unreservedly of her inchoate right of dower, may be foreclosed under its terms and conditions to pay off the debt it secures, and completely bar the inchoate right of dower.

4. Same—Equity.

Equity will not interfere in behalf of the wife who has unreservedly joined in a mortgage on her husband's lands, to restrain the sale according to the terms of the instrument, by first ordering a foreclosure sale of the lands outside of the wife's inchoate interest, and if not sufficient, subject her interest to sale for the payment of her husband's debt.

APPEAL by defendants from *Barnhill, J.*, at January Term, 1926, of NASH. Error.

The following findings of fact and judgment was rendered by the court below:

"1. Defendant, C. M. Griffin, on 8 December, 1919, executed and delivered to defendant, J. P. Bunn, trustee, the deed in trust conveying the land mentioned in the pleadings, to secure five notes in the sum of $1,000 each, maturing on 8 December, 1920, 1921, 1922, 1923 and 1924, respectively. Said sum of $5,000 evidenced by said notes was the balance due on the purchase money for said land described in the pleadings and said trust deed was a purchase-money mortgage.

"2. The plaintiff, who is the wife of defendant, C. M. Griffin, joined in the execution of said notes as surety and likewise joined in the execution of said trust deed for the purpose of conveying her inchoate right of dower as collateral security for payment of said notes.

"3. All of said notes have been paid except the sum of $2,250, which is now due thereon, and which balance is now held by the defendant, the National Bank of Rocky Mount, a purchaser in due course for value before maturity. There are also due on said property certain taxes and street paving assessments assigned to and held by said bank.

"4. There being a default in the payment of said notes, the defendant, J. P. Bunn, trustee, at the request of the holder thereof, after due advertisement, offered the land described in said trust deed for sale at public auction in strict accord with the terms of said trust deed, on 22 December, 1925, when the defendant, the National Bank of Rocky Mount, became the last and highest bidder in the sum of $7,000.

"5. On the tenth day after said sale, and before the execution of any deed thereunder this action was instituted, and the temporary restraining order herein issued was served on the defendants.

"6. More than ten days have now elapsed since said sale and no advanced bid has been made and no order of resale has been entered by the clerk.

"Upon the foregoing facts the court being of the opinion that the plaintiff is entitled to have said land first sold subject to her dower interest so as to preserve and protect her inchoate right of dower and in so far as possible, free the same from the lien of said trust deed.

"It is ordered and adjudged that the defendants, J. P. Bunn, trustee, readvertise and resell the said property under the terms thereof, first offering for sale said land subject to plaintiff's inchoate right of dower therein; and in the event said property when so sold brings a sufficient amount to pay said debt, including costs of sale, taxes, paving assessments due, the said defendant is forever enjoined and restrained from selling or conveying plaintiff's inchoate right of dower therein. Should said land when so sold fail to bring a sufficient amount to pay the items herein enumerated, then and in that event, said trustee may forthwith at the same time and place sell the tract in fee, including plaintiff's interest therein."

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

Douglass & Douglass and Finch & Vaughan for plaintiff.
Battle & Winslow for defendants.

CLARKSON, J. *Varser, J.*, speaking to the subject of dower in *Pridgen v. Pridgen,* 190 N. C., p. 107, says: "Dower has long been a favorite of the law, ranking with life and liberty (Bacon Uses, p. 37), and showing a firm establishment in the Year Books, and probably originating from a Danish custom, 'since' as Blackstone recalls, 'according to historians of that country, dower was introduced into Denmark by Swein, the father of Canute, out of gratitude to the Danish ladies who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it is a very plain and sensible one: for the sustenance of the wife and the rearing and education

of the younger children.' Since these early times the right of dower has been highly favored by the courts. 9 R. C. L., 563; *Hodge v. Powell,* 96 N. C., 64; *McMorris v. Webb,* 17 S. C., 558; *Lewis v. Apperson,* 103 Va., 624."

The land dowable "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., 823; *Pridgen v. Pridgen, supra.* Upon the death of the husband the dower becomes consummate. During the lifetime of the husband it is inchoate. The wife, during the lifetime of her husband, by proper conveyance, can alienate her inchoate right of dower. The wife joining with her husband in deed of conveyance and privy examination. C. S., 4102.

It was argued here that the learned and painstaking judge in the court below, who heard this case, based his decision upon *Chemical Co. v. Walston, supra,* and held "that the inchoate doweress was entitled to have the trustee first offer the land for sale, subject to her inchoate dower, to ascertain if the mortgage could be retired when so sold; and, in the event of the land failing to bring enough when so sold, it might be sold free from dower."

From a careful reading of the *Walston case, supra,* it will be noted that case was a controversy without action. All parties were before the Court and the dower was consummate, and *Stacy, C. J.,* carefully sets forth the rights of the widow. At p. 824, it is said: "It therefore follows that in determining the widow's dower, the value of the land, without deducting the mortgage debt, would form the basis of computation. *Caroon v. Cooper,* 63 N. C., 386; *Creecy v. Pearce,* 69 N. C., 67; *Gwathmey v. Pearce,* 74 N. C., 398; *Askew v. Askew,* 103 N. C., 285. The widow's dower is not liable for the debts of her husband, except as she may charge the same by conveying her right of dower as collateral security for said debts or any part thereof. When a wife executes a mortgage with her husband she thereby conveys her dower in the property described therein as security for the payment of the debt mentioned in the mortgage. *Gore v. Townsend,* 105 N. C., 232." It will be further observed that in the *Walston case,* the mortgagee was not undertaking to sell under the power, but by foreclosure in equity. All parties were before the Court at the instance of the mortgagee, and the widow was claiming her dower then consummate. This is not our case.

In the present case, the extraordinary remedy of injunction, is sought by plaintiff to stop the doing of a thing authorized by her to be done. In accordance with the statute she joins in a conveyance with her husband. From the finding of facts: "The plaintiff, who is the wife of

defendant, C. M. Griffin, joined in the execution of said notes as surety and likewise joined in the execution of said trust deed for the purpose of conveying her inchoate right of dower as collateral security for payment of said notes."

In the deed in trust to J. P. Bunn, trustee, she contracts that "if said indebtedness or any part thereof, shall not be paid in full with all interests at maturity," etc., the holder of any unpaid notes (now the plaintiff) "shall advertise said land for thirty days at the courthouse door in Nash County and three other public places in said county, and sell the same at a time and place named in the notice of advertisement at public auction, for cash (at which sale the owner of said notes shall have full power to bid) and out of the proceeds pay, first whatsoever may be due on notes due 8 December, 1920, 21, 22 and 23, and then note due 8 December, 1924, and all expenses of selling, including five per cent commission on the gross proceeds of sale of all property herein described for his services, and the surplus, if any, pay to the said C. M. Griffin."

In the finding of facts this was done "in strict accord with the terms of said trust deed," etc.

Plaintiff had the right to make this contract in the manner provided by law, which was done and contracted that her inchoate dower right could be sold, which was done in accordance with the contract. She now asks that this contract be rescinded and the land be sold subject to her inchoate dower right in the very teeth of her agreement that the whole be sold. We cannot so hold. It nowhere appears in the record that the land is susceptible of division and asked to be sold in parcels and then as a whole. It appears that it is a city house and lot, and from the dimensions incapable of division for beneficial purposes. What rights she has in the surplus after the payment of the debts is not before us, although she authorizes the trustees to pay the surplus to her husband.

In *Leak v. Armfield,* 187 N. C., p. 628, it was said: "In *Lea v. Johnson,* 31 N. C., 19, *Pearson J.,* said: 'Hard cases are the quicksands of the law. In other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law.' In *Cureton v. Moore,* 55 N. C., 207, it was said: 'A court of equity can no more relieve against "hard cases" unless there be some ground of equity jurisdiction, than a court of law, for both courts act upon general principles. Equity, as well as law, is a science, and does not depend upon *the discretion* of the court entrusted with equity jurisdiction, or the vague ideas that may be entertained as to hard cases.' . . . It may be 'hard measure' to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously

hamper business. Those interested in the equity of redemption have the right of paying off the first lien when due. We can see no equitable ingredient in the facts of this case. The mortgage is not a 'scrap of paper.' It is a legal contract that the parties are bound by. The courts, under their equitable jurisdiction, where the amount is due and ascertained—no fraud or mistake, etc., alleged—have no power to impair the solemn instrument directly or indirectly by nullifying the plain provisions by restraining the sale to be made under the terms of the mortgage."

For the reasons given, there was error in the judgment below.

Error.

STATE v. NATHAN B. DAIL.

(Filed 17 February, 1926.)

Receiving Stolen Goods—Larceny—Evidence—Connected Crimes—Criminal Law.

Under an indictment charging defendant with stealing an automobile, and with receiving same with a felonious intent, knowing at the time it was feloniously stolen, evidence that he and his associates who were stopping at his home, and from whom he had received it, used it under a plan then formed to burglarize a store, is competent to disprove the defendant's good faith in receiving the automobile under the circumstances, and to show his guilty knowledge and intent in the matter.

APPEAL by defendant from *Calvert, J.*, at November Term, 1925, of PERQUIMANS.

Criminal prosecution tried upon an indictment charging the defendant with the larceny of an automobile, the property of one Cahoon, valued at $300, and with receiving same, with a felonious intent, knowing at the time that it had been feloniously stolen or taken.

From an adverse verdict and judgment pronounced thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Ross for the State.

Herbert Leary and Ward & Grimes for defendant.

STACY, C. J. There was ample evidence offered on the hearing to warrant the jury in finding, as it did, that the defendant, with a felonious intent, received the automobile in question, the property of one

Cahoon, valued at $300, from Sam Lougee and Lewis Powell, knowing at the time that the same had been feloniously stolen or taken and carried away by them. C. S., 4250; *S. v. Caveness,* 78 N. C., 484; *S. v. Hayes,* 187 N. C., 490.

There was evidence that the same persons who stole the automobile, used it in burglarizing the residence of Townsend Chappell, a blind merchant of Perquimans County. The defendant herein was also under indictment, charged with being an accessory to said burglary. Receipt of the automobile was admitted by the defendant, but according to his contention, he bought the same in good faith and had no reason to believe that it had been stolen. The State, on the other hand, contended that the two men who stole the automobile were stopping at the home of the defendant, and while they were negotiating in regard to its sale, plans were then being made and perfected by the three to burglarize the Chappell home in order to get some money. The two transactions or plots were thus inseparably connected, and evidence of the burglary was offered by the State to disprove the defendant's claim of good faith or to show his guilty knowledge and intent in buying and receiving the automobile.

The defendant stressfully contends that error was committed to his prejudice in permitting the State to offer this evidence, over objection, of a separate offense, tending to show that a burglary had been perpetrated in the community and in connection with which the defendant was then under indictment, but not on trial, as an accessory before the fact to such principal felony. C. S., 4175.

It is undoubtedly the general rule of law 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. Adams,* 138 N. C., 688; *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,* or to make out the *res gestæ,* or to exhibit a chain of circumstantial evidence in respect to the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. *S. v. Simons,* 178 N. C., 679. 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 exception to the rule has been 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, as reported in 62 L. R. A., 193-357.

We think the evidence, above mentioned, and which forms the basis of defendant's main assignment of error, clearly falls within the exception to the rule and was properly admitted. *S. v. Miller,* 189 N. C., 695; *S. v. Murphy,* 84 N. C., 742.

The other exceptions are without special merit. We have found no reversible error on the record, and hence the verdict and judgment will be upheld.

No error.

STATE v. NATHAN B. DAIL.

(Filed 17 February, 1926.)

(For Digest, see *S. v. Dail, ante,* 231.)

APPEAL by defendant from *Calvert, J.,* at November Term, 1925, of PERQUIMANS.

Criminal prosecution tried upon an indictment charging the defendant with being an accessory before the fact of burglary in violation of C. S., 4175.

From an adverse verdict and judgment pronounced thereon, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Ross for the State.

Herbert Leary and Ward & Grimes for defendant.

STACY, C. J. The instant case is controlled by the decision in another case against the same defendant, this day decided, and in which he was charged with receiving a stolen automobile, with a felonious intent, knowing at the time that the same had been feloniously stolen. C. S., 4250. The two appeals present the same question of law as to whether evidence of one crime is competent on the trial of another, it being established that both arose out of the same common scheme or design on the part of the defendant and his confederates to make way with the stolen automobile which they had and to rob the safe of a blind merchant who lived nearby. Being twins in birth, it was impracticable to show the character of one of the crimes without reference to the other. The evidence was competent.

No error.

STATE v. WALTER DAIL.

(Filed 17 February, 1926.)

1. **Receiving Stolen Goods—Evidence—Accessories—Criminal Law.**

Evidence that the defendant was at the home of his brother when the latter purchased a car that had been stolen; that he was told to keep the car concealed for awhile, and that he helped change certain parts thereon for other parts, to conceal its identity, etc., is sufficient to take the case to the jury upon the question of his guilt.

2. **Same—Accessories.**

Where two persons aid and abet each other in the commission of a crime, both being present, they are both liable as principals and equally guilty.

APPEAL by defendant from *Calvert, J.*, at November Term, 1925, of PERQUIMANS.

Criminal prosecution tried upon an indictment charging the defendant with the larceny of an automobile, the property of one Cahoon, valued at $300, and with receiving same, with a felonious intent, knowing at the time that it had been feloniously stolen or taken.

From an adverse verdict and judgment pronounced thereon, the defendant appeals, assigning errors.

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

McMullan & LeRoy for defendant.

STACY, C. J. It was in evidence that Walter Dail, the defendant herein, was at the home of Nathan B. Dail, defendant in a similar appeal, this day decided, when Sam Lougee and Lewis Powell were there trying to sell a stolen automobile; that Nathan purchased the car and immediately traded it to Walter, telling him not to drive it anywhere for about a month and not to let anyone see it. In making the trade and in order to obscure the identity of the stolen car, certain parts of defendant's machine were exchanged for similar parts on the stolen car. It is clear that Walter Dail was equally guilty with Nathan B. Dail in receiving the stolen automobile, with a felonious intent, knowing at the time that the same had been feloniously taken and carried away by Lougee and Powell. C. S., 4250.

The defendant's motion for judgment as of nonsuit, made first at the close of the State's evidence and renewed at the close of all the evidence, and upon which he chiefly relies, was properly overruled. The evidence was amply sufficient to carry the case to the jury. The law is well settled

that where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. *S. v. Hart,* 186 N. C., 582; *S. v. Skeen,* 182 N. C., 844; *S. v. Jarrell,* 141 N. C., 722; *S. v. Fox,* 94 N. C., 928.

In the absence of any reversible error appearing on the record, the verdict and judgment must be upheld.

No error.

IN RE APPLICATIONS OF REX L. FARMER AND OTIS W. DUKE FOR LICENSES TO PRACTICE LAW.

(Filed 24 February, 1926.)

1. Attorneys—License—"Upright Character."

The upright character named by the statute and the Rules of Court, is such as would qualify the applicant to practice a profession as an officer of the court, that has a widespread influence upon the people of the community, and such as the applicant enjoys among those with whom he has lived, and not alone a want of bad character, or one that is but indifferent. C. S., 194. Rule of Court 3½(a), 190 N. C., 883.

2. Same—Admissions of Former Bad Character—Restoration of Upright Character.

Where an applicant to obtain license to practice law from the Supreme Court admits that at a prior time his character was such as to have then disqualified him, he must make it appear that he has since lived such a life as to restore the character upon which a license should now be issued, which has not been done in the instant case.

3. License—Burden of Proof.

Where the application for license to practice law is resisted under the statute and Rule of the Supreme Court, the applicant must show that his character is of that quality of "uprightness" that entitles him to his license.

PROTESTS having been duly filed against the issuance of licenses to Rex L. Farmer and Otis W. Duke, two of the applicants for license to practice law at the January examination, 1926, on the ground, as alleged, that each is wanting in upright character, and the said applicants having met every other requirement, hearings to determine the merits of the protests were had before the Supreme Court in Raleigh, 11 February, 1926, after due notice to protestants and respondents.

APPLICATION OF REX L. FARMER.

STACY, C. J. Rex L. Farmer was one of the applicants for license to practice law in this State at the January examination, held in the city

of Raleigh on Monday, 25 January, 1926. Before entering upon the examination and sometime prior thereto, said applicant was notified of a protest on file in the clerk's office against the issuance of a license to him, on the ground that "he is not a citizen of upright character." Notwithstanding this protest, which is signed by a number of residents of Wilson County, the applicant, who had complied with all the preliminary requirements, persisted in taking the examination and has tendered a creditable paper showing that he has a competent knowledge of the law, hence the question raised by the protest is directly presented. See Rule 3½(a), 190 N. C., 883.

C. S., 194, provides that no person shall practice law in this State without first obtaining license to do so from the Supreme Court; that all examinations shall be in writing, and based upon such course of study, and conducted under such rules, as the Court may prescribe; and further that all applicants who satisfy the Court of their competent knowledge of the law and *upright character* shall receive license to practice law in all the courts of the State.

Due notice having been issued to protestants and respondent, the matter was heard in open court on 11 February, 1926, the protestants being represented by Mr. R. F. Mintz of the Wilson bar, and the respondent by Mr. O. P. Dickinson, also of the Wilson bar.

The protest, among other things, is based upon allegations, supported by affidavits, to the effect that the respondent, Rex L. Farmer, is a man of questionable character; that, in his office as a justice of the peace of Wilson County, he has not only failed to make due returns and account for moneys and things intrusted to him, but in some instances, he has converted them to his own use; and that he has generally engaged in unethical practices.

It is alleged that on or about 15 September, 1925, one Olive Crayer (or Clary) issued a State warrant against J. W. Miller before the said Rex L. Farmer, charging the defendant with "fraudulently obtaining a diamond ring"; that the ring was delivered to the justice of the peace in lieu of an appearance bond, but was not reported to the clerk of the Superior Court, as the papers in the case were never sent up by the justice of the peace; and that in response to a writ of *recordari* issued by the Superior Court of Wilson County, the said justice of the peace incorporated the following statement in his return:

"Warrant served and defendant and prosecuting witness both appearing before the undersigned the defendant agreed to return to the prosecuting witness the ring in question whereupon the prosecuting witness withdrew the prosecution. Cost in the case being paid by the prosecuting witness.

"A statement was made to the undersigned justice of the peace by the defendant that he did not believe the ring was the legal property of the prosecuting witness, however the defendant admitted he had no claim upon the ring, and upon this statement the undersigned informed the prosecutrix that she would have to show how she came by the ring before the justice of the peace felt justified in returning to her the ring, whereupon, the prosecuting witness, Olive Clary, agreed that it would be to her satisfaction for the undersigned to hold said ring until such time as she could prove her legal ownership.

"The ring in question is now in the possession of the undersigned as a trustee and not in *custodia legis* and will be delivered to the rightful owner at the proper time.

"In consequence of the foregoing the papers in the case were destroyed. Rex L. Farmer, justice of the peace."

The above return was accompanied by three affidavits—no reason being assigned therefor—in which the affiants, purporting to speak of their own knowledge, corroborate the statement of the justice of the peace as to how he came into the possession of the ring and why he continued to hold it.

But as against this return, it is alleged, and not denied, that in December, 1925, the said J. W. Miller sued out a claim and delivery against the said Rex L. Farmer in the County Court of Wilson County to recover the possession of the diamond ring in question and that it was adjudged in said county court that J. W. Miller was legally entitled to its possession.

There are several charges, supported by affidavits, of bad checks being turned over to the respondent as a justice of the peace, collected by him and no satisfactory accounting made of them.

It is also alleged, but without supporting affidavit and vigorously denied, that the respondent has failed and refused to account for all the funds received by him while an officer of the Wilson Ku Klux Klan.

It is further alleged, as tending to show the respondent's attitude toward the law and the courts, that on or about 30 October, 1925, while hearing a case, some reference was made to a Supreme Court ruling, in reply to which the respondent said: "To hell with the d..... Supreme Court. I don't give a d..... for the Supreme Court or any other court. I am running my own court as I d..... please." The respondent denies that any such language was ever used by him.

In addition, the protestants have offered a number of affidavits to the effect that the respondent is not generally regarded as a reliable man, or as a man of good moral character, but, on the other hand, that he is generally considered to be a man of bad character.

In answer to these charges, the respondent has offered a large number of affidavits from citizens of Wilson County who testify to his general good character, and one in particular which states that while he may have exhibited some faults and frailties in his immature years, it has been a matter of gratification to his friends to witness the calm, equable and well-poised manner in which he has approached his riper manhood.

The respondent further contends that the matters and things herein complained of, should not be held to bar his right to receive license to practice law in this State, because he alleges, the protestants are not actuated by proper motives, but by ill will towards him. However this may be, the Court must base its judgment on the record.

After a careful and painstaking consideration of all the matters contained in the papers before us, and with a full appreciation of the effect of our decision, we are constrained to believe that the evidence adduced shows such a lack of moral perception, or careless indifference to the rights of others, as to render the Court unable to say that the respondent, Rex L. Farmer, possesses the necessary upright character to entitle him to license to practice law.

This "upright character," prescribed by the statute, as a condition precedent to the applicant's right to receive license to practice law in North Carolina and of which he must, in addition to other requisites, satisfy the Court, includes all the elements necessary to make up such a character. It is something more than an absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. "Character," said Mr. Erskine in the trial of Thomas Hardy for high treason, "is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion." Even more is this true when the restoration of character, as here, is the subject of consideration. It is then a matter of time and growth.

The reason and policy underlying the statute were fully discussed on a former occasion, *In re Applicants for License,* 143 N. C., 1, at which time, *Brown, J.,* gave the following expression to his views: "The public policy of our State has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by the attorney is more important, if anything, to the public

and to the proper administration of justice than legal learning. Legal learning may be acquired in after years, but if the applicant passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace instead of an ornament to his great calling—a curse instead of a benefit to his community—a Quirk, a Gammon, or a Snap, instead of a Davis, a Smith, or a Ruffin."

And we may pause to say that this requirement of the statute is eminently proper. Consider for a moment the duties of a lawyer. He is sought as counselor, and his advice comes home in its ultimate effect to every man's fireside. Vast interests are committed to his care; he is the recipient of unbounded trust and confidence; he deals with his client's property, his reputation, his life, his all. An attorney at law is a sworn officer of the court, whose chief concern, as such, is to aid in the administration of justice. In addition, he has an unparalleled opportunity to fix the code of ethics and to determine the moral tone of the business life of his community. Other agencies, of course, contribute their part, but in its final analysis, trade is conducted on sound legal advice. Take, for example, a commercial center of high ideals, another of low standards, and there will invariably be found a difference between the bars of the two localities. The legal profession has never failed to make its impress upon the life of the community. It is of supreme importance, therefore, that one who aspires to this high position should be of upright character, and should hold, and deserve to hold, the respect and confidence of the community in which he lives and works. *In re Dillingham,* 188 N. C., p. 165; *In re Applicants for License,* 143 N. C., 1.

"No profession," says Mr. Robbins in his American Advocacy, 251, "not even that of the doctor or preacher, is as intimate in its relationship with people as that of the lawyer. To the doctor the patient discloses his physical ailments and symptoms, to the preacher the communicant broaches as a general rule only those things that commend him in the eye of heaven, or those sins of his own for which he is in fear of eternal punishment, but to his lawyer he unburdens his whole life, his business secrets and difficulties, his family relationships and quarrels and the skeletons in his closet. To him he often commits the duty of saving his life, of protecting his good name, of safeguarding his property, or regaining for him his liberty. Under such solemn and sacred responsibilities, the profession feels that it owes to the people who thus extend to its members such unparalleled confidence the duty of maintaining the honor and integrity of that profession on a moral plane higher than that of the merchant, trader or mechanic."

While not mentioned as prerequisites, it may be stated that no one should seek to enter the legal profession, "in its nature the noblest and

most beneficial to mankind, in its abuse and debasement the most sordid and pernicious," who does not understand its high mission or who does not feel its essential nobility. It is neither a place of refuge nor a reformatory for those who have stumbled in other fields.

Application denied.

APPLICATION OF OTIS W. DUKE.

STACY, C. J. The second applicant to persist in taking the January examination in the face of a protest was Otis W. Duke of Greensboro. He has tendered a satisfactory paper showing that he has a competent knowledge of the law, hence the necessity of considering the merits of the protests filed against the issuance of license to him. Rule 3½ (a), *supra*. The original protest was made by Mrs. Martha H. Duke, divorced wife of the respondent. On notice from the clerk, Mr. A. B. Andrews, Chairman of the Committee on Admission to the Bar and Legal Education of the North Carolina Bar Association, filed in the name of the North Carolina Bar Association a formal protest based on Mrs. Duke's allegations and forwarded copies of all papers to the local bar association of Guilford County. A committee appointed by said Guilford County Bar Association heard evidence from both protestant and respondent and transmitted same to the Court for its convenience and consideration in determining the matter.

The protest was heard in open Court on 11 February, 1926, the protestant, Mrs. Martha H. Duke, appearing in person and the respondent being represented by Major E. D. Kuykendall and Mr. Shelley B. Caviness of the Greensboro Bar.

All the affidavits forwarded by the committee of the Guilford County Bar Association and others were offered in evidence for the consideration of the Court in determining the question as to whether the respondent, Otis W. Duke, is of sufficient upright character to warrant the issuance of license to him. C. S., 194.

From these affidavits, it appears, without contradiction, that in August, 1922, while a deputy sheriff of Guilford County, the respondent attended a ball game at Monticello, about ten miles north of Greensboro, became intoxicated, engaged in a fight, used a deadly weapon, and was indicted in six cases, which were disposed of at the October Term, 1922, Guilford Superior Court, as follows:

No. 4. State v. O. W. Duke. Nuisance, using profane and indecent language on highway. Defendant pleads guilty. Judgment of the court that the defendant pay a fine of $25.00 and costs.

No. 5. State v. O. W. Duke. Assault. Defendant pleads guilty. Judgment of the court that the defendant pay a fine of $50.00 and costs.

No. 6. State v. O. W. Duke. Carrying concealed weapon. Defendant pleads guilty. Judgment of the court that the defendant pay a fine of $50.00 and costs.

No. 7. State v. O. W. Duke. Assault with a deadly weapon. Defendant pleads guilty. Prayer for judgment continued on payment of costs.

No. 8. State v. O. W. Duke. Resisting officer. Defendant pleads guilty. Prayer for judgment continued on payment of costs.

No. 9. State v. O. W. Duke. Pointing pistol. Defendant pleads guilty. Prayer for judgment continued on payment of costs.

In addition to the judgments entered in the above cases, in three of which the prayers for judgment were continued, the respondent was discharged as a deputy sheriff of Guilford County.

At the March Term, 1924, Guilford Superior Court, P. H. Petree recovered a judgment of $200.00 against the respondent in a civil action for a wrongful assault.

At the August Term, 1924, Guilford Superior Court, the protestant, Mrs. Martha H. Duke, obtained an absolute divorce from the respondent on the statutory ground of adultery, and the court found the following facts and incorporated them in the judgment:

"The Court finds as a fact that the defendant, Otis W. Duke, is not a fit and suitable person to have the care and custody of Mary Helen Duke, minor child of plaintiff and defendant, and the court further finds that the plaintiff, Martha H. Duke, is a fit and suitable person to have the care and custody of said minor child, and the interest of said minor child will be best served by being placed in the care and custody of said Martha H. Duke."

The protestant alleges that this divorce proceeding was instituted at the instance of the respondent; that he furnished her money with which to bring the suit; and that the witnesses were procured and selected by him.

There are several other charges preferred against the respondent, some involving immorality and moral turpitude, and one touching the two homicides committed by the respondent while a police officer, but as these are denied, or explanations offered, we deem it unnecessary to set them out, as we are forced to but a single conclusion on the undisputed evidence.

In reference to the criminal records, mentioned above, the respondent says that "with regret and shame he admits the unfortunate fight in which he was engaged at Monticello, which cost him his job as a deputy sheriff and at the same time showed to him the absolute folly of drinking whiskey"; that he has changed his manner of living since that time, abstaining entirely from strong drink; that he has faithfully discharged

his duties as a justice of the peace, since his appointment as such; that he has tried to show the officials of the city of Greensboro and of Guilford County, for whom he at one time worked, "that although a man can sometimes be 'down,' he need not necessarily be 'out' "; and that he has earnestly endeavored in every way possible to regain the confidence and esteem of the community—in testimony of which he files a large number of character certificates from many citizens of high standing and repute in the city of Greensboro and Guilford County. In addition, the respondent declares to the Court his intention to persist in living a better life, which is highly commendable.

He alleges that the protestant is wholly mistaken in her allegations touching his connection with the divorce proceeding. Without any ill will towards her and without any desire on his part to strike back, for he alleges that his former wife was a young woman of character and refinement at the time of their marriage in 1914, the respondent suggests that she is displeased because he was married again in the fall of 1924, about two months after the divorce, and is now living happily with his second wife, and that the protestant, Mrs. Martha H. Duke, is actuated by improper motives in filing this protest.

The undisputed facts, appearing on the record, call for but little comment; they speak for themselves. It is conceded that the respondent was discharged as a deputy sheriff of Guilford County in 1922, because of his unfitness to hold the position. At the August Term, 1924, it was solemnly adjudged by the Superior Court of Guilford County that the respondent "is not a fit and suitable person to have the care and custody of his minor child." This finding would not have been made without evidence to support it, and it will be observed that the judgment was entered during the period respondent was studying law preparatory to taking the examination for license. Rule 2, 185 N. C., 787. He is now paying into the clerk's office $30.00 a month for the support of his nine-year-old child.

Is this record such as to warrant the Court in finding that the respondent, Otis W. Duke, is now of sufficient upright character to entitle him to receive license to practice law in all the courts of North Carolina? We think not.

There is strong evidence tending to support the conclusion that the respondent was quite willing for his former wife to obtain a divorce from him. According to his own affidavit, he was living with her as late as 21 April, 1924, when they separated; he then went back for a few days about a month later; suit for divorce was instituted in June or July following, and the divorce obtained at the August Term of court thereafter. He filed no answer to her complaint charging him with adultery

and alleging that he was not a fit and suitable person to have the care and custody of his minor child. He married again within two months after the divorce.

If the protestant's present allegations be true, then a fraud was practiced on the court by the respondent. If they be not true, the judgment as it stands proclaims the respondent's infidelity and unfitness to have the care and custody of his minor child. So, taking either horn of the dilemma, this divorce proceeding with the judgment rendered therein is a stumbling block in the path of the respondent. If the record as made be not true, it is his fault for he was silent at a time when it was his duty to speak. But the proceeding itself imports verity. Therefore the respondent is face to face with a record, made as a result of his own wrongdoing, which negatives the conclusion that he now possesses the necessary upright character required of successful applicants for license to practice law in North Carolina.

Application denied.

CALKINS DREDGING COMPANY, INC., v. THE STATE OF NORTH CAROLINA, THE FISHERIES COMMISSION OF NORTH CAROLINA, AND THE FISHERIES COMMISSION BOARD OF NORTH CAROLINA.

(Filed 24 February, 1926.)

1. Government — Claims Against State — Recommendatory Powers of Supreme Court—Constitutional Law.

The original jurisdiction given the Supreme Court to pass upon claims against the State or its subordinate agencies of government, which are not subject to suit or execution under judgment, are recommendatory to the Legislature only, as to the matters of law involved upon facts agreed to, or made to appear, and this Court does not pass upon conflicting evidence to determine the facts at issue. Const., Art. IV, sec. 9.

2. Same—Original Jurisdiction.

The powers given the Supreme Court of the State to recommend to the Legislature the payment of claims against the State is original and exclusive.

3. Government—Suits—Actions.

Neither the State nor its subordinate agencies of government may be subject to suits or actions against it or them in its own courts or the courts of other states.

4. Government — Claims Against State — Recommendation of Supreme Court—Questions of Law.

The Supreme Court will not recommend to the Legislature the payment of a claim against the State, when no questions of law are involved, or when such questions are resolved against the claimant.

5. Same—Dismissal.

Where it is made to appear to the Supreme Court that a claimant against the State seeking the recommendatory jurisdiction of the Court is not entitled under its contract with a subordinate agency of the State to a favorable consideration, or to have its contract reformed in equity, and has taken the State's voucher in full payment, and has received the money therefor, there is shown no legal right to have the claim recommended by the Supreme Court, and the action will be dismissed.

PROCEEDING commenced by Calkins Dredging Company, Inc., under C. S., 1410, in the Supreme Court of North Carolina, invoking the original jurisdiction of said Court, conferred by Article IV, section 9 of the Constitution of North Carolina, to hear claims against the State, and to make recommendations with respect thereto, to the General Assembly, at its next session, for its action.

C. R. Pugh and Thompson & Wilson for claimant.

Attorney-General Brummitt and Assistant Attorney-General Nash for respondents.

CONNOR, J. The complaint herein, setting forth the nature and grounds of its claim, was filed by the Calkins Dredging Company, Inc., in the office of the clerk of this Court, on 19 November, 1925. The said complaint was duly served on the Governor of the State. Thereafter, on 1 December, 1925, answer on behalf of respondents was filed by the Attorney-General and the Assistant Attorney-General; a reply to said answer was filed by claimant on 1 January, 1926. The proceeding was then heard and considered by this Court upon the pleadings.

It appears from the allegations and admissions in said pleadings that claimant is a corporation, organized and existing under the laws of the State of Virginia, with its principal office and place of business in the city of Norfolk, in said state; that respondents, the Fisheries Commission of North Carolina, and the Fisheries Commission Board of North Carolina, are agencies of the State of North Carolina, created by statutes duly enacted by the General Assembly of said state, for the purpose of enforcing the laws of said state, relative to fish, and of promoting the fishing industry in said state. C. S., 1869, ch. 168, Public Laws 1923. The powers and duties of said respondents are defined in Article 3 of ch. 37, C. S., 1919, and amendments thereto. By chapter 162, Public Laws 1923, the Treasurer of the State was authorized and directed to issue bonds of the State of North Carolina, in the sum of $500,000, the proceeds of the sale of said bonds, or so much thereof as might be necessary, to be used by the Fisheries Commission "to open

inlets, plant oysters, build hatcheries, provide equipment, and for such other necessary improvements of the fish and sea-food industry of the State." It is expressly provided in said statute that the proceeds of the sale of said bonds shall be used by the Fisheries Commission for the purpose of opening inlets and providing necessary improvements to aid the fish and sea-food industry of the State. Chapter 162, Public Laws 1923, secs. 6 and 7.

Pursuant to authority vested in them by statute, respondents, the Fisheries Commission of North Carolina, and the Fisheries Commission Board of North Carolina, during the year 1924, employed the Calkins Dredging Company, Inc., claimant herein, to open New Inlet, in Dare County, by dredging and excavating same, and thereby constructing a channel in said inlet from Pamlico Sound to the Atlantic Ocean. The said inlet, through which there was formerly a channel of sufficient depth and width for the free flow of water between the ocean and the sound, had, in recent years, been gradually closing, from natural causes. The fishing industry of the State would, in the opinion of respondents, be permanently benefited by the opening of this inlet and the construction of a channel which would permit sea-fish to enter the sound through said inlet and would also permit the salt water of the ocean to flow into the sound where the water had become too fresh for proper oyster culture. The gradual closing of New Inlet, and of other inlets through the banks which lie between the Atlantic Ocean and the sounds into which the rivers of the State empty, has, in the opinion of experts, greatly diminished the supply of fish and sea-food, and thereby retarded the growth and expansion of the fishing industry of the State. The opening of these inlets by dredging and excavations was a part of the constructive program for the development of the State authorized and directed by the General Assembly, at its sessions in 1921 and 1923.

The work, which claimant was employed to do at New Inlet, was completed on or about 1 September, 1924, at a cost of about $115,000. It was approved and accepted by respondents. As the result of this work, an open channel between the Atlantic Ocean and Pamlico Sound through New Inlet had been constructed; there was a regular ebb and flow of the water through this channel, causing the level of the waters of the sound to rise and fall with the rise and fall of the tide in the ocean; there was a current of considerable volume and velocity flowing through this channel.

During January, 1925, less than six months after the completion of the work by claimant at New Inlet, respondents ascertained that the said inlet was again gradually closing by the filling in of the channel

constructed by the Calkins Dredging Company, Inc. This was caused by the action of the winds and water upon the sands which compose the banks through which the channel had been cut and which form the bottom of the ocean and the sound. Thereupon, respondents conferred with the president of the Calkins Dredging Company as to the conditions which had thus developed. As a result of the conference, an agreement in writing was entered into, at Morehead City, on 13 January, 1925, between the Calkins Dredging Company, Inc., and respondents. This agreement is as follows:

"This agreement made and entered into this 13 January, 1925, by and between the Calkins Dredging Company of Norfolk, Virginia, party of the first part, and the North Carolina Fisheries Commission Board, parties of the second part, witnesseth:

"1st. The Calkins Dredging Company have this day agreed to furnish their complete dredging outfit, the 'Federal,' which is now in first-class condition, and do certain dredging work at New Inlet under the direction of the Fisheries Commissioner and Brent S. Drane, engineer for the commission, said dredging outfit to be assembled in Norfolk and ready to be towed to New Inlet by January 20th, or very soon thereafter; the amount of work to be done to be determined by the commissioner and engineer.

"2d. The parties of the second part agree to pay a towing charge from Norfolk to New Inlet of $550.00, and in event the parties of the first part fail to secure a job of work at Wilmington, the parties of the second part agree to pay an additional towing charge of $550 from New Inlet to Norfolk.

"3rd. The parties of the second part agree to pay to the parties of the first part a per diem of $450 for such time as dredge is actually employed in doing excavation work.

"4th. In event it is found necessary to do any dredging in order to get around the bend between the bulk head and New Inlet, the parties of the second part agree to pay for such dredging at a per diem of $450.

"5th. In event of major breakdowns making machine shop work necessary, the parties of the second part will not be held liable for loss of time exceeding four days at the rate of $125 per day.

"6th. The parties of the second part agree to furnish fresh water to the edge of the cut and to furnish the services of the 'Katie M' for towing the dredge in and out of the channel. Also to furnish one power boat ('Croatan' or 'Katie M') to be used as a supply boat.

"7th. It is distinctly understood and agreed that the time for towing, installation and removal of plant shall not, in any event, exceed twenty days at a per diem of $335.00.

"8th. It is understood and agreed that the parties of the second part are to render all assistance possible in getting the outfit on and off the job.

CALKINS DREDGING COMPANY,
By (S) J. D. CALKINS, *President.*

NORTH CAROLINA FISHERIES COMMISSION BOARD,
By (S) J. K. DIXON, *Chairman.*
By (S) J. S. NELSON, *Commissioner.*"

On 26 January, 1925, thirteen days after the date of the agreement, the Calkins Dredging Company began towing its dredging outfit from Norfolk, Virginia, to New Inlet in Dare County, North Carolina. The towing was delayed, at North River, for several days, by a heavy storm, and the outfit did not arrive at the bulk head or bar off New Inlet until 31 January, 1925. Five days had thus been consumed in towing the dredging outfit from Norfolk to the bulk head or bar off New Inlet. But for the storm which delayed the towing several days after the dredging outfit left Norfolk, it would have arrived earlier. When the outfit arrived at the bulk head, it was ascertained that the channel in New Inlet was entirely closed, so that automobiles were being driven across the sand which had filled the channel. It was impossible, by reason of this condition, to float the dredge across the bulk head or bar, without grounding same. Representatives of both claimant and respondents were present when the dredging outfit arrived at the bulk head, and this condition was discovered. In the effort to get the dredging outfit across the bulk head to the place where it was to be installed and the work begun, under the agreement dated 13 January, 1925, it was grounded; thirteen days were consumed in getting the outfit from the bulk head or bar to the place where it was installed and where the operation began. The Calkins Dredging Company began the work of excavation and dredging on 13 February, 1925, one month after the date of the agreement, and continued said work until 12 March, 1925.

On 12 March, 1925, after an inspection of the work performed by claimant, under the agreement of 13 January, 1925, and after a consideration of all the conditions then existing at New Inlet, respondents concluded that it was not advisable to continue said work of dredging and excavation; claimant was thereupon, on said date, ordered to discontinue operations under the agreement of 13 January, 1925. The work was discontinued. Claimant was unable, on account of the conditions at New Inlet, to remove the outfit, and to have the same towed back to Norfolk until 15 April, 1925. On said date the return trip was begun, and the dredge arrived at Norfolk, under tow, on 16 April, 1925. Thirty-

five days elapsed from the date on which the work of dredging and excavation was discontinued, to wit, 12 March, 1925, to the date on which the return trip to Norfolk, by tow began, to wit, 15 April, 1925.

Claimant was paid on 5 March, 1925, the sum of $13,900.93 by voucher No. 362; this sum included the amount agreed to be paid for the towing charge from Norfolk to New Inlet; the amount per diem for five days consumed in towing the outfit from Norfolk to the bulk head or bar off New Inlet; the amount per diem for thirteen days consumed in moving the outfit from the bulk head to the place where it was installed, and where the operations were begun; and, also, the amount per diem for dredging and excavation from 13 February to 28 February, 1925.

Claimant was further paid on 20 April, 1925, the sum of $6,170 by voucher No. 533, this sum included the amount per diem for dredging and excavation from 1 March to 11 March, 1925; the amount per diem for two days on account of the removal of the outfit from New Inlet to Norfolk; and also the amount for towing charges for the return trip from New Inlet to Norfolk.

Claimant has been paid by respondents, under the agreement dated 13 January, 1925, the sum of $1,100, the towing charges for the trips from Norfolk to New Inlet, and from New Inlet back to Norfolk; the sum of $12,000, for dredging and excavating, 26 days and 16 hours at $450; the sum of $6,700, for time consumed in towing, installing and removing outfit, 20 days at $335; the sum of $270.93, for extras allowed, making a total of $20,070.93.

On 20 April, 1925, four days after the dredging outfit had arrived at Norfolk, the Calkins Dredging Company rendered to the North Carolina Fisheries Commission, at Morehead City, N. C., a statement showing that the amount then due for services of its dredging plant "as per contract dated 13 January, 1925" was $6,170. Voucher No. 533 was thereupon issued for said sum, payable to Calkins Dredging Company, on the face of which the following words were written: "Settlement in full for balance due on contract dated 13 January, 1925, charge New Inlet." This voucher was duly presented to the State Treasurer, who thereupon issued a warrant for the sum of $6,170 payable to the order of Calkins Dredging Company, "in full payment of the within account." This warrant, bearing the endorsement, "For deposit, Calkins Dredging Company, Inc., J. D. Calkins, President," was duly paid upon presentation to the Eastern Bank & Trust Co., New Bern, N. C., upon which it was drawn.

Claimant now presents a claim against the State of North Carolina, the Fisheries Commission of North Carolina, and the Fisheries Commission Board of North Carolina, for the sum of eleven thousand and fifty

dollars ($11,050.00), alleging that said sum is due for the time which elapsed from 14 March to 15 April, 1925—35 days—during which its dredging outfit remained at New Inlet, after the discontinuance of the work under orders from the Fisheries Commission Board, until the date on which it began the return trip to Norfolk. Claimant contends that it is entitled, under the agreement dated 13 January, 1925, to a per diem of $335 for 35 days and prays that this Court recommend that the General Assembly, at its next session, provide by appropriation from the general funds of the State for the payment of the amount of the claim, to wit, $11,050.

The jurisdiction of this Court, which claimant invokes by this proceeding, is conferred by section 9 of Article IV of the Constitution of North Carolina. It is an original jurisdiction; it may be exercised only when application is made direct to this Court. It is confined to the hearing of claims against the State, which by reason of the sovereignty of the State cannot be made the subject of litigation in the courts of this State, or in any other courts. "It is well settled that a state cannot be sued in its own courts, or in any other, unless it has expressly consented to such suit, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States, by virtue of the original jurisdiction conferred on such court by the Constitution of the United States." 25 R. C. L., 412. Nor can a commission or board, created by statute, as an agency of the State be sued. *Carpenter v. R. R.*, 184 N. C., 400. The decision of this Court upon a claim against the State, which it shall hear, in the exercise of this jurisdiction, is merely recommendatory. The Court has no power to render judgment upon a claim against the State, adjudicating finally the rights of the claimant or of the State with respect to said claim. No process in the nature of execution may issue upon any decision which the Court may make, after hearing a claim against the State to enforce the same. The General Assembly is in no wise bound by the decision of this Court upon the validity or invalidity of such claim. It may take such action upon the claim, if presented to it, as it deems just and proper, and in accordance with a sound public policy. The recommendation of this Court will have such influence only upon the action of the General Assembly, as its members shall deem it entitled to. It is, however, the duty of this Court to hear such claim against the State as may be properly presented to it and if the Court decides that under the law the State is liable, and but for its exemption by reason of its sovereignty from suit, a judgment could be recovered against the State on the claim, by the claimant to make its recommendation to the General Assembly, at its next session, for its action with respect to the payment thereof. The procedure to enforce claims against the State is prescribed by C. S., 1410.

In *Bledsoe v. The State,* 64 N. C., 393, *Justice Reade,* writing for the Court, says: "We are of opinion that it was not contemplated that when a claim is presented against the State there shall be a 'trial of the facts in detail, but only that we should decide such questions of law as may seem to be involved, together with our own impression of the facts generally, so as to make our decision of the law intelligible." *Pearson, C. J.,* in *Reynolds v. The State,* 64 N. C., 461, says: "We are fully satisfied, on a perusal of the papers in the proceeding, of the correctness of the view taken in *Bledsoe v. The State, supra,* to wit, that our 'recommendatory jurisdiction' in regard to claims against the State does not embrace cases involving mere matters of fact, and that it was not the intention of the framers of the Constitution to impose upon the Court the labor of the trial of facts, and that the jurisdiction is confined to claims where, the facts being agreed on, it was supposed an opinion of the Supreme Court on important questions of law would aid the General Assembly to dispose of such cases; it having been before a question whether the judges could consistently with their constitutional duties, communicate an opinion to the Legislature." In *Clement v. The State,* 76 N. C., 199, the Court, being unable to decide the questions of law involved in the claim against the State, until it was sufficiently informed of the facts, formulated issues of fact and directed that same be submitted to a jury, to be determined by them from the evidence offered; it further directed "that the finding of the jury, and the rulings of his Honor, with all exceptions, be certified to this Court." The issues were submitted to a jury at June Term, 1877, of the Superior Court of Wake County. Upon the proceedings in the Superior Court being certified to this Court, a decision was made upon the validity of the claim, and it was ordered that a report of said decision be made to the Governor of the State to be transmitted by him to the General Assembly; *Clement v. The State,* 77 N. C., 142. In *Sinclair v. The State,* 69 N. C., 47, it was held that the recommendatory jurisdiction of the Court ought not to be invoked in matters of small value, particularly when there is no doubt as to the law. In *Horne v. The State,* 82 N. C., 383, *Justice Ashe,* says that although the amount involved may be small, the jurisdiction is properly invoked, when grave questions of law will probably arise in the investigation by the General Assembly of a claim against the State presented to it. The motion of the Attorney-General to dismiss the proceedings was denied. The proceedings to enforce a claim against the State, in *Reeves v. The State,* 93 N. C., 257, was dismissed for the reason that only questions of fact were involved, *Justice Merrimon* saying: "If the claim is a plain one, only involving questions of fact, it ought to be taken at once before the Legislature, unless its nature be such as that it may be presented to the Auditor, or some other

appropriate authority, for adjustment or allowance." In *Cowles v. The State,* 115 N. C., 174, *Justice Burwell,* discussing the jurisdiction conferred upon this Court by Art. IV, sec. 9, says: "It was intended by this provision of the Constitution that persons who asserted that they held legal claims against the sovereign State should here find a tribunal before which they might have, in proper cases, the legality of their claims adjudicated—a tribunal before which the sovereign State would, for a certain purpose, abdicate the privilege of exemption from liability to be sued and appear as any other litigant to the end that its liability to the petitioner might be determined by the law. We see no good reason why in such proceedings as this we should not be required to determine the rights of the petitioner and the liability of the State by the same laws that would govern those rights and that liability if the action was against an individual debtor." The Court held that as the claim in that proceeding would have been barred by the statute of limitations, if made against an individual, the plea of the statute by the State was a good defense to the claim, and held that it could not declare that the State was legally indebted to the claimant. The proceeding was dismissed.

In *Baltzer v. The State,* 104 N. C., 266, *Justice Merrimon* says that "the obvious purpose of the jurisdiction so conferred was to have the Court settle and adjudge the legal validity of claims, to the end that the Legislature may provide for their payment." The proceeding was dismissed for the reason that the General Assembly was expressly forbidden by section 6 of Article I of the Constitution to pay the claim presented therein, the Court saying that "it would be idle, futile and ridiculous for this Court to declare and adjudge the validity of a claim, against the State, and recommend to the General Assembly to provide for its payment, when the Constitution expressly forbids it to pay or provide for the payment of such a claim." See opinion of *Merrimon, C. J.,* in same proceeding, reported in 109 N. C., 188. This opinion was affirmed on a writ of error by the Supreme Court of the United States, 161 U. S., 240.

The proceeding in *Miller v. The State,* 134 N. C., 270, was dismissed; this Court declined to hear the claim presented in that proceeding, saying, in the opinion written by *Justice Montgomery,* "This case does not involve any question of law. We do not feel called upon, therefore, to make any recommendation to the General Assembly in the premises. If we should do so, the members of that body would have the right to feel justly offended that we should seek to point out their duty to them in a matter where there was no law question involved."

The claim presented by this proceeding presents no questions of law; the liability of the State is to be determined by the terms and provisions

of the agreement in writing, dated 13 January, 1925. Upon the facts as they appear from the pleadings, claimant has been fully paid all sums which respondents agreed to pay and for which they or the State were liable under the agreement. The terms and provisions of the agreement are clear and explicit; there can be no difficulty in interpreting or construing them. Claimant was entitled to payment for the time "for towing, installation, and removal of plant," not to exceed twenty days at $335 per day. More than twenty days were consumed in towing, installing and removing the plant; it was distinctly understood and agreed that respondents should pay for not exceeding twenty days thus consumed. This respondents have done.

Claimant, apparently anticipating that its claim against the State could not be sustained under the agreement in writing, signed by both claimant and respondents, alleges that said writing does not truly and correctly set out and contain the agreement with respect to payment for time consumed in towing, installing and removing its plant; it prays for reformation of said written agreement, on the ground that same was drawn and executed by the mutual mistake of the parties, or the mistake of claimant induced by false representations of respondents as to the conditions existing at New Inlet at its date. Upon the facts alleged in the complaint, we must hold that claimant has failed to show that it is entitled to such relief. The validity of its claim must be determined by the agreement, in writing, signed by both claimant and respondents; it is not alleged that the representations were both false and fradulent or that they were made by respondents for the purpose of inducing and that they did induce claimant to sign the said paper-writing. It clearly appears that the paper-writing as drawn and signed contains the agreement of the parties relative to its subject-matter.

After claimant's outfit had been returned to Norfolk, to wit, 20 April, 1925, it rendered a statement to respondents for amount due for services under the contract; voucher for this amount was issued by respondents and accepted by claimant as "settlement in full for balance due on contract dated 13 January, 1925." This voucher was accepted by the Treasurer of the State, who issued his warrant "in full payment of the within account." This warrant, with the endorsement of claimant, has been paid.

The following rule is well established in the State of North Carolina, and is consistently followed in the trial of actions in its Courts involving the rights of citizens and others, subject to their jurisdiction:

"It is well recognized that when in case of a disputed account between parties, a check is given and received clearly purporting to be in full or when such check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a

given character or all indebtedness to date, the courts will allow to such payment the effect contended for." *Rosser v. Bynum,* 168 N. C., 340; *Supply Co. v. Watt,* 181 N. C., 432; *Blanchard v. Peanut Co.,* 182 N. C., 20; *DeLoache v. DeLoache,* 189 N. C., 394.

We cannot decide that the claim against the State presented in this proceeding is valid as a legal obligation of the State or that claimant would be entitled to judgment against the State, but for its exemption from suit by reason of its sovereignty, and therefore can make no recommendation to the General Assembly for the payment of the claim. The proceeding must be

Dismissed.

J. S. SCHOFIELD'S SONS CO. v. J. H. BACON AND JOHN W. MOORE, PARTNERS, TRADING UNDER THE FIRM NAME OF BACON & MOORE, THE TOWN OF LITTLETON, AND MARYLAND CASUALTY COMPANY.

(Filed 24 February, 1926.)

1. Judgments Set Aside—Consent—Contracts—Fraud—Mutual Mistake.

A consent judgment is the agreement of the parties entered into with the sanction of the presiding judge, and may not be set aside, lawfully given, in the absence of allegation and proof of fraud or mutual mistake.

2. Judgments—Consent—Contracts—Parties—Beneficial Interest—Independent Action—Jurisdiction of Court.

Where the surety on the bond for a town is liable for failure of the contractor to pay material furnishers for the construction of a light, water and sewerage system, and a consent judgment in the Federal Court is entered to pay the material furnishers for the work: *Held,* one of the materialmen who was not a party to the action may maintain his action in the State Court under the principle that the judgment was a *quasi* contract made for his benefit.

APPEAL by defendant Maryland Casualty Co., from *Lyon, J.,* of HALIFAX Superior Court. Affirmed.

The following is the agreed statement of facts:

"1. That on 15 February, 1922, Bacon & Moore entered into a contract with the town of Littleton, whereby the said Bacon & Moore were to install for the said town a water and light plant and a sewerage system.

"2. That the town of Littleton required Bacon & Moore to enter into a bond in the penal sum of twenty-four thousand, one hundred and sixty-seven dollars and eighty-three cents; with Maryland Casualty Company as surety.

"3. That on 22 May, 1922, J. S. Schofield's Sons Company entered into a contract with Bacon & Moore whereby they were to furnish and

did furnish materials to go into and formed a part of the contract of the said Bacon & Moore and the town of Littleton.

"4. That thereafter, on 10 April, 1924, Bacon & Moore executed a note to J. S. Schofield's Sons Company for one hundred and six dollars and seventy cents; that on 15 May, 1924, Bacon & Moore executed a note for seventy-five dollars to the plaintiff; that on 23 June, 1924, Bacon & Moore executed their note for one hundred dollars to the plaintiff; that said three aforesaid notes represented the balance due on the contract dated 22 May, 1922.

"5. That on 18 June, 1923, the Skinner Engine Company brought suit against Bacon & Moore, the town of Littleton and the Maryland Casualty Company in the Superior Court of Halifax County in conformity with C. S., 2445, and a notice of the pendency and purpose of the suit was duly published in the *Roanoke News,* a weekly newspaper published in the town of Weldon, North Carolina, in accordance with C. S., 2445, vol. III, beginning with the issue of 20 February, 1924.

"6. That Westinghouse Electric Company, Crane Company, Chattanooga Sewer & Pipe Company, intervened in this action with the Skinner Engine Company, and subsequently the aforesaid suits were all settled together. The purpose of the suit of the Skinner Engine Company and the others who intervened in accordance with the statute was to hold the bond executed by the Maryland Casualty Company liable for materials and labor furnished in the performance of the contract dated 15 February, 1922, by Bacon & Moore and the town of Littleton.

"7. That on 13 March, 1925, a judgment was entered in the suit of J. H. Bacon and John W. Moore, partners, trading as Bacon & Moore, against the town of Littleton in the District Court of the United States; and Schofield's Sons Company were not parties to the foregoing suit or judgment.

"8. That thereafter, on 13 July, 1925, J. S. Schofield's Sons Company brought suit in the Superior Court of Warren County against Bacon & Moore, the town of Littleton and the Maryland Casualty Company, which said suit was transferred on motion to Halifax County for trial, and this suit was to recover the balance due under the contract dated 22 May, 1922, evidenced by the notes above referred to.

"9. That materials under the contract dated 22 May, 1922, between Schofield's Sons Company and Bacon & Moore were furnished to the town of Littleton on or about 1 October, 1922.

The foregoing having been agreed as the facts in case and upon said facts being submitted to the court to determine the liability of the parties.

"The court being of the opinion that the judgment set out in section seven of the facts agreed, was for the benefit of the plaintiff, it is

"Considered and adjudged that plaintiff recover of the defendant, Maryland Casualty Company, the sum of $281.71, with interest on $75.00 from 15 July, 1924, interest on $100.00 from 23 August, 1923, and interest on $106.71 from 15 July, 1924, and costs."

To the foreging judgment defendant, Maryland Casualty Company excepts, assigns error and appeals to the Supreme Court.

Daniel & Daniel and Garland B. Daniel for plaintiff.
Geo. C. Green for defendant.

CLARKSON, J. The essential part of the judgment, which is a consent judgment, in the Federal Court and referred to in section 7 of the agreed case, is as follows: "It is further ordered, adjudged and decreed that the town of Littleton pay the costs of this action, and, in addition thereto, pay over to the said Maryland Casualty Company the sum of $8,000 in consideration of which payment the said Maryland Casualty Company is to hold the town of Littleton, Bacon & Moore, and the indemnitor for Bacon & Moore on account of bond executed for Bacon & Moore by said Maryland Casualty Company, forever harmless against all lienable claims for material furnished Bacon & Moore and used for the construction work done by Bacon & Moore under their contract with the town of Littleton."

It is admitted "that materials under the contract dated 22 May, 1922, between Schofield's Sons Company and Bacon & Moore were furnished to the town of Littleton on or about 1 October, 1922."

The main question presented by this appeal is the right of plaintiff to base a suit against Maryland Casualty Company on the consent judgment in the Federal Court.

In *Bank v. Mitchell, ante,* 190, we said: "It is well settled in this jurisdiction: If parties have the authority, a consent judgment cannot be changed, altered or set aside without the consent of the parties to it. The judgment, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement made between the parties and a matter of record by the court, at their request. The judgment, being a contract, can only be set aside on the ground of fraud or mutual mistake," and cases cited.

In *Thayer v. Thayer,* 189 N. C., p. 508; 39 A. L. R., 434, it was said: "The suit is properly brought. We said in *Parlier v. Miller,* 186 N. C., 503, 119 S. E., 898: '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 party or privy to the contract.' *Federal Land Bank v. Assurance Co.,* 188 N. C., 753, 125 S. E., 631."

In the *Federal Land Bank case, supra,* it was held: "Numerous decisions have established the principle, in this jurisdiction at least, that ordinarily the beneficiaries of an indemnity contract may maintain an action on said contract, though not named therein, when it appears by express stipulation, or by fair and reasonable intendment, that their rights and interests were in the contemplation of the parties and were being provided for at the time of the making of the contract. *Dixon v. Horne,* 180 N. C., 585; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *R. R. v. Accident Corp.,* 172 N. C., 636; *Withers v. Poe,* 167 N. C., 372; *Voorhees v. Porter,* 134 N. C., 591; *Gastonia v. Engineering Co.,* 131 N. C., 363. It was held in *Gorrell v. Water Supply Co.,* 124 N. C., p. 333, that 'One not a party or privy on a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach.' This has been affirmed in numerous decisions and is the settled law here and elsewhere."

In accordance with C. S., 2445 (vol. III), Bacon & Moore made a contract bond in the penal sum of $24,167.83 with the town of Littleton. Maryland Casualty Company was surety on the bond. One of the conditions of the bond was: "And shall promptly make payment to all persons supplying said Bacon & Moore labor and materials in the prosecution of the work provided for in such contract." The plaintiffs furnished Bacon & Moore materials sued for in this action, and have not been paid.

Several creditors of J. H. Bacon and John W. Moore, partners trading as Bacon & Moore, brought suit against them and the town of Littleton and the Maryland Casualty Company in the Superior Court of Halifax County, and followed the procedure set out in C. S., 2445, *supra.* Plaintiffs did not intervene in twelve months, as required by said statute.

Bacon & Moore brought a suit in the Federal Court (Eastern District of North Carolina) against the town of Littleton. In that suit the consent judgment was rendered and, under the provision in that judgment, this suit is brought.

It will be noted that in the consent judgment Bacon & Moore and the town of Littleton agreed: (1) The town of Littleton pay the cost of action (2) pay over to the Maryland Casualty Company the sum of $8,000. In consideration the Maryland Casualty Company is to hold the town of Littleton, Bacon & Moore and the indemnitor for Bacon & Moore, on account of bond executed for Bacon & Moore by said Maryland Casualty Company, *forever harmless against all lienable claims for material furnished Bacon & Moore and used for the construction work done by Bacon & Moore under their contract with the town of Littleton.*

There is no dispute that Bacon & Moore, who signed the contract judgment, owe plaintiffs for the materials sued on. The materials

furnished by plaintiffs to Bacon & Moore were used by them under their contract with the town of Littleton to install for the town a water, light and sewerage system. No lien can be enforced against a municipality for sewer system. *Scheflow v. Pierce,* 176 N. C., p. 91. Nor water works pumping station and electric lighting plant. *Gastonia v. Engineering Co.,* 131 N. C., p. 363. Nor water works. See *Noland v. Trustees,* 190 N. C., 252. The words *lienable claim,* construing the word lienable to create a lien, could not apply to the town of Littleton—statute gave no lien. The $8,000 was turned over to the Maryland Casualty Company to save harmless the town of Littleton and Bacon & Moore against all lienable claims for material furnished, etc. There could be no such thing as a lienable claim against the town of Littleton or Bacon & Moore. Plaintiffs did have a claim on Bacon & Moore for material furnished them and used by them on the contract with the town of Littleton, which the Maryland Casualty Company agreed to "promptly make payment." This claim is unpaid and the suit in controversy is founded on the consent judgment. Bacon & Moore owes it and the Maryland Casualty Company agree to save them harmless, and has $8,000, turned over for that purpose. We think a just and righteous interpretation was that the claims against Bacon & Moore for material furnished the town should be paid out of the fund in the hands of the Maryland Casualty Company under the consent judgment, as these claims were originally "lienable" or enforcible out of the bond given by the Maryland Casualty Company. The only way the Maryland Casualty Company could save Bacon & Moore harmless is to pay this claim.

The judgment below is

Affirmed.

J. F. WHEDBEE v. J. B. RUFFIN, F. F. TRIPP AND S. W. McKEEL.

(Filed 24 February, 1926.)

1. Appeal and Error—New Trial—Specific Issues.

A new trial granted generally on appeal is as to all the issues involved, unless the opinion states only such issues on which the new trial is granted, or to which it shall be confined.

2. Mortgages—Contracts—Equity of Redemption—Evidence—Appeal and Error—Harmless Error.

Upon breach by mortgagee of his contract to enable mortgagor to retain title to his equity in the mortgaged premises for a certain and agreed length of time, the controlling question as to damages is the value of the equity at the time it was lost; but where the evidence is that it was the same then as that admitted at a different time, its exclusion is not prejudicial or reversible error.

8. Costs—Actions—In Forma Pauperis—Courts—Discretion.

In an action brought *in forma pauperis*, it is within the power and discretion of the trial judge at any time during the trial to tax the costs against plaintiff if unsuccessful in his action, the plaintiff's remedy being by motion to retax the costs if so advised.

CIVIL ACTION tried before *Sinclair, J.*, August Term, 1925, of BERTIE.

This case was considered by this Court at the Spring Term, 1925, and is reported in 189 N. C., 257. The facts contained in the present record are substantially the same as set out in said case, and for this reason will not be repeated.

The issues submitted to the jury in the present case and the answers thereto were as follows:

1. Did the defendants enter into a valid contract with the plaintiff, J. F. Whedbee, to keep him in the possession of the land described in the pleadings with retention of his title to his equity in same during the year 1921, as alleged in the pleadings with retention of his title to his equity in same during the year 1921, as alleged in the complaint? A. No.

2. If so, did defendants Ruffin, Tripp and McKeel fail to keep and comply with such contract? A. .....

3. What amount would said lands have sold for on 1 January, 1922, if they had been sold on that date for cash, under the power of sale contained in the mortgage and deed of trust under which they were sold 5 February, 1921? A. .....

4. What would have been the amount of indebtedness secured by said mortgage and deed of trust, including interest, on 1 January, 1922? A. $9,350.00.

5. What damages, if any, is the plaintiff entitled to recover of the defendants, Ruffin, Tripp and McKeel? A. .....

Judgment was entered upon the verdict and the plaintiff appealed.

Gillam & Davenport for plaintiff.

Stanley Winborne, Craig & Pritchett for defendants.

BROGDEN, J. There are thirty-eight exceptions in the record, and a separate discussion of each is not essential to the determination of the appeal. A group of exceptions involve the question of the meaning or significance of a new trial. The concluding paragraph in the opinion in the former appeal, as will appear in 189 N. C., 262, is as follows: "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."

The plaintiff insists that the meaning of the language employed by *Connor, J.,* confined the inquiry in the present trial to the single issue of damages and excluded both issues and evidence relating to other aspects of the controversy. The law is to the contrary. The identical question was thus disposed of in *Lumber Co. v. Branch,* 158 N. C., 251, as follows: "This Court, upon application, can grant a general or partial new trial, as it may see fit under all the circumstances; but when a new trial is granted, nothing more being said, it means a new trial of the whole case—of all the issues, and not merely of one of them, or, as in this case, of a part of one." *Huffman v. Ingold,* 181 N. C., 426.

Another group of exceptions challenges the correctness of the ruling of the trial judge in excluding testimony as to the value of the land in controversy on the date of the option in 1920, or the extension thereof 1 January, 1921, and the date of sale 5 February, 1921, and on the date of the trial at the August Term, 1925. The contract disclosed in the record is not a contract to convey land, but to enable plaintiff "to hold title to his equity in the land during the year 1921," and the controlling question would be the value of the equity of redemption at the time it was lost. The exceptions to the exclusion of this evidence become immaterial, however, by reason of the fact that it appears from the record that the valuations of the land thus excluded by the trial court were the same as the estimates given by the witnesses as to value of the land on 1 January, 1922, to wit, $14,000. Therefore, there was no change in the value of the land pending the controversy. It is true the plaintiff would have testified, if permitted, that the land was worth much more than $14,000 at the date of the trial, nearly four years after the alleged breach of contract. This was too remote.

The plaintiff brought a suit as a pauper, and in the final judgment it is decreed "that the plaintiff pay the costs of this action, same to be taxed by the clerk." The plaintiff insists that taxing the costs against him, after having been allowed to sue as a pauper, is error. The right to sue as a pauper is a favor granted by the court and remains throughout the trial in the power and discretion of the court. *Dale v. Presnell,* 119 N. C., 489. While it is true the record does not disclose that any motion was made to require the plaintiff to give security, still the matter of taxing costs is a collateral matter, and, if any injustice has been done to the plaintiff in this respect, he must make a motion as provided by law for the retaxing or proper taxing of costs.

After a diligent examination of all the exceptions we are impelled to hold that the case has been fairly and properly tried and that no reversible error appears upon the record. Let the judgment be

Affirmed.

JOSEPH BISSETTE v. J. L. STRICKLAND.

(Filed 24 February, 1926.)

1. Deeds and Conveyances—Mortgages—Descriptions—Boundaries—Parol Evidence.

A description in a mortgage to a life estate in lands as being in a certain county and township, containing twenty acres more or less, a part of a certain estate, and giving the names of two parties whose lands join it: *Held*, sufficient to admit parol evidence to fit the *locus in quo* to the description in the instrument, and is not void for vagueness of description. C. S., 992.

2. Same—Evidence of Identification—Acreage.

Held, evidence in this case tending to show that the mortgagor of the lands owned only one tract of land, that it identified the *locus in quo* by two adjoining owners, is sufficient, though the number of acres actually conveyed slightly exceeded the number given in the conveyance.

3. Evidence—Questions for Jury.

The weight of the evidence relative to the issues, when more than one reasonable inference can be made therefrom, is for the jury, though it may not be altogether positive or may be conflicting.

4. Deeds and Conveyances—Mortgages—"Adjoining" Lands—Boundaries—Statutes.

Where the word "adjoining" is used in giving the owners of land, it has the significance of giving the boundaries to the *locus in quo*. C. S., 992.

CIVIL ACTION tried before *Cranmer, J.*, at October Term, 1925, of NASH.

The plaintiff purchased from E. J. Bissette certain tracts of land in Nash County fully described in deed from E. J. Bissette to Joseph Bissette, recorded in Deed Book 279, page 136, in the office of the register of deeds for Nash County. The date of the deed was 27 November, 1922. Prior to the making of said deed the grantor therein, E. J. Bissette, had executed to the defendant, J. L. Strickland, a mortgage on a part of the land theretofore conveyed by him to the plaintiff, Joseph Bissette. The mortgage was dated 26 November, 1919, and duly recorded in February, 1920. The plaintiff brought this action to remove a cloud from his title, alleging in the complaint that said mortgage constituted a cloud upon his title. The defendant, answering the complaint, alleged that said mortgage was a valid and subsisting lien. The plaintiff contended that the description of the land mentioned in said mortgage was so vague and indefinite as to render the mortgage void. The description of the land was as follows: "A certain piece or tract

of land lying and being in Nash County, state aforesaid, in Bailey Township, and described and defined as follows: All of our lifetime interest in twenty acres of land, more or less, and being a part of the Mary A. J. Bissette estate, and joining the lands of F. R. Perry, John H. Griffin and others."

The plaintiff introduced in evidence the deed from E. J. Bissette and wife to him, above referred to, and also the mortgage above referred to from E. J. Bissette and wife to the defendant, J. L. Strickland. The defendant offered F. R. Perry, one of the adjoining land owners mentioned in said mortgage, who testified that he knew the boundaries of the Mary A. J. Bissettee land, and that he also knew the particular piece of land containing twenty acres, more or less, described in the mortgage; that it joined his land and also joined the John H. Griffin land, and that E. J. Bissette, the grantor in said mortgage, lived on this particular piece of land for several years, and that so far as he knew E. J. Bissette never owned any other land in the county.

Kinchen Lyles, another adjoining land owner, testified that he knew the land mentioned in the mortgage, and that the tract of land in controversy adjoined his land on the east, the land of Mrs. Martha Bissette on the west, the land of Mr. Perry on the north, and the Griffin land on the south, and that E. J. Bissette lived on this particular piece of land, and that it was separate from the other tracts of land; that he knew of no other piece of land containing twenty acres, more or less, which joined the land of Kinchen Lyles on the east, Martha Bissette on the west, F. R. Perry on the north, and John H. Griffin on the south except the E. J. Bissette land, "*and that there is no other tract of land that fills the bill.*"

E. J. Bissette, the maker of the mortgage, testified that he had been living on the land twenty or twenty-five years., and this particular tract of land joined the land of F. R. Perry on the east and Kinchen Lyles on the south, and that he never owned any other piece of land except the land described in the mortgage.

There was testimony to the effect that Mary A. J. Bissette owned several tracts of land and that the tract in controversy contained twenty-five, thirty or thirty-one acres.

The plaintiff objected to all testimony of witnesses attempting to identify the land on the ground that the description in the mortgage was so vague and indefinite that the mortgage was void, and, therefore, parol evidence could not be admitted to aid the description. The jury found that the mortgage was a valid and subsisting lien on the property, and from the judgment, in accordance with the verdict, the plaintiff appealed.

Austin & Davenport for plaintiff.
Finch & Vaughan and Manning & Manning for defendant.

BROGDEN, J. The question arising from the record is whether the description of the property in the mortgage deed in controversy can be aided by parol testimony or whether the mortgage is void by reason of vague and indefinite identification of the property conveyed. The function of the description in conveyances is to identify the land covered by the conveyance. C. S., 992, is as follows: *"Vagueness of description not to invalidate.* No deed or other writing purporting to convey land or an interest in land shall be declared void for vagueness in the description of the thing intended to be granted by reason of the use of the word "adjoining" instead of the words "bounded by," or for the reason that the boundaries given do not go entirely around the land described: *Provided,* it can be made to appear to the satisfaction of the jury that the grantor owned at the time of the execution of such deed or paper-writing no other land which at all corresponded to the description contained in such deed or paper-writing."

This statute applies only where there is a description which can be aided by parol, but not when there is no description. *Harris v. Woodard,* 130 N. C., 580.

It cannot be said that the mortgage contains no description of the land conveyed, because reference is made to adjoining owners and the land is further identified as being a part of the Mary A. J. Bissette estate. While the description is not complete, and perhaps may stand upon the border line of legal sufficiency, still it is within the principle announced in *Farmer v. Batts,* 83 N. C., 387, which principle has been firmly established, as settled law, by an increasing line of decisions reaffirming the soundness of that decision. *Johnson v. Mfg. Co.,* 165 N. C., 105; *Patton v. Sluder,* 167 N. C., 500; *Norton v. Smith,* 179 N. C., 553; *Green v. Harshaw,* 187 N. C., 213; *Freeman v. Ramsey,* 189 N. C., 790.

In obedience to the legal principles of construction deducted from the pertinent decisions of this Court we hold that the description in the mortgage is sufficient to permit the admission of parol evidence to identify the land or to fit it to the land intended to be conveyed. Therefore, the exceptions taken to parol evidence of identity, admitted by the trial judge are untenable. While the evidence was not altogether positive and unequivocal, and even to some extent conflicting, its weight and credibility was for the jury.

The fact that the acreage in the mortgage was referred to as twenty acres, more or less, and that there was evidence that the tract con-

tained twenty-five, thirty or thirty-one acres, does not affect the principle. *Patton v. Sluder,* 167 N. C., 500.

We have given careful consideration to all the exceptions presented in the record, and for the reasons given, we are constrained to hold that the evidence of identification was properly admitted and the case properly tried.

Affirmed.

PEOPLES BANK & TRUST CO. v. B. P. PARKS ET UX.

(Filed 24 February, 1926.)

1. Appeal and Error—Certiorari—Laches—Rules of Court.

A motion for a *certiorari* will not be considered in the Supreme Court when not timely made in accordance with the rule, and it appears that appellant has been guilty of laches in respect to serving his case, and negligent otherwise. Rule 5, 185 N. C., p. 788, as amended 189 N. C., p. 843.

2. Same—Superior Court—Extension of Time by Judge.

The trial judge has no authority to extend time for the service of case by the respective parties to exceed that fixed by the Rule of Court for perfecting appeals.

3. Appeal and Error—Certiorari—Writ, when Granted.

Appellants are only entitled as of right to the granting of their motion in the Supreme Court for a writ of *certiorari,* when the failure to perfect their appeal is due to some error or act of the court, or its officers, and not to any fault or neglect of theirs, or of their agents.

4. Same—Discretion of Court.

The granting of a writ of *certiorari* to bring up a case on appeal to the Supreme Court, is not an absolute right of the appellant, but ordinarily rests in the discretion of the Supreme Court.

MOTION for *certiorari* to have case brought up from WAYNE Superior Court and heard on appeal.

J. Faison Thomson, D. H. Bland and N. W. Outlaw for defendants, movants.

STACY, C. J. This was an action to set aside a deed alleged to have been made by B. P. Parks to his wife, Myrtle Parks, with intent to hinder, delay and defraud the creditors of the said B. P. Parks. The case was tried at the October Term, 1925, Wayne Superior Court, and resulted in a verdict and judgment in favor of the plaintiff. The defendants gave notice of appeal to the Supreme Court. By consent, de-

fendants were allowed sixty days within which to prepare and serve statement of case on appeal, and the plaintiff was allowed sixty days thereafter to file exceptions or counter statement of case. This application for *certiorari* was made 10 February, 1926, for the reason "that said plaintiff and defendant are unable to agree as to a correct statement of case on appeal, and it is impossible to have same settled by the judge who tried the case in time to be presented at this term of the Supreme Court."

The defendants served their statement of case on appeal 24 December, 1925, the last day allowed to them for serving same, and the plaintiff served its counter-case 4 February, 1926, less than sixty days thereafter. It does not appear that the papers have been sent to the judge or that he has been requested to set a time for settling the case before him. The record proper, upon which the motion for *certiorari* is based, was not filed in this Court until 10 February, 1926, less than 14 days before the call of the docket from the Fourth District, the district to which the case belongs. There is nothing on the record to suggest the necessity of any unusual time in preparing the case on appeal.

Under our settled rules of procedure, an appeal from a judgment rendered prior to the commencement of a term of the Supreme Court must be brought to the next succeeding term; and, to provide for a hearing in regular order, it is required that the same shall be docketed here fourteen days before entering upon the call of the district to which it belongs, with the proviso that appeals in civil cases from the First, Second, Third and Fourth Districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. Rule 5, vol. 185, page 788, as amended, vol. 189, page 843.

We again call the attention of the profession to the fact that the rules governing appeals are mandatory and not directory. The Court has not only found it necessary to adopt them, but equally necessary to enforce them and to enforce them uniformly. *Finch v. Comrs.*, 190 N. C., 154. The single modification sanctioned by the decisions is that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for *certiorari,* which motion may be allowed by the court, in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right. *S. v. Farmer,* 188 N. C., 243.

Nor is the situation bettered when the time for serving statement of case on appeal and exceptions thereto or counter statement of case is enlarged by order of the judge trying the case as he is authorized, in his discretion, to do under C. S., 643, amended by chapter 97, Public Laws 1921, for this statute gives him no more authority to abrogate the rules of the Supreme Court than litigants or counsel would have to impinge upon them by consent or agreement. *Cooper v. Comrs.*, 184 N. C., 615.

It will be observed that the defendants in the present case by agreeing to such a long extension of time and by taking the full sixty days allowed to them, thereby put it out of their power to have the case ready for hearing on appeal as required by the rules of the Supreme Court. This they did at the peril of losing their right of appeal, and, as might have been expected, they have lost it.

Appellants are entitled to a writ of *certiorari* only when the failure to perfect their appeal is due to some error or act of the court or its officers, and not to any fault or neglect of theirs or that of their agent. *Bank v. Miller*, 190 N. C., 775.

Motion denied.

STATE v. W. H. RAWLINGS.

(Filed 24 February, 1926.)

Criminal Law—Automobiles—Reckless Driving—Criminal Intent.

Upon a trial under an indictment with three counts: assault with a deadly weapon, an automobile; operating a motor vehicle on a public highway while under the influence of intoxicating liquor; and recklessly, and in breach of C. S., 2618, wherein it was admitted by the State that there was no evidence of intentional assault, and the jury having returned for their verdict that defendant "was guilty of an assault, but not with reckless driving": *Held*, the admission and the verdict on the last two counts dispelled the element of criminal negligence and criminal intent, and a conviction on the first count will not be sustained.

APPEAL by defendant from *Calvert, J.*, at November Term, 1925, of PERQUIMANS.

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

Ehringhaus & Hall for the defendant.

ADAMS, J. In the indictment there are three counts. The first charges the defendant with an assault with a deadly weapon, an automobile; the second, with operating a motor vehicle on a public highway while

under the influence of intoxicating liquor; and the third, with operating an automobile recklessly in breach of C. S., 2618. *S. v. Sudderth,* 184 N. C., 753.

On the trial Sheriff Wright was examined in behalf of the prosecution. He testified that he and the witness Perry were traveling in Perry's car on a sixteen-foot concrete highway in the direction of Winfall, which is three miles from Hertford; that Perry, who was driving, kept his car to the right of the center of the road; that the witness saw the defendant's car coming from the direction in which they were going and that it was to "the defendant's left of the center of the road"; that he thought the defendant would turn to the right far enough to enable them to pass; that he did not do so and the cars collided; that the car was damaged and Perry "knocked unconscious." He said that neither car was moving at an excessive rate of speed, and that the relation between the three men had been and still was "perfectly friendly." He was corroborated by Perry.

The defendant testified that his car was on the right side of the road and that "the other car approached and ran into him"; that after the occurrence he pointed out to other witnesses the marks of his wheels; and that he thought the cars would clear each other in passing.

The State admitted that there was no evidence of an intentional assault, its "theory being that the defendant was guilty of reckless driving and upon this basis of an assault as well." The judge correctly instructed the jury in accordance with this theory; and they returned for their verdict, "Guilty of an assault, but not guilty of reckless driving."

The defendant moved that the verdict be set aside as a matter of law and that the judgment be arrested for the reason that the acquittal of the defendant on the count for reckless driving took away the only element on which the assault could be predicated and necessarily worked an acquittal on the first count. These motions were denied and the defendant excepted and appealed from the judgment.

Since the defendant was acquitted of the charges set out in the second and third counts, the only question is whether the verdict returned and the judgment pronounced on the first count can be sustained. According to the record the State contended that the defendant was guilty of an assault because of his reckless driving; but as the jury found him "not guilty of reckless driving," this theory is destroyed. Only one other need be considered. There is evidence from which the jury might have inferred that the defendant just before the meeting of the two cars intentionally kept and operated his own car on the wrong side of the road in breach of the statute. C. S., 2617; Laws, Ex. Ses., 1924, ch. 61. Wherefore it may be argued that the intentional performance of this unlawful act is evidence of a specific intent to commit the assault.

We are not unmindful of the general principle that a specific intent to injure a particular person need not be shown if there be the intentional commission of an unlawful act; but the intentional driving of a motor vehicle on the wrong side of the road in disregard of the statute is *malum prohibitum,* not *malum in se.* Moreover, the verdict dispels the idea of criminal negligence and criminal intent. *S. v. Horton,* 139 N. C., 588. Considering the admissions of the State and the finding of the jury we are of opinion that the conviction on the first count cannot be sustained.

Error.

VIRGINIA BRIDGE & IRON CO. v. TOWNSVILLE RAILROAD CO.

(Filed 24 February, 1926.)

Appeal and Error—Insufficiency of Case—Remand.

Where the case on appeal does not disclose whether one signing an obligation does so as agent of the corporation principal or as guarantor of payment, the case will be remanded, when such is essential to passing upon the question as to the bar of the statute of limitations presented by the appeal.

APPEAL by defendant from *Sinclair, J.,* at October Term, 1925, of VANCE.

On 23 April, 1920, the plaintiff and the defendant executed a written contract, under the terms of which the plaintiff constructed for the defendant on the line of its railroad a single-track steel bridge 137 feet in length. The agreed price was 6.95 cents a pound payable, 25% when complete shipment was made and 25% in 60, 90, and 120 days thereafter. Below the signature of the contracting parties was attached the following stipulation: "In consideration of the fact that the Virginia Bridge & Iron Company has executed the foregoing contract, I do hereby guarantee to the said Virginia Bridge & Iron Company that the Townsville Railroad Company will make all payments to be due or to become due under said contract as follows: 25% in cash when shipment is made, and the balance in three equal payments 60 days, 90 days and 120 days thereafter. When shipment is made I will give the Virginia Bridge & Iron Company my negotiable notes for the three deferred payments, said notes to draw interest at 6% per annum after maturity. Witness my hand and seal this 5 May, 1920. J. R. Paschall (Seal)." J. R. Paschall is not a party to this action. The plaintiff alleged and offered evidence tending to show that certain payments had been made on the contract price; that is, on 4 January, 1921, $586.55; on 4 April,

1921, $1,200; and 3 June, 1921, $880; on 1 September, 1921, $1,000; leaving an unpaid balance of $10,000; and that payments of interest had been made down to and including 15 July, 1922. There was evidence that the payments were made by Paschall and that he gave his notes for the debt after the completion of the work, and that after the maturity of the notes and Paschall's default he gave the plaintiff collateral security of the par value of $7,500. The plaintiff alleged that Paschall was a large creditor of the defendant and offered testimony to show that he was the defendant's treasurer and that he represented the defendant in making the contract.

Scott & Buchanan and T. T. Hicks & Son for plaintiff.
J. H. Bridgers for defendant.

PER CURIAM. The defendant contends that it was discharged from liability by reason of the contract between the plaintiff and Paschall; that the relation between these two created an obligation which was separate and distinct from that of the defendant; that all payments were made by Paschall as guarantor; and that the plaintiff's claim against the defendant is barred by the statute of limitations. *Coleman v. Fuller,* 105 N. C., 328.

A trial by jury was waived and the presiding judge found these facts: the action was begun 26 August, 1924; the defendant has not been released from its obligation; that the payments were made by Paschall; and the balance due is $10,000 with interest from 15 January, 1922. His Honor held that the plaintiff's cause of action against the defendant is not barred.

We are left somewhat in doubt as to the import of the finding that the payments were made by Paschall. It appears that Paschall was treasurer of the defendant and as such was instrumental in the execution of the contract; but it does not distinctly appear whether Paschall made all or any of the payments in his capacity as guarantor or in his capacity as treasurer of the defendant. There is another point. In the written contract Paschall guaranteed payment; in the case on appeal, which was agreed to by the attorneys, it is said there was evidence of an agreement that he should become surety. Before deciding whether the claim is barred we prefer to have a more complete disclosure of the facts relating to these two questions. The case is therefore remanded for a further finding of the facts.

Remanded.

T. A. HENDERSON v. CITY OF WILMINGTON AND WALTER H. BLAIR, MAYOR, JOSEPH E. THOMPSON AND E. L. WADE, COMMISSIONERS OF THE CITY OF WILMINGTON.

(Filed 3 March, 1926.)

1. Municipal Corporations—Statutes—"Faith and Credit"—Necessary Expenditures—Courts—Questions of Law.

Our statutes enumerating certain properties that may be acquired by municipalities are not in conflict with our Constitution, Art. VII, sec. 7, when not specifying that the question of expenditures therefor shall first be submitted to the voters of the community, when the credit of the community is involved therein, it being for the courts, as a matter of law, to decide whether such expenditures come within the constitutional inhibition, or are for a necessary expenditure permitted within its terms. C. S., 2691.

2. Same.

Cities and towns may levy a tax for necessary expenses up to the constitutional limitation without a vote of the people and without legislative permission; for necessary expenses they may exceed the constitutional limitation by legislative authority, without the approval of the voters: but for purposes other than necessary, a tax cannot be levied either within or in excess of the constitutional limitation except with the approval of the voters under special legislative authority. Const., Art. V, sec. 6; Art. VII, sec. 7.

3. Same—Government—Business Advantages.

The courts in determining whether a proposed issue of bonds by a city is for a necessary expense not requiring the assent of its voters, look to the question of whether the proposed issuance of bonds is for purposes governmental in their scope, and the issuance will be declared unconstitutional when the bonds are for purposes relating only to the business advantages to be derived by the community.

4. Same—Acquisition of Wharves and Terminals.

Without the approval of its voters, a city is inhibited by Art. VII, sec. 7, from issuing bonds for the acquisition of free "wharves or terminals" that may be of advantage to its local business interests. The distinction is drawn between the consideration of the question of a necessary expense for keeping up wharves and terminals already owned or acquired.

5. Same—Ordinances—United States Government Contracts.

Under the facts of this case: *Held*, that the declaration in the ordinance that the wharf and terminal facilities proposed to be acquired were for a necessary expense under a deed to the property given by the agency of the United States Government conditioned upon their acquisition and maintenance, does not affect the question of its constitutionality as determined by the courts.

CLARKSON, J., dissenting.

HENDERSON *v.* WILMINGTON.

APPEAL by the defendants from a judgment of *Daniels, J.*, rendered at Chambers on 30 November, 1925.

This is a controversy without action upon the following statement of facts:

1. Plaintiff, T. A. Henderson, is a citizen, resident and taxpayer of the city of Wilmington, State of North Carolina.

2. The defendant, city of Wilmington, is a municipal corporation, duly created under the laws of the State of North Carolina. The defendant, Walter H. Blair, is mayor of said city, and the defendants, Joseph E. Thompson and James E. L. Wade, are commissioners of said city.

3. On 18 November, 1925, the board of commissioners of the city of Wilmington, passed an ordinance providing for the issuance of bonds not to exceed the amount of $100,000, pursuant to the Municipal Finance Act. After the introduction and before the final passage of said ordinance, an officer designated by the board of commissioners for that purpose, made and filed with the clerk of said city, the statement it appeared that the net debt of the city of Wilmington, including the said $100,000 of bonds, did not exceed 8 per cent of the assessed valuation of property in said city, as last fixed for municipal taxation. Said ordinances were published in a newspaper published in the city of Wilmington, in accordance with law. The said ordinance is in words and figures as follows:

"*An Ordinance Authorizing the Issuance of Bonds for the Construction of Public Municipal Docks and Terminals:*

"Be it ordained, by the board of commissioners of the city of Wilmington, North Carolina, and it is hereby ordained by authority thereof as follows:

SECTION 1. Pursuant to the Municipal Finance Act, bonds of the city of Wilmington are hereby authorized to be issued in an aggregate principal amount not exceeding $100,000 for the purpose of paying the cost of constructing public municipal docks and terminals at or near the property known as the Old Liberty Shipyard, on the Cape Fear River, said public docks and terminals to be used for the purpose of shipping, both foreign and coastwise.

"SEC. 2. A tax sufficient to pay the principal and interest of said bonds shall be annually levied and collected.

"SEC. 3. It is hereby determined, pursuant to the requirements of the Municipal Finance Act, that a statement of the debt of the city of Wilmington has been filed with the city clerk, and is open to public inspection.

"SEC. 4. It is hereby determined that all expenses to be defrayed by means of the bonds hereby authorized are necessary expenses of the city of Wilmington, within the meaning of section 7, Art. VII, of the Constitution of North Carolina.

"SEC. 5. This ordinance shall be published once in each of the two successive weeks after its final passage.

"SEC. 6. This ordinance shall take effect thirty days after its first publication, unless in the meantime, a petition for its submission to the voters is filed under the Municipal Finance Act, and in such event it shall take effect when approved by the voters of the city of Wilmington, at an election as provided in said act."

4. The defendants will, unless restrained by an order of this court, proceed at once to issue $100,000 of bonds of the city of Wilmington as provided for in said ordinance, for the purpose therein expressed, without a vote of a majority of the qualified voters of said city, and the question of issuing said bonds for such purpose has not been submitted to the voters of said city at an election.

5. The defendant, city of Wilmington, is the owner of a certain tract of land lying partly within, and partly without, the city limits, and having considerable river front, which property was formerly known as the Liberty Shipyard, and was conveyed to the city of Wilmington by the United States Shipping Board Emergency Fleet Corporation, upon certain terms and conditions hereinafter more fully set out. That said tract of land constitutes the only available water front at or near the city of Wilmington, on which public docks and other terminal facilities can be erected. That while private interests have constructed adequately equipped docks and terminals on the river at, and near, the city of Wilmington, and although such terminals may be operated under publicly regulated charges, the existence of publicly owned docks and terminals is necessary to insure that equality of facilities and service, which is demanded by the shipping interests.

6. That the city of Wilmington is largely dependent for its material welfare and progress upon the proper development of its port, and that in order for said city to compete with other coastal cities on the South Atlantic Seaboard, it is necessary for said city to offer to shipping interests adequate publicly owned docks and terminal facilities.

7. The United States Board of Engineers has adopted a rule requiring municipalities to make adequate provision for utilizing waterway development, such as docks and other terminal facilities, as a condition precedent to the approval of water-way development projects.

8. There are at present, two major water-way development projects for the Port of Wilmington, viz.: a thirty-foot depth, with a 400-foot

channel from the bar to the city, and the construction of the inter-coastal water-way from Beaufort to the Cape Fear River, and that the construction of public municipal docks and terminal facilities as provided for in said proposed bond issue is calculated to materially aid in the securing of both of these projects.

9. That on 11 September, 1920, the United States Shipping Board Emergency Fleet Corporation, by deed duly executed, conveyed to the city of Wilmington, the lands and premises hereinabove referred to and upon which it is proposed to construct said public municipal docks and terminals. Said deed is in words and figures, in part, as follows:

"DISTRICT OF COLUMBIA }
"CITY OF WASHINGTON } ss.

"Indenture made and executed this the eleventh (11th) day of September, A.D. nineteen hundred twenty (1920), by and between the United States Shipping Board Emergency Fleet Corporation, a corporation organized and existing under the laws of the District of Columbia, representing and acting for the United States of America, (herein called the grantor), party of the first part, and the city of Wilmington, of the State of North Carolina, a municipal corporation, (herein called grantee), party of the second part:

"Whereas, the said grantee, during the year nineteen hundred eighteen (1918), was instrumental in procuring the donation to the grantor of the land or real estate hereinafter described; and,

"Whereas, the inducement to the said grantee was the location and maintenance by the said grantor of a shipyard at or near the city of Wilmington, in the State of North Carolina, and,

"Whereas, the grantor has ceased to operate the shipyard upon said real estate; and,

"Whereas, it is desired, as a matter of public policy, that the grantor shall assist in the maintenance of ports and terminals upon the eastern seaboard of the United States, as enjoined upon it by law; and,

"Whereas, the grantee is willing to accept a conveyance of said land or real estate subject to a condition to maintain perpetually free port and terminal facilities upon the real estate hereinafter described; and,

"Whereas, at a meeting duly held by the board of trustees of the grantor, said United States Shipping Board Emergency Fleet Corporation, in the city of Wilmington, District of Columbia, on the eleventh (11th) day of September, nineteen hundred twenty (1920), the following resolution was unanimously adopted by said board of trustees:

(Here follows resolution.)

"Now, therefore, this indenture witnesseth: That the said grantor, in consideration of the premises and in further consideration of the sum of thirty-seven thousand five hundred dollars ($37,500), in hand paid by the grantee, the receipt whereof is hereby acknowledged, has granted, sold, conveyed, and confirmed, and by this indenture does hereby grant, bargain, sell, convey and confirm to the city of Wilmington, the following described real estate, to wit: (Here follows description of property.)

To have and to hold the aforegranted and above described parcels of land, together with all the appurtenances and rights, unto the said grantee and its successors and assigns forever, upon condition, however, that the said grantee, its successors and assigns, will, within ten (10) years from the date of this instrument, create and erect upon such portion of said real estate as is appropriate and necessary therefor, free port and terminal facilities, and will, from and after the expiration of said term of years, perpetually and continuously maintain upon said real estate such free port and terminal facilities, and the further condition that whenever said grantee, its successors and assigns, shall fail to keep and maintain, after the expiration of said term of years, free port and terminal facilities upon said land or real estate, then, and in that event, the said land or real estate shall revert to, and the title shall vest in, the grantor, or, if the grantor is not then in existence, to the United States Shipping Board, or, if the United States Shipping Board is not then in existence, to the United States of America, and the said grantor, for itself and its successors, hereby covenants and agrees to and with the said grantee, its successors and assigns, to warrant and defend the title to the above described tracts or parcels of land against the lawful claims of all persons."

10. That there are no funds available for the construction of said docks and terminals except the proceeds of the proposed bond issue, and that unless said docks and terminals are constructed by the city of Wilmington, within the time limited in said deed, the real estate therein conveyed to the city of Wilmington, will, under the terms thereof, revert to the grantor and the defendant, city of Wilmington, will be divested of all interest or estate therein.

11. The plaintiff maintains that the issuance of said bonds as aforesaid, will be unlawful for the reason that the issuance of said bonds would be in violation of section 7, Art. VII, of the Constitution of North Carolina, which declares that no town shall contract a debt, or levy a tax, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein, that the construction of public municipal docks and terminals on the lands and premises referred to, is

not a necessary expense within the meaning of said section of the Constitution of North Carolina, and that, therefore, the issuance of bonds for said purpose, without first obtaining the approval of the voters of said town as required by said section of the Constitution will be unlawful.

12. On the other hand, the defendants maintain that the issuance of said bonds as aforesaid will not be unlawful for the reason that the construction of public municipal docks and terminals, is a necessary expense within the meaning of section 7, Art. VII, of the Constitution of North Carolina, and that, therefore, said bonds may be lawfully issued without submitting the same to a vote of the people and obtaining a vote of the majority of the qualified voters.

13. The plaintiff maintains that upon the foregoing facts, he is entitled to judgment restraining and enjoining the defendants from issuing said bonds. The defendants maintain that the issuance of said bonds as aforesaid, should not be enjoined.

14. It is agreed, that if, upon the foregoing facts, the court shall be of the opinion that said bonds, or any of them, will be invalid, judgment shall be rendered enjoining and restraining the defendants from issuing said bonds.

Judge Daniels was of opinion that while all the requirements of the Municipal Finance Act of 1921 had been complied with, the purpose for which the bonds are to be issued does not constitute a necessary expense of the city of Wilmington within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina, and that said bonds cannot legally be issued without submitting the question to a vote of the people as provided in Art. VII, sec. 7, and restrained and enjoined the defendants from issuing the bonds under the ordinance set out in the agreed case. The defendants excepted and appealed to the Supreme Court.

Bryan & Campbell for plaintiff.
K. O. Burgwin for defendants.

ADAMS, J. The Constitution, Art. VII, sec. 7, provides: "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 necessity of a rigid observance of this provision has been pointed out and reiterated in our decisions and emphasized by special legislative enactment. C. S., 2691. In analyzing and construing this section in its relation to the sixth section of Article 5, the Court has held: (1) That for necessary

expenses the municipal authorities may levy a tax up to the constitutional limitation without a vote of the people and without legislative permission; (2) that for necessary expenses they may exceed the constitutional limitation by legislative authority, without a vote of the people; (3) that for purposes other than necessary expenses a tax cannot be levied either within or in excess of the constitutional limitation except by a vote of the people under special legislative authority. *Herring v. Dixon,* 122 N. C., 420; *Tate v. Comrs.,* 122 N. C., 812.

The qualified voters of the city have had no opportunity to express their will on the far-reaching question of building docks to be used in "shipping, both foreign and coastwise," and there is no pretense that the indicated tax will be within the constitutional limitation. Therefore the bonds can be issued and the tax levied, if at all, only upon the principle stated in the second class,—that is, that the bonds are authorized by the Legislature and are to be issued for a necessary expense of the city. It is provided by statute that any city shall have the right to acquire, establish and operate waterworks, electric lighting systems, gas systems, schools, libraries, cemeteries, market-houses, wharves, play or recreation grounds, athletic grounds, parks, abattoirs, sewer systems, garbage and sewage disposal plants, auditoriums or places of amusement or entertainment, armories, rest rooms, a system of public charities, etc., and that reasonable appropriations for these purposes shall be "subject to the provisions of the Constitution of the State." C. S., 2832. That is, if the purpose involves a necessary expense, as, for example, a market-house or a municipal lighting system, the assent of the qualified voters is not essential; but if the purpose does not involve a necessary expense, as, for instance, a hospital or place of amusement, the will of the voters must be ascertained. It is also provided that for certain of these purposes land may be acquired by purchase or condemnation. C. S., 2791, 2792; Laws 1917, ch. 136, subch. 4, sec. 1; Laws 1919, ch. 262.

The constitutionality of these acts is not in question. The Legislature has not said that the purposes enumerated involve a necessary expense (although some, but not all, do); for this is a question of law. Since the appropriations are "subject to the provisions of the Constitution" they must conform to the Constitution; and for this reason there is no conflict between the statute and the organic law.

The bonds are to be issued for the purpose of constructing "public municipal docks and terminals." Neither the word "docks" nor the word "terminals" appears in the statute we have cited; and "wharves," which is found in the statute, does not appear in the ordinance. But we make no point on the technical distinction between a "dock," a "wharf"

and a "terminal"; we grant for the present purpose only that "wharves" may be treated as synonymous with or at least as including "docks and terminals." It will be conceded, we presume, that a municipality may not engage in the business of erecting wharves or docks unless expressly authorized by its charter or by statute. This principle is elementary. If the statute (C. S., 2832) authorizes the defendants to acquire, establish, or operate a wharf, it also prescribes a definite constitutional limitation under which the authority may be exercised; and if the statute had not prescribed it, the Constitution has. This limitation is "a vote of the majority of the qualified voters" in the city, unless the construction of the proposed wharf or dock is a necessary municipal expense. Whether it is a necessary expense within the meaning of the Constitution is the question to be determined.

With the mere utility of the enterprise we are not concerned. Whether "shipping, foreign and coastwise" would expand commerce is alien to the principle we are considering. The convenience, the benefit to be conferred upon a particular class, the insufficiency of present facilities, and a want of opportunity for commercial or industrial competition—these and similar premises are not factors that can control or even contribute to our solution of the present controversy. We are dealing exclusively with a question of law, with the legal formalities necessary to pledging the faith of the city by issuing bonds for the contemplated purpose; and as these formalities are mandatory they may not be disregarded or ignored.

It is admitted, we understand, that the term "necessary expense" includes law and fact, and, as used in the Constitution and in contracts purporting to incur municipal indebtedness, that it involves matters, not for legislative, but for judicial determination. *Storm v. Wrightsville Beach,* 189 N. C., 679; *Black v. Comrs.,* 129 N. C., 121; *Mayo v. Comrs.,* 122 N. C., 5, overruled on another point in *Fawcett v. Mt. Airy,* 134 N. C., 125. This is recognized by the Legislature in its statutory definition of "necessary expenses" as the necessary expenses referred to in Art. VII, sec. 7, of the Constitution. 3 C. S., 2919. Also in the provision: "If a bond ordinance provides for the issuance of bonds for a purpose other than the payment of necessary expenses of the municipality, the approval of a majority of the qualified voters of the municipality as required by the Constitution of North Carolina, shall be necessary in order to make the ordinance operative." 3 C. S., 2948. It is plain, then, that neither the finding of the defendants (as stated in the fourth section of their ordinance) that the expenses to be defrayed are necessary expenses, nor the rule, adopted by the United States Board of Engineers requiring municipalities to make adequate provision for utilizing docks and other terminal facilities, nor yet any executory provision in the deed of the United States shipping board Emergency Fleet

Corporation can have the least bearing or influence upon our interpretation of the constitutional provision.

In defining "necessary expense" we derive practically no aid from the cases decided in other States. We have examined a large number of such cases apparently related to the subject and in each one we have found some fact or feature or constitutional or statutory provision antagonistic to or at variance with the section under consideration. We must rely upon our own decisions.

In *Wilson v. Board of Aldermen,* 74 N. C., 748, 759, *Rodman, J.,* said that it would be difficult, if not impossible, to draw a precise line between what are and what are not the necessary expenses of the government of a city; and in *Fawcett v. Mt. Airy,* 134 N. C., 125, *Montgomery, J.,* remarked that it would be almost impossible to state in legal phraseology the meaning of the words "necessary expense" as applied to the wants of a city or town government. The definition given in *Jones v. Comrs.,* 137 N. C., 579, 599, indicates less restraint and less doubt. There it is said by *Hoke, J.,* "They (necessary expenses) involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of the public peace and administration of public justice—expenses to enable the county to carry on the work for which it was organized and given a portion of the State's sovereignty." In a subsequent decision the same writer observes that the term more especially refers to the ordinary and usual expenditures reasonably required to enable a county properly to perform its duties as a part of the State government. *Keith v. Lockhart,* 171 N. C., 451, 456. This feature is again stressed in *Ketchie v. Hedrick,* 186 N. C., 392, in which the late *Chief Justice Clark* said: "But all these cases extending the meaning of the words, "necessary expenses," were due to the enlarged scope of governmental expenses, causing a broader vision and very proper growth in the recognized needs and requirements of municipal government. They were not based upon any idea that "necessary expenses" would take in matters which were not required as necessary governmental expenses."

By virtue of this interpretation it has been held that among necessary expenses may be classed those incurred by a city or town for streets, lights, water, sewerage, a fire department, an electric fire-alarm, an incinerator, a municipal building, a markethouse, a jail or guard-house, and jetties for the protection of a village bordering on the water; and among expenses not necessary may be grouped those for schools and schoolhouses (see, however, *Collie v. Comrs.,* 145 N. C., 170), hospitals, rights of way for railroads, and manufacturing, industrial, and commercial enterprises. *Storm v. Wrightsville Beach, supra;* and cases cited; *Brown v. R. R.,* 188 N. C., 52; *Ketchie v. Hedrick, supra;*

Armstrong v. Comrs., 185 N. C., 405; *Williams v. Comrs.*, 176 N. C., 554; *Stephens Co. v. Charlotte*, 172 N. C., 564; *Keith v. Lockhart, supra; Sprague v. Comrs.*, 165 N. C., 603.

The cases declaring certain expenses to have been "necessary" refer to some phase of municipal government. This Court, so far as we are advised, has given no decision to the contrary. *Hartsfield v. New Bern*, 186 N. C., 136, is not in conflict with this position. There the question of levying a tax or pledging the credit of the city did not arise. Article VII, sec. 7, of the Constitution was not construed or discussed; it was not referred to in the opinion. In that case the plaintiffs sought to enjoin the city of New Bern from acquiring an easement in a strip of land about twenty feet in width extending from the tracks of the Atlantic and North Carolina Railroad to Union Point; and they based their suit upon the allegation that the act of the Legislature giving the city the right of eminent domain was a private act passed without the preliminary notice of thirty days and without evidence of three several readings on three different days. Const., Art. II, secs. 12, 14. Upon this question the appeal was prosecuted; not upon that of levying a tax or pledging the credit of the city. The reference in the reported case to municipal wharves as "public necessities" appears incidentally in the preliminary statement. It is not a part of the opinion; so it cannot be accepted as a precedent or as the expression of the Court. The controversy had reference to the exercise under legislative grant of the city's alleged right to condemn the plaintiffs' land to enable a railroad built principally by the State and certain counties, including Craven, to extend its track to the water front.

In *Scales v. Winston-Salem*, 189 N. C., 469, the plaintiff asked damages for personal injury alleged to have resulted from the negligent construction of an incinerator. In pointing out the distinction between acts done for the private benefit of the city and those done in the performance of a governmental power, we quoted from the opinion in *Moffitt v. Asheville*, 103 N. C., 237, 254, in which *Avery, J.*, said: "The grading of streets, the cleansing of sewers, and keeping in safe condition wharves from which the corporation derives a profit are corporate duties." In *Moffitt's case* and in *Scales' case*, the question was that of the defendant's liability for negligence; neither has anything to do with Art. VII, sec. 7, of the Constitution. There are many "corporate duties" which are utterly remote from those relating to necessary expenses. The duty of keeping a wharf in safe condition after the city has lawfully established or acquired it is altogether separate and distinct from obedience to the mandate that a wharf shall not be established or acquired by pledging the city's credit or levying a tax without the assent of the qualified voters. In *Adams v. Durham*, 189 N. C., 232, it was

held that the building of an auditorium for the convenience of the city, while not a necessary expense, was a public purpose, and that the city authorities could use money already on hand in the erection of such building. *Chief Justice Hoke* remarked that Art. VII, sec. 7, did not apply because the expenditure would impose no further liability and would require no further taxation. Suppose the city of Wilmington had in its treasury money enough to construct the proposed docks and with this money should build them and use them for a profit; or, suppose the qualified voters should approve the sale of the bonds and the levy of a special tax and out of the proceeds the city should build the docks and use them for a profit; in either event it would be incumbent upon the city to keep the docks in repair and a negligent failure to perform this "corporate duty" would lay the foundation of a suit in damages, as in case of failure to perform any similar corporate duty whether the "purpose" did or did not originally involve necessary expense. This principle is not new: it is upheld in a number of our decisions. *Fisher v. New Bern,* 140 N. C., 506; *Harrington v. Wadesboro,* 153 N. C., 437; *Terrell v. Washington,* 158 N. C., 281; *Woodie v. North Wilkesboro,* 159 N. C., 353; *Harrington v. Greenville, ibid.,* 632.

But none of these cases decides the specific question under review. The decisions heretofore rendered by the Court make the test of a "necessary expense" the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace or the administration of justice; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is "necessary" within the meaning of Art. VII, sec. 7, and the power to incur such expense is not dependent on the will of the qualified voters. Now, for what purpose are the bonds to be issued and the tax levied? As previously indicated, to build docks and terminals "to be used for the purpose of shipping, both foreign and coastwise." Ordinance, sec. 1. This is primarily a business venture; and as such it is unrelated to the administration of justice or to any governmental function; it does not involve a "necessary expense." The power to tax is restricted; and the Constitution has wisely ordained that a municipal corporation shall not without the assent of a majority of the qualified voters levy a tax in aid of an enterprise of this character. The proposed undertaking is local. If it were an enterprise upon which the whole State had embarked a different question might arise; for the Court has held that the restrictions contained in Art. VII, sec. 7, are confined to local measures and do not include those which affect the entire commonwealth. *Bank v. Lacy,* 183 N. C., 373; *Lovelace v. Pratt,* 187 N. C., 686.

The defendant reminds us, as suggested in *Storm v. Wrightsville Beach, supra,* that we should "look for better moral and material conditions and governmental machinery to provide them." We may also admit the force of the statement that "the luxuries of one generation have become the necessities of another." *Swindell v. Belhaven,* 173 N. C., 2. Nor are we inadvertent to the cases, long since overruled, in which it was held that expenses incurred for lights and water were not "necessary." *Mayo v. Comrs., supra; Thrift v. Elizabeth City,* 122 N. C., 31. But we must not lose sight of the fact that each of these progressive changes was governmental in its nature. Upon the same principle conditions are conceivable in which the establishment of a wharf might be deemed to involve a necessary expense; but in this case such conditions do not appear.

The proposed bonds are not required as a necessary governmental expense and cannot be issued under the ordinance adopted by the defendants. The judgment is

Affirmed.

CLARKSON, J., dissenting: The facts substantially agreed upon in the submission of controversy succinctly are as follows:

On 11 September, 1920, the defendant, city of Wilmington, purchased from the United States Shipping Board Emergency Fleet Corporation, a large tract of land located near the southern boundaries of the city, partly within the city limits, and partly without, and on the river front. The deed conveying the property is set out, in part, in the main opinion. Under its provisions the city of Wilmington agrees, within a period of ten years, to "create and erect upon such portion of said real estate as is appropriate and necessary therefor free port and terminal facilities," and to continuously maintain such free port and terminal facilities. The deed further stipulates that upon the failure of the city, the grantee, to comply with these provisions, within the time limited, title to the real estate conveyed will revert to the grantor, and that the grantee will thereupon be divested of all right, title and interest thereto. The purchase price of this property was $37,500. The city of Wilmington is located on the Cape Fear River thirty miles above the mouth of the river. The river from its mouth to, and for some distance beyond, the city of Wilmington, has a thirty-foot channel. The Port of Wilmington is well adapted for a distributing port for water-borne commerce, except that it has no adequate port or terminal facilities, such as are demanded by the shipping interests, and such as are in keeping with other ports on the South Atlantic Seaboard. Not being an industrial center, the city of Wilmington depends, in a large measure, for its material and commercial welfare, upon its development as a

port. This development is retarded by its present failure to offer adequate port and terminal facilities. Under present conditions, it cannot successfully compete with other South Atlantic Ports which have publicly owned facilities of this nature. In order to remedy these defects, and in order to develop the city to the point where it was logically intended that it should be developed, and thereby increase its commercial and material welfare, the governing authorities of the city now propose to issue bonds in the aggregate amount not to exceed $100,000, for the construction of publicly owned ports and terminals, to be located on the premises referred to in the deed set out in the record. The only question presented in this appeal is as to whether or not such an expenditure is a "necessary expense" within the meaning of Art. VII, sec. 7, of the Constitution of North Carolina.

In the main opinion it is said: "The necessity of a rigid observance of this provision (Art. VII, sec. 7, of the Const., of N. C.), has been pointed out and reiterated in our decisions and emphasized by special legislative enactment," and cites C. S., 2691, which is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied, or collected by any officer of the same, except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." This is in C. S., under "General Municipal Debts," and the exact language of Art. VII, sec. 7, of the Constitution.

On the contrary, the constructive thought of the State is ever bending to beneficial necessities. For example, in *Mayo v. Washington,* 122 N. C., p. 5 (1898—Electric Light Plant) and *Thrift v. Elizabeth City,* 122 N. C., p. 31 (1898—Waterworks), were held not a "necessary expense," and a vote of the people was necessary. In *Fawcett v. Mt. Airy,* 134 N. C., 125 (19 December, 1903), these cases were overruled, and water and light were held to be a necessary expense.

In *Herring v. Dixon,* 122 N. C., 422, the very case cited in the main opinion: An injunction was sought by plaintiff, suing on behalf of himself and other taxpayers of Greene County, against defendant, sheriff of Greene County, contending that the road act was unconstitutional and the tax was uncollectible. The lower court granted the injunction, this Court held error and said: "There has long been a feeling that the system of working roads entirely by a levy upon labor, without any taxation upon property, was unsatisfactory in its results, and with many there has been a conviction of its unfairness. The present act is, at any rate, an outcome of what is known as the *'Public Roads Improvement'* movement, which originating, as far as this State is concerned, in a statute somewhat similar to this, enacted for the county of Mecklenburg, has, with more or less modification, been since enacted for a great many

other counties; the features common to all being largely the working of the public roads by taxation in lieu of the conscription of labor, and further in utilization of convicts, who formerly lay idle in jail. *Working the roads being a necessary expense,* the courts are incompetent, under the authorities, to interfere with the manner and expense of working them, unless the total levy exceeds the constitutional limitation or the equation is not observed." This decision holding the road act constitutional, was saving "Good Road Movement" in the State. The other case—*Tate v. Comrs.,* 122 N. C., p. 812, is to the same effect and upholds the road act. The Court lays down in both decisions the three propositions set forth in the main opinion for taxation guidance, which is well settled law. In *Storm v. Wrightsville Beach,* 189 N. C., p. 681, jetties were held necessary expenses, it was said: "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, *convenience 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 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. . . . *The term in the Constitution 'necessary expense,' 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, markethouse, 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."

The Municipal League of the State had a committee to present to the Legislature of North Carolina at its session in 1917, a comprehensive upbuilding act for municipalities, the main features are embodied in chapter 136, Pub. Laws 1917, entitled "An act to provide for the organization and government of cities, towns and incorporated villages." A part is C. S., 2832, cited in the main opinion, and is subchapter 13, sec. 11. A full copy of the section is as follows: "Any city shall have the right

to acquire, establish, and operate waterworks, electric lighting systems, gas systems, schools, libraries, cemeteries, market houses, wharves, play or recreation grounds, athletic grounds, parks, abattoirs, slaughter houses, sewer systems, garbage and sewerage disposal plants, auditoriums or places of amusement or entertainment, and armories. Said city shall have the further right to make a civic survey of the city, establish hospitals, clinics, or dispensaries for the poor, and dispense milk for babies; shall have the power to establish a system of public charities and benevolence for the aid of the poor and destitute of the city; for the welfare of visitors from the country and elsewhere, to establish rest rooms, public water-closets and urinals, open sales places for the sale of produce, places for hitching and caring for animals and parking automobiles; and all reasonable appropriations made for the purposes above mentioned shall be binding obligations upon the city, subject to the provisions of the Constitution of the State."

The Legislature of North Carolina has given the municipal corporations of the State, C. S., 2832, *supra,* the power to acquire, establish, etc., *wharves.* The discretion is given to the municipal authorities, under C. S., 2791 (1917, ch. 136, subch. 4, sec. 1—1919, ch. 262), *"having and exercising or desiring to have and exercise the management and control of the streets . . . wharves." . . . The right to purchase and condemn for public use "on behalf and for the benefit of such city . . . either within or outside of the city."* 2791-2. *Berry v. Durham,* 186 N. C., p. 424. The Legislature made no provision for a vote of the people in regard to wharves, clearly indicating it was a necessary expense, recognizing at the same time the well known provision of the Constitution.

The Legislature has recognized the necessity of certain things that municipalities can acquire and among them *wharves* (terminal facilities). The will of the Legislature is the supreme law of the land, subject to the Constitution. To say the least, the fact that the Legislature having given the municipalities the power in its discretion to acquire by purchase or condemnation and management and control of *wharves,* is a legislative construction that wharves are a necessity. This declaration should have great persuasive influence on a court.

In *Sutton v. Phillips,* 116 N. C., 504, it is said: "While the courts have the power, and it is their duty, in proper cases to declare an act of the Legislature unconstitutional it is a well recognized principle that the courts will not declare that this coördinate branch of the government has exceeded the powers vested in it unless it is plainly and clearly the case. If there is any reasonable doubt it will be resolved in favor of the lawful exercise of their powers by the representatives of the people."

S. v. Knight, 169 N. C., 352; *Faison v. Comrs.,* 171 N. C., 415; *R. R. v. Cherokee Co.,* 177 N. C., 88; *R. R. v. Forbes,* 188 N. C., 155.

The purpose of the bond issue, as appears by the ordinance is: "Pursuant to the Municipal Finance Act, bonds of the city of Wilmington are hereby authorized to be issued in an aggregate principal amount not exceeding $100,000 for the purpose of paying the cost of constructing public municipal docks and terminals at or near the property known as the Old Liberty Shipyard, on the Cape Fear River, said public docks and terminals to be used for the purpose of shipping, both foreign and coastwise."

Black's Law Dictionary (2 ed.), p. 1226, defines wharf: "A perpendicular bank or mound of timber, or stone and earth, raised on the shore of a harbor, river, canal, etc., or extending some distance into the water, for the convenience of lading and unlading ships and other vessels. Webster: A broad, plain place near a river, canal, or other water, to lay wares on that are brought to or from the water. Cowell: A wharf is a structure erected on a shore below high-water mark, and sometimes extending into the channel, for the laying vessels alongside to load or unload, and on which stores are often erected for the reception of cargoes. *Doane v. Broad Street Ass'n,* 6 Mass., 332; *Langdon v. New York,* 93 N. Y., 151; *Dubuque v. Stout,* 32 Iowa, 47; *Geiger v. Filor,* 8 Fla., 332; *Palen v. Ocean City,* 64 N. J. Law, 669, 46 Atl., 774."

Black, *supra,* p. 385, defines Dock: "The space, in a river or harbor, inclosed between two wharves. *City of Boston v. Lecraw,* 17 How., 434, 15 L. Ed., 118; *Bingham v. Doanne,* 9 Ohio, 167. 'A dock is an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uniform level within the docks.' *Perry v. Haines,* 191 U. S., 17, 24 Sup. Ct., 8, 48 L. Ed., 73."

Webster defines terminal as an end, extremity, boundary or terminus; forming the terminus or extremity.

The word "wharves" in the State statute goes beyond being treated as synonymous with "docks and terminals"—wharves include "docks and terminals."

In *Hartsfield v. New Bern,* 186 N. C., p. 136, a unanimous Court gave the implied construction that under C. S., 2791-2, wharves were a necessity. The facts in that case—New Bern was founded and the colony first settled by de Graffenried and his followers on the land at the junction of the Trent and Neuse rivers—*Union Point.* This was the residence of the Indian King, Taylor, from whom de Graffenried bought it and erected the first Government House. This property was owned for generations by the city of New Bern and leased by it for 99 years, etc., but

on 13 January, 1923, the city paid the lessees $22,500, to cancel the lease, and held the property for wharves and terminals. It was necessary for the city to condemn certain property so that the Atlantic & N. C. Railroad Co., could extend its main track to the wharf at *Union Point,* deep water terminus, on Neuse and Trent rivers. The city contended (p. 138-9), "Its physical connection with the waterways and wharves at New Bern will not only benefit all of the people in Craven County, but all of the people in the State living in the territory wherein freight rates are based upon rail and water competition at New Bern. The physical connection and combined use of the rail and water transportation facilities was the very idea and hope of Murphey, Graham, Morehead, and other men who promoted internal improvements before the Civil War. The track of the Atlantic and North Carolina Railroad crosses Trent River at New Bern at an angle, and plaintiff's narrow strip of land adjoining is so situated that by extending their line to the channel of Trent River the railroad company may be deprived altogether of reasonable or adequate docking facilities, and the railroad company never has had anything more than a very narrow and inadequate dock and wharf until this track was constructed parallel with Trent and Neuse rivers and connecting with the *Union Point property, which is to be developed as a municipal wharf, as Wilmington, Norfolk, Baltimore, New York, and many other cities and towns on the water have developed municipal wharves as public necessities.*" The plaintiff contended that the purpose was private and not public and his land could not be taken for private purpose for the railroads to make connection with Union Point wharves. The Court construes 2791-2, etc., *supra.* The Court says: "The act of the Legislature is presumed to be valid, and all doubts are resolved in its support, and it will not be held unconstitutional unless the conflict between the fundamental law and the legislation is manifest and without reasonable doubt. The condemnation in this case is for a public purpose, and it was within the power of the eminent domain under the provision of the statute above cited to take such property for public use in the manner stated. The operation of this side-track along the river fronts of the city of New Bern must be of great benefit to all shippers, manufacturers, merchants, and industries along the right of way. It is essential that the municipal docks and wharves shall be physically connected with the railroads of the country, and this track is the only means by which this can be done in the city of New Bern. . . . The lack of terminal facilities has doubtless prevented the public from enjoying the low freight rates prevailing where water transportation is obtained. To procure better freight rates has moved the people of that community to establish municipal wharves, but the wharves cannot be successfully maintained without railroad connection. . . .

(p. 144.) The enterprise thus undertaken was justified, and seems to have been *imperatively demanded by public necessity.*" In the main opinion a narrow construction of "necessary expense" is sought for and adhered to. Taking a broad view, we find Collins in "Our Harbors and Inland Waterways" (1924), p. 6, says: "Several other Atlantic seaports have entered the race, notably Philadelphia, Baltimore, Norfolk and Charleston. In each case, these cities have felt the stimulus of the World War upon their trade, and are thoroughly awake to the possibilities of the future. They have engaged the services of experts to design improvements for their harbors, and are expending vast sums in deepening channels, *building docks and warehouses and equipping them with modern machinery, for handling cargoes.* Philadelphia, although far from the coast, has open navigation throughout the year. She stands at the center of a great manufacturing area, and has even more direct rail connections with the west than has New York. Baltimore and Norfolk enjoy wonderful harbor facilities and Charleston has probably the best natural harbor on the Atlantic seaboard after New York." Wilmington on the Cape Fear, with a splendid water front and a thirty-foot channel, is not mentioned. The city, until the present time, has done nothing.

The administration of the port of Philadelphia is under municipal control. The city owns about 20 piers. Baltimore is under municipal control. In its report issued March, 1922, it is estimated that it will expend on the port of Baltimore $10,000,000 a year for 10 years. The city of Norfolk owns three tracks with a water front 2,301 feet at Seawell's Point. It also owns several docks at street ends, suitable for launches and light craft vessels. The port administration of Charleston is vested in the municipality. The city has purchased terminal property from the railroads and the United States at a cost of $1,500,000 to be used as a public terminal. This includes a belt line railroad. Jacksonville is located 27.5 miles from the mouth of St. John's River. In 1913, the city authorized a bond issue of $1,500,000 for the construction of municipal docks. The city is engaged in carrying out very large improvements at this terminal. Pensacola, Florida, owns 8,000 feet of frontage not developed, but a bond issue of $450,000 has been approved. Mobile, Ala., is in the southwestern part of Alabama, at the mouth of Mobile River, and the head of Mobile Bay. The Legislature of the State of Alabama recently authorized a $10,000,000 bond issue for the development of this port. The publicly owned terminals in existence at the present time are owned by the city of Mobile and consist of about 1,500 feet of wharfage, located on the west side of the river near the center of the business section and extending from Sauphin Street to State Street. This wharf is equipped with a shed and has rail connection.

The above applies to municipal owned terminals on the Atlantic and Gulf. All have municipal facilities except Wilmington. The State Terminals, such as New Orleans, La., the State and other interests have expended over $50,000,000 there. The State owns 18 covered wharves with an area of 2,450,000 square feet and 7 open wharves with an area of 620,000 square feet. An immense cotton terminal warehouse has been constructed as well as a public grain elevator.

Millions upon millions of dollars have been spent on State terminals at the following places: Houston, Texas; San Diego, Los Angeles, and San Francisco, Cal.; Portland, Ore.; Tacoma and Seattle, Wash.; Boston, Mass.; Providence, R. I., etc. States and cities are constructing public ports and facilities for shipping. One port—that of Portland, Ore.—has been built 113 miles from the sea; and Los Angeles, Cal., has gone 25 or 30 miles to the sea and built a port, and the port of Houston, Texas, is being built 50 miles from the gulf at an expense of more than thirty millions of dollars. If we expect to have our ports and waterways improved by the United States Government, we must have public terminals.

The United States law on this subject: "Every United Port should own its own water front, and this should be controlled by a port authority composed of the business men who have an excellent grasp of the export and import business and who are willing to devote sufficient time to the subject. These should be appointed without regard to political affiliations, and should take the broad view that the port is the property of the people at large, and that the provision of the best facilities will promote quicker ship dispatch, attract more ships, and thus enlarge the commerce of the port; that while the port terminal should be self-supporting, the charges should be adjusted to produce this result, without injury to business and that the growth of the port will mean the growth of the city and increased material prosperity to the individuals of the city and State. Those states which have only one man ports should in particular exert themselves to develop it along the most modern lines, and the first step in this direction is the appointment of a competent port authority." And further in the River and Harbor Act of 2 March, 1919, appears the following: "It is hereby declared to be the policy of Congress *that water terminals are essential to all cities and towns located upon harbors or navigable waterways, and that at least one public terminal should exist, constructed, owned and regulated by the municipality, or other public agency of the State,* and open to the use of all upon equal terms, and with the view of carrying out the policy to the fullest possible extent, the Secretary of War is hereby vested with the discretion to withhold, unless the public interest would seriously suffer by delay, moneys appropriated in this act for new projects adopted herein, or for the further

improvement of existing projects, if, in his opinion, no water terminals exist adequate for the traffic, and open to all on equal terms, or unless satisfactory assurances are received that local or other interests will provide such adequate terminal or terminals." What is the use of the United States Government expending millions of dollars on our channels and harbors if we allow them to remain unused? If we use them the United States Government will improve them. A city having a water-front, the water is practically a street for boats, as the streets are for vehicles.

It has been decided that the construction and repair of bridges and roads are necessary expenses. *Herring v. Dixon,* 122 N. C., 420; *Crocker v. Moore,* 140 N. C., 432; *Hendersonville v. Jordan,* 150 N. C., 35; *Comrs. Yancey v. Road Comrs.,* 165 N. C., 632; *Moose v. Comrs. Alexander,* 172 N. C., 419; *Woodall v. Highway Commission,* 176 N. C., 377; *Parvin v. Comrs. Beaufort,* 177 N. C., 508; *Guires v. Comrs. Caldwell,* 177 N. C., 516; *Davis v. Lenoir,* 178 N. C., 668.

Bridges and streets in a city are admittedly a necessary expense. They are primarily used for vehicles to go over to carry passengers and produce in and out of a city. A city that has a water front has to have wharves or terminals for water vehicles to load and unload passengers and produce brought in and carried out of the city. A wharf or terminal at the end of a street is practically a bridge, built by a municipality on a navigable stream, so that ships on a public highway can load and unload passengers and produce is, like a bridge or street, a necessary expense. The boats and ships—sea vehicles—load and unload on a wharf or terminal—a bridge as it were—over which produce is hauled to and from the street, and where passengers go to and from the city by water.

In the agreed case it states:

"SEC. 4. It is hereby determined that all expenses to be defrayed by means of the bonds hereby authorized are necessary expenses of the city of Wilmington, within the meaning of section 7, Art. VII, of the Constitution of North Carolina.

"SEC. 5. This ordinance shall be published once in each of the two successive weeks after final passage.

"SEC. 6. This ordinance shall take effect thirty days after its first publication, unless in the meantime a petition for its submission to the voters is filed under the Municipal Finance Act, and in such event it shall take effect when approved by the voters of the city of Wilmington, at an election as provided in said act."

No petition was filed to submit the ordinance to a vote of the people of the city, as provided in C. S., 2947. The plaintiff, a lone taxpayer,

brings this suit. Under the Finance Act he could have submitted the matter to a popular vote, but instead he brings this suit.

The writer of the main opinion in this case, in *Scales v. Winston-Salem,* 189 N. C., p. 470, says: "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 and uniformity of 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,* 103 N. C., 237, *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 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. Whitakers' Smith on Neg., 122; *Barnes v. District of Columbia,* 1 Otto, 540-557; *Treightman v. Washington,* 1 Black., 39; Wharton Neg., sec. 262."

In the above case it will be noted that a municipality "may be liable in damages for injury proximately caused by negligence in the exercise of its ministerial or absolute duties," then some of the absolute, corporate, duties are mentioned: (1) grading of streets; (2) cleansing of sewers (3) keeping in safe condition wharves, from which the corporation derives a profit. It is begging the question by saying "There are many," corporate duties "which are utterly remote from those relating to necessary expenses." The trouble here is that in the *Scales case* it was recognized by the writer of the main opinion that *wharves,* like *streets*

and sewers, were *absolute duties—corporate duties.* In the *Scales case* it is held that for injury resulting from the failure to exercise or negligent exercise of governmental powers the municipality is exempt from liability, but not so with absolute—corporate—duties; the city is liable, and wharves are a corporate duty—that is the *Scales case*—wharves therefore being a necessity and a "necessary expense" under Art. VII, sec. 7, of the Constitution.

The Constitution, Art. VII, sec. 7, does not require a vote of the people for "necessary expenses." It is said in the *Moffitt* and *Scales* opinions that the cities have certain absolute duties—corporate duties—to keep up streets, sewers and wharves. Why? Because they are necessary expenses.

I think the governing body of the city of Wilmington has the right to issue the $100,000 in bonds for the purpose of paying the cost of constructing public municipal docks and terminals or wharves. That from the facts and circumstances of this case it is a "necessary expense." *Persuasive consideration should be given* (1) to the governing body, the local authorities, of the city of Wilmington who have solemnly declared that the "bonds hereby authorized are necessary expenses of the city of Wilmington within the meaning of section 7, Art. VII, of the Constitution of N. C. (2) The city of Wilmington has purchased the land from the United States Shipping Board Emergency Fleet Corporation for $37,500 on condition that the city of Wilmington "maintain perpetually free port and terminal facilities." This contract was made 11 September, 1920, and expires in ten years. (3) The U. S. Government in the River and Harbor Act says: "It is hereby declared to be the policy of Congress that *water terminals are essential to all cities and towns located upon* harbors or navigable waterways. (4) It is admitted by the writer in the main opinion that there is no exact case in point. (5) The Legislature having given the power the court should be slow to construe that the Legislature did not have the power and declare the act unconstitutional. (6) In the *Hartsfield case, supra,* this Court in a unanimous opinion has practically said that wharves were a necessary expense. In the *Scales case, supra,* this Court by a unanimous opinion said keeping in safe condition wharves is a corporate (necessary) duty. (7) All the large cities on the Atlantic Coast have municipal wharves, terminals and docks. The sole exception is Wilmington. The consequence is that this progressive city, owning the land under a conditional deed from the U. S. Government, to create trade and wealth and give employment to all its citizens whereby it may become a greater municipality, has passed the act to issue bonds in the sum of $100,000—within the financial act limit—to build wharves and terminals on its land. It is a necessary expense for a farmer to plant seed-corn, just as it is a necessary expense

for Wilmington on the water-front of the Cape Fear River, to have wharves, docks and terminals—not to have them would be such economy as a farmer would use in not planting seed-corn. The hope of Murphey, Graham and Morehead of the past, great constructive statesmen and the same type of the present generation, was that such cities as Wilmington with water front should have wharves and terminals to stimulate and encourage those that travel the ocean highways to come to the seaport, like the state and county highways, so that produce can be shipped anywhere, and especially to and from South America and the West Indian Islands, without first going through Northern ports. The municipality is attempting to do this. The Legislature has given it the power. Courts do not make, but construe, the law. Courts have no right to arbitrarily declare an act unconstitutional.

I think the purpose a "necessary expense" and the action of the governing body of the city of Wilmington should be upheld.

ROBERTS-ATKINSON CO. v. INTERNATIONAL HARVESTER CO. OF AMERICA, INCORPORATED.

(Filed 3 March, 1926.)

1. **Vendor and Purchaser—Sales Territory—Contracts—Damages.**

Where an exclusive territory is given by contract by the manufacturer for the sale of its products, definitely fixing the date of its duration, no previous notice to the date so fixed is required of the manufacturer for the discontinuance of this arrangement, and he is not liable for the wares previously purchased by the vendee, and remaining in the hands of the latter, or otherwise, when no provision has been made therefor.

2. **Contracts—Vendor and Purchaser—Written Contracts—Parol Evidence —"Terms" of Sale.**

All previous or contemporaneous verbal expressions with that of a written contract are construed to be therein embraced, when the writing itself excludes them, unless approved by a contracting party or its vice-principal in writing: but where such contract is for the sale of certain wares giving exclusive territory for resales, and excepts therefrom "different prices or terms": *Held*, it may be shown by parol that a certain article had been sold on consignment by the vendor's accredited representative, and not to be regarded as a sale unless he should resell the same from the vendee's place of business.

APPEAL by plaintiff from *Lyon, J.*, November Special Term, 1925, of JOHNSTON. Reversed.

The plaintiff alleges that it was a corporation doing a general mercantile business in the town of Selma, N. C. That defendant was a

corporation doing a general manufacturing and sales business of harvesting machinery, tractors, wagons and other farm implements, with a branch office in Charlotte, N. C. That since about 1914 plaintiff had been agent for and represented the defendant in Selma territory for the sale of its machinery, etc., until the year 1922, when the defendant, on 24 February, 1922, notified plaintiff that the territory for the sale of defendant's machinery was placed in other hands. That no prior notice was given plaintiff and plaintiff was left with $3,394.58 worth of harvesting machinery, merchandise, parts, etc., of defendants on hand unsold. It is further alleged:

"8. That in addition to the foregoing, this plaintiff has in its custody, and control, one International Tractor, $800, which was consigned to this plaintiff, and which this plaintiff has been unable to sell, and now has on hand, subject to the orders of the defendant, and for which this plaintiff is entitled to credit, on the note due by the plaintiff to the defendant, as set out in the following paragraph:

"9. That this plaintiff is indebted to the defendant in the sum of $1,074.22, and the interest due on the renewal note for the machinery and merchandise purchased from the defendant, and which this plaintiff stands ready and willing to pay the same whenever the defendant pays this plaintiff for the value of its products which it has on hand, and which this plaintiff is unable to dispose of because of the severance of their contract with the defendant, without any excuse or without any complaint on the part of the defendant of its notice or intention so to do."

The plaintiff contended that on account of the breach of contract on part of defendant, it was damaged in the sum of $3,394.38 for machinery and parts left on hand unsold and in other respects $2,000, not necessary to set out.

The plaintiff prays "That the defendant be required to credit the note of the plaintiff with the sum of $800, for the tractor consigned to this plaintiff, and held subject to the orders of the defendant. That the defendant be required to redeem the property and parts, now in the possession of the plaintiff, which is made practically worthless by reason of the defendant canceling the contract with this plaintiff, without notice to this plaintiff, and pay the plaintiff for the value of the same, to wit, $2,594.38, less the balance on the note of $1,074.22 and interest, due by the plaintiff to the defendant, after deducting the value of the tractor $800, as above stated. That the plaintiff recover of the defendant the sum of $2,000 damages by reason of the unlawful termination of said contract without notice to the plaintiff, that is $1,000 damages in the advertising and work in building up the sale of the defendant's products, and $1,000 damages in the failure of the

plaintiff to collect the notes given for the purchase of the defendant's products by reason of the defendant's unlawful termination of the contract aforesaid, and the plaintiff's inability to furnish the parts to the machinery so sold; for the cost of this action, to be taxed by the clerk, and for such other and further relief, as the plaintiff may be entitled to in the premises."

The defendant, answering, says: "That it is true that the plaintiff executed unto the defendant in writing a 'sale contract and order' on April 14, 1921, which was accepted by the defendant at the Charlotte, North Carolina, branch, on 19 May, 1921, upon Thomas H. Atkinson having entered into a contract with the defendant guaranteeing the payment of all obligations of the plaintiff arising thereunder; that all liabilities of the defendant under the provisions of said contract terminated on 31 October, 1921, as set forth in said written contract; that it is true that the plaintiff and the defendant had from year to year for several years prior thereto entered into similar annual contracts; that it is true that the defendant declined to enter into a similar contract with the plaintiff for the year 1922, as it had the legal right to do; that the defendant did enter into a similar annual contract for the year 1922, with Roberts & Brothers of Selma, and so notified the plaintiff on or about 24 February, 1922. That the defendant was under no obligations whatever to give plaintiff notice of its intention of exercising its right of declining to enter into a contract with the plaintiff for the year 1922; that the defendant was within its legal right in declining to contract with the plaintiff or any other person for the year 1922. . . . That the International Tractor, mentioned in article 8 of the complaint, was sold by the defendant to the plaintiff and its promissory note accepted therefor, which note has been paid in full by the plaintiff; and except as herein admitted article 8 of the complaint is denied." Defendant denies the other allegations of plaintiff.

At the close of plaintiff's evidence, defendant made a motion for judgment as of nonsuit, which was allowed by the court below. Plaintiff excepted, assigned error, and appealed to the Supreme Court. Necessary facts will be considered in the opinion.

W. P. Aycock, W. H. Lyon and F. H. Brooks for plaintiff.
Clifford & Townsend for defendant.

CLARKSON, J. The "sale contract and order" made between plaintiff and defendant was introduced by plaintiff. It was dated 14 April, 1921, and was for the year 1921. Plaintiff's witness, Thomas H. Atkinson, president of plaintiff corporation, admitted on cross-examination that the defendant company "declined to renew the contract," etc. Atkinson

also testified that his company had been handling the defendant's products in the Selma territory from about 1914 to and including 1921.

It is not necessary to state the grievances of plaintiff. The circumstances, under which defendant declined to renew the contract with plaintiff, may be hard on plaintiff company, but in defendant's answer it says it "was within its legal rights," etc. We take the same view from the evidence.

Courts cannot make contracts for parties. It is their province to construe them when made. The parties to the present contract were *sui juris*. There is no fraud or mutual mistake alleged. Plaintiff's contract with defendant was for 1921. Defendant declined to renew it. Plaintiff is bound by the written words. "It is to the interest of the parties and society as well, that contracts be performed as made." *Building Co. v. Greensboro,* 190 N. C., p. 506. The promise is made to those (Psalm XV, part of v. 4) "He that sweareth to his own hurt and changeth not."

From the entire record there is no sufficient evidence to sustain any of plaintiff's contentions, except the 8th allegation of complaint in reference to the "International Tractor." We think on this aspect there was sufficient evidence to be submitted to the jury.

C. C. Hinton testified, in part: "During 1918 and 1919, I was bookkeeper for the plaintiff. I was present when the transaction occurred about the tractor being sent to us. Mr. Smith, representative of the defendant, called the 'block man,' who was general sales manager for this territory, made the consignment contract with reference to this tractor. They had some tractors stored down there; the defendant had previously shipped some tractors down to us to be stored and then reshipped, and Mr. Smith agreed with Mr. W. B. Roberts, who was then the general manager of the plaintiff corporation, that if he would buy one of the little No. 181 tractors that he would guarantee he (Smith) would sell it, and he said he (Smith), would guarantee the sale of it and the tractor was shipped to the plaintiff under those conditions. In settlements with Mr. Hummerickhouse, collector for the defendant company, this tractor was left off at different times on account of the understanding between Mr. Smith and the plaintiff. I have heard Mr. Hummerickhouse and other agents or collectors of the defendant refer to this tractor in their settlements with the plaintiff. Mr. Hummerickhouse, from time to time, recognized this tractor consignment and said it would be carried on and taken care of in a subsequent settlement. This was discussed and the settlement of the tractor was postponed from time to time on account of Mr. Smith not having sold the tractor as he guaranteed to sell it; Mr. Smith promised to get it all

adjusted and it went on for a good long while in that shape. There was never any direct payment made on this tractor. Payments were made from time to time on running account. For the four years, 1917, 1918, 1919 and 1920, the company handled about $53,000 of defendant's products."

Thomas H. Atkinson, testified, in regard to tractor, on cross-examination: "I do know it was carried as a balance credit every time we settled with it and it was admitted that it would be taken care of later," etc. "On redirect-examination the witness again stated that in their settlement with the defendant the tractor was always carried forward as a standing credit to be taken care of on final settlement; that Mr. Hummerickhouse, agent for the defendant, said 'Pay us so much now and we will take that up in the next settlement.' "

Upon suggestion of the court, the invoice was introduced under which the defendant shipped to the plaintiff the tractor claimed in the pleadings to have been consigned. This invoice was in the usual form indicating the purchase of said tractor by the plaintiff under the general contract.

It appears, from the evidence, that plaintiff and defendant had dealings for about seven years in harvester machinery, and during 4 years of that period plaintiff handled about $53,000 of defendant's products. That an "International Tractor" was shipped to plaintiff and the invoice was in the usual form indicating the purchase of the tractor by the plaintiff under the general contract. From the testimony of Atkinson and Hinton, it would seem that as to the "International Tractor" there was an agreement that this tractor should be held by plaintiff on consignment and sold by defendant's general sales manager, Mr. Smith. This was recognized by the parties for years. That this was an agreement made by "Mr. Smith, representative of the defendant, called the 'block man,' who was general sales manager for this territory." This agreement was also recognized by Mr. Hummerickhouse, collector for defendant and other agents of defendant for years. It is true that the following provision is in the "sale contract and order." "It is understood that this order is then subject to the acceptance of the company's branch manager having charge of the purchaser's territory, and that this contract contains the entire agreement between the parties with reference thereto, and that there shall not be any change in any of the prices, terms or conditions printed therein, unless such change is made and accepted in writing, by said branch manager."

Walker, J., in *Medicine Co. v. Mizell,* 148 N. C., p. 388, says: "But it is positively stated in the order, as we have said, that there is no agreement, verbal or otherwise, affecting the terms of the order, except

the one expressed therein, and to this the defendant freely assented by signing the written instrument. The well-settled rule of law forbids him now to show the contrary by oral testimony. It was therefore improper to admit the evidence to show that the goods were to be returned, at his option, if not sold within ninety days, as this clearly contradicts the express terms of the contract." *Colt v. Turlington,* 184 N. C., 139; *Colt v. Springle,* 190 N. C., 230.

The "sale contract and order" (part sec. 10) has also this provision: "In addition to the goods now ordered, all goods heretofore or hereafter shipped to the purchaser between the dates of 1 November, 1920 and 31 October, 1921, both inclusive, shall be considered as sold under this contract, and subject to all of its provisions, *except as different prices or terms have been or may be agreed upon at the time.*"

The same kind of "sale contract and order" were entered into by and between plaintiff and defendant for the previous years. The testimony of Hinton is to the effect that *at the time* the *terms* were different as to the "International Tractor." From his testimony and Atkinson's, this was recognized by defendant's agents for years, both Smith and Hummerickhouse and others.

In *Manufacturing Co. v. McPhail,* 181 N. C., 208, it is said by *Allen, J.*: "Negotiations and conversations preparatory to the execution of a written contract are merged in the writing, and evidence will not be received of a contemporaneous agreement which contradicts its terms. To do so would be 'contrary to the well-settled rule,' as stated by the *Chief Justice* in *Walker v. Venters,* 148 N. C., 388, where he said: 'It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well-settled rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of men, citing *Basnight v. Jobbing Co.,* 148 N. C., 350.' *Cherokee County v. Meroney,* 173 N. C., 655."

The contract in the present case has an exception and expressly provides that a part of the contract, to wit, *"different prices or terms"* may be agreed upon at the time. Black's Law Dictionary (2d ed.), p. 1146, speaking to the definition of *terms,* says: "In the law of contracts and in court practice, the word is generally used in the plural, and 'terms' are conditions; propositions stated or promises made which, when assented to or accepted by another, settle the contract and bind the parties. Webster. See *Hutchinson v. Lord,* 1 Wis., 313, 60 Amer. Dec., 381; *S. v. Fawcett,* 58 Neb., 371, 78 N. W., 636; *Rokes v. Amazon Ins. Co.,*

51 Md., 513, 54 Am. Rep., 323." We think plaintiff comes under the exception clause and can show the terms by parol.

There can be no question about the authority of Smith, who the testimony shows was "general sales manager for this territory," of defendant, to make such an agreement.

It has been held that where the powers of the selling agent are general, it is competent for him, with the consent of the purchaser, to rescind a prior executed sale, revest the title, and make a conditional sale to the same purchaser on terms which would leave the property at his principal's risk until the conditions were performed. *Scott v. Wells,* 6 Watts & S., 357, 40 Am. Dec., 568.

An agent authorized to sell may stipulate as one of the terms of sale that the goods sold may be returned if not satisfactory. *Oster v. Mickley,* 35 Minn., 243, 28 N. W., 710; *Eastern Mfg. Co. v. Brenk,* 32 Tex. Civ. App., 97, 73 S. W., 538. If intrusted with an article to sell, with no restrictions on his authority, he may sell subject to trial, and agree that the property may be returned and the sale rescinded if the article is not satisfactory to the purchaser. *Deering v. Thom.,* 29 Minn., 120, 12 N. W., 350. And after entering into a contract for the sale of a machine, the agent has authority to modify the contract by agreeing that the purchaser may take the machine home, try it, and if not satisfactory, return it, and the sale be rescinded. *Warder & B. & G. Co. v. Pischer,* 110 Wis., 363, 85 N. W., 968." *Beck v. Wilkins-Ricks Co.,* 186 N. C., 214; *Finance Co. v. Cotton Mills Co.,* 187 N. C., 240; *Hunsucker v. Corbitt,* 187 N. C., 503; *Kelly v. Shoe Co.,* 190 N. C., 409.

There was sufficient evidence in regard to the "International Tractor" to have been submitted to the jury—the probative force was for them.

The nonsuit in regard to this aspect of the case cannot be sustained.

For the reasons given, the judgment below is

Reversed.

I. J. YOUNG v. C. A. STEWART.

(Filed 3 March, 1926.)

1. Evidence—Identity.

In an action to recover possession of a diamond owned by the plaintiff and at the time in the defendant's possession, evidence as to how and when the plaintiff lost his diamond is immaterial.

2. Evidence—Exclamations—Res Gestæ—Spontaneity.

Spontaneous declarations uttered at or near the time of an occurrence, when pertinent to the inquiry, are *pars rei gestæ.*

3. Appeal and Error—Evidence—Cross-Examination—Prejudicial and Unresponsive Answer—Motions—Objections and Exceptions.

Where the answer to a question asked on cross-examination is not responsive, and is prejudicial to the party asking it, exception for an appeal must be made on refusal of a motion to strike it out.

4. Evidence—Res Gestæ—Exclamations.

Where the plaintiff has identified a diamond ring in defendant's possession, the subject of the action, there was evidence that the plaintiff and his wife were together when she suddenly exclaimed, "I have lost the set out of my ring": *Held*, not incompetent as hearsay for the husband to testify to this declaration on the trial as it was *pars rei gestæ*.

5. Same—Hearsay.

It is not absolutely required that exclamations must be made immediately at the time of the occurrence to be *pars rei gestæ*, though remoteness of time may be considered upon the question as to whether they were involuntary or narrative.

6. Appeal and Error—Prejudice—Corroborative Evidence.

Held, under the facts of this case, that plaintiff's wife told the plaintiff, her husband, that the band in which the diamond was set had been lost, was incompetent, but nonprejudicial, and the testimony of this witness that the diamond would fit the lost setting was competent as relating to the credibility of his other testimony.

7. Appeal and Error—Prejudice.

The erroneous admission of evidence upon the trial to be reversible error, must be shown to have been prejudicial to the appellant.

8. Appeal and Error—Evidence—Harmless Error.

Hearsay evidence may be rendered harmless by the same evidence given without objection by the appellant.

9. Trials—Arguments—Agreement as to Time—Discretion of Court.

Where at the suggestion of the trial judge the counsel for the parties have not agreed as to the length of the argument to the jury, they cannot complain that he has exercised his legal discretion in not extending it.

10. New Trials—Newly Discovered Evidence—Supreme Court—Prejudice.

A new trial will not ordinarily be granted by the Supreme Court upon newly discovered evidence that is cumulative or contradictory of some of the evidence on the trial, when it does not appear that it would have influenced the jury in rendering their verdict.

APPEAL by defendant from *Sinclair, J.*, at October Term, 1925, of VANCE. No error.

Action by plaintiff to recover of defendant a diamond. Plaintiff alleges that he is the owner of a diamond, which was lost from the setting on a ring, worn by his wife, while he and his wife were attending a meeting in a Chautauqua tent in the city of Henderson, N. C.; that this diamond was seen by plaintiff, some time after its loss, in the pos-

session of defendant; that plaintiff after inspecting the diamond with defendant's permission, informed defendant that the diamond in his possession was the same which plaintiff had lost; that defendant refused to deliver said diamond to plaintiff, although requested by him so to do.

Defendant denies that plaintiff has lost or owns a diamond; he admits that he has in his possession a diamond, and that plaintiff has seen and inspected the same; he alleges that he, and not the plaintiff, is the owner of this diamond.

The issue submitted to the jury was as follows:

"Is the diamond in question the property of I. J. Young?" The jury having answered this issue, "Yes," it was adjudged that "I. J. Young recover of C. A. Stewart the diamond in question, now in his possession and about which this controversy was had, at once, together with costs, to be taxed by the clerk." From this judgment defendant appealed to the Supreme Court.

Perry & Kittrell, Kittrell & Kittrell and Zollicoffer & Zollicoffer for plaintiff.

T. T. Hicks & Son, Thos. M. Pittman and A. A. Bunn for defendant.

CONNOR, J. Plaintiff, as a witness in his own behalf, testified: "Some months ago I saw a diamond in the possession of C. A. Stewart. I examined the diamond. It is mine. The diamond was originally my uncle's, and it came to me through his widow's will. It was first in a shirt stud, for shirt or tie. While screwing it in one morning I twisted it off. Then I had it set in a band ring. I wore it for some time. After I was married, my wife wore it. It was lost in the Chautauqua tent, and we could not find it. My wife was wearing the ring when the diamond was lost. The band was burst on both sides—just the stone was lost. The next time I saw the diamond was when Mr. Stewart had it. I communicated with Mr. Stewart. He very kindly brought it up. I looked at it, my wife looked at it, my brother and sister looked at it, I am positive it is the same stone.

"I allege in my complaint that the stone weighed 4½ karats. I know exactly what it weighs—between 3 and 4 karats. I identified the stone in the possession of C. A. Stewart as my diamond by its size, its cut, and by the particular flaw it has through the center. I think I can describe the flaw—it is what a jeweler would call a bubble; do not know whether I could describe it more definitely than that. I think there is another marking—a small scar on the side of it where it was scratched in resetting on one occasion. Mr. Mixon scratched it. I did not see him scratch it. The scratch was on it when it came from him. The scratch was not on it when it went to him.

"I wore the stone from 1893 or 1894 until 1900. I was thoroughly familiar with the stone. I state positively that the diamond in question is my stone. It was lost in June, 1923."

On cross-examination, plaintiff testified that he was with his wife when she lost the diamond. The following questions and answers appear in the record:

"Q. How did you know she had lost it? A. Because she said, 'I have lost the set out of my ring.' Certainly I did not see my wife lose the diamond. If I had, I should have picked it up. It was lost at the Chautauqua tent. My wife was sitting directly behind me. I have not the band now. She has lost that.

"Q. How do you know it is lost? A. She told me so."

Defendant, in apt time, objected to the answer to each of the foregoing questions, and moved the court to have same stricken from the record, for that it appeared from said answers that witness was testifying from hearsay, and that this testimony was therefore incompetent. The objection was not sustained and the motion was denied. Defendant excepted.

Plaintiff on his cross-examination further testified: "The diamond I lost weighed 3 and 51-100 karats. Mahler in Raleigh has weighed it. I saw it weighed within the last two years—since this suit was started."

"Q. You saw the diamond you are suing for weighed? A. Mr. Mahler told me in his store that it weighed 3 and 51-100 karats."

Defendant objects to foregoing answer. Objection overruled. Defendant excepted. There was no motion to strike this answer from the record.

Witness further testified: "I have seen this diamond weighed in Mahler's store. I have seen the diamond my wife lost weighed in Mahler's store. The diamond I got under the will of my Aunt Pattie Young was weighed by a jeweler in my presence before it was lost. E. E. Hight is the person who weighed it. I do not know whether he is living or not. I saw him weigh it, and did know what it weighed."

Question by the court: "How did that correspond with the weight of Mahler?" Defendant objects. Objection overruled; defendant excepted.

A. "Very well. Mr. Hight told me that the diamond weighed between three and four karats. Mahler's weight was 3 and 51-100 karats."

Defendant objected; objection overruled; defendant excepted. There was no motion to strike this testimony from the record.

Defendant assigns as error the admission of the testimony of plaintiff, as evidence (1) that the diamond and the ring in which it was set were lost for that it appears that this testimony was based solely upon hearsay, to wit, statements made to witness by his wife, who did

not testify and was not sworn as a witness at the trial, and (2) that the diamond which was bequeathed to him by his Aunt Pattie weighed between 3 and 4 karats, and that the diamond which was in defendant's possession weighed 3 and 51-100 karats, for that it appears that this testimony was also based solely upon hearsay, to wit, statements made to witness by Mr. Hight and Mr. Mahler, neither of whom testified or was sworn as a witness at the trial.

There was competent evidence, to which there was no objection, that plaintiff was the owner of a diamond, which was bequeathed to him by his aunt, and which had formerly been owned by his uncle. Plaintiff's right to recover the diamond in the possession of defendant was not dependent upon a finding by the jury that this diamond had been lost; if the diamond which defendant admitted was in his possession and which plaintiff did not deny he had purchased from a third person, was the identical diamond which plaintiff owned, then plaintiff was entitled to recover, regardless of whether it had been lost or not. There was no contention by defendant that if the jury should find that plaintiff had ever owned the diamond in question, as he alleged, he had ceased to own it. The manner in which it had passed from his possession was immaterial, for it was not contended that he had parted with the title. The question chiefly involved in the issue, to be determined by the jury, was whether the diamond in defendant's possession was the same diamond which plaintiff owned, under the will of his Aunt Pattie Young.

The rule with respect to hearsay testimony as evidence, is stated by *Justice Hoke* in *S. v. Springs,* 184 N. C., 768, as follows: "With certain recognized exceptions, applicable chiefly in civil causes, and unless expressly made so by statute, hearsay evidence is not competent in the trial of issues determinative of substantial rights, a position particularly insistent where such issues involve the life or liberties of the litigant." *Smith v. Moore,* 149 N. C., 185; 1st Elliot on Evidence, secs. 315-319, Greenleaf (16 ed.), sec. 99a; Lockhart on Evidence, sec. 138. "Evidence, oral or written, is called hearsay when its probative force depends in whole or in part upon the competency and credibility of some person other than the witness by whom it is sought to produce it." 11 A. & E. (2 ed.) 520. This definition was approved by *Justice Brown* in *King v. Bynum,* 137 N. C., 492, and is cited with approval by *Justice Brogden* in the recent case of *S. v. Lassiter, ante,* 210. The grounds upon which hearsay testimony is excluded as evidence are stated and discussed in the opinion in each of these cases. *Justice Brown* says: "There are exceptions to this general rule excluding hearsay evidence laid down by the text-writers on evidence, such as admissions, confessions, dying declarations, declarations against interest, an-

cient documents, declarations concerning matters of public interest, matters of pedigree, and the *res gestæ.*" Hearsay testimony which does not come within any exception to the general rule of exclusion is incompetent, and should not be admitted; *Sloan Bros. v. Sawyer-Felder Co.*, 175 N. C., 657; if the answer to a question asked on cross-examination of the witness discloses that it is based upon hearsay and it is not within an exception to the general rule, it should, upon motion, made in apt time, be stricken from the record; *S. v. Green,* 187 N. C., 466; *Gilland v. Stone Co.*, 189 N. C., 786. If a question, addressed to a witness, on cross-examination, for the purpose of impeachment, elicits an answer, which is responsive to the question, but which is incompetent, such answer will not be held as reversible error, unless a motion to strike the same from the record is made in apt time, and overruled by the court, or unless if such motion is made and overruled, the answer is clearly prejudicial; *S. v. Green, supra.* An assignment of error will not be sustained unless same is based upon an exception to the refusal of a motion to strike out.

The testimony of the witness in this case that the diamond and the ring, with the bursted setting, were both lost was clearly based, in part, at least, upon statements made to the witness by his wife. The testimony was given by witness in answer to questions addressed to him on cross-examination. Defendant, in apt time, objected to the answers, and moved the court to strike same from the record. Defendant excepted to the refusal of these motions. These assignments of error, are therefore properly presented to this Court upon defendant's appeal from the judgment.

The exceptions were well taken, unless the testimony comes within a well-recognized exception to the general rule; otherwise, the assignments of error must be sustained, unless the error was clearly nonprejudicial.

A statement made as a part of the *res gestæ* may be given as evidence, although the person by whom the statement is made does not testify as a witness at the trial. "*Res gestæ* is generally defined," says *Furches, C. J.*, in *Summerrow v. Baruch,* 128 N. C., 202, "to be what is said or done contemporaneous with the fact sought to be established, or, at least, so nearly contemporaneous in point of time as to constitute a part of the fact to be proved, and to form a part of it, or to explain it." The statement must be instinctive rather than narrative or the result of deliberation. "In order for a declaration to be admissible as a part of the *res gestæ,* it must be the spontaneous utterance of the mind, while under the influence of the transaction, the test being, it has been said, whether the declaration was the facts talking through the party or the party talking about the facts." 22 C. J., 461, sec. 549, and cases cited;

S. v. Spivey, 151 N. C., 676; *S. v. Bethea,* 186 N. C., 23. It is said that "the modern tendency seems to be to treat spontaneity as a substitute for contemporaneousness, so that the act or declaration is not required to be exactly coincident in point of time with the main fact, but may even be separate from it by a considerable length of time, provided it is so immediately and closely connected with the main fact as to be practically inseparable therefrom, and serviceable to a clear understanding thereof, the element of time being of importance merely as bearing on the question of spontaneity." 22 C. J., 452. If a declaration is admissible as part of the *res gestæ,* it is competent, no matter by whom said. *Queen v. Ins. Co.,* 177 N. C., 34.

Applying these principles, it was competent for the witness to testify that while he and his wife were in the tent, at the Chautauqua, she, sitting directly behind him, said, "I have lost the set out of my ring." The witness testified that the last time he saw the diamond before he and his wife went to the Chautauqua, was when his wife was at supper on the night that they went to the Chautauqua; that she made the statement within fifteen minutes after she lost it; that the next time he saw the diamond it was in the possession of defendant. The testimony was competent as evidence that the diamond was lost from the setting on the ring that night and that Mrs. Young first discovered her loss when in the tent at the Chautauqua. It was a spontaneous statement made by the wife to her husband immediately upon her discovery of the loss. There was no error in refusing the motion to strike this testimony from the record.

Upon the same principles, however, we must hold that it was error for the court to refuse to allow the motion to strike out the testimony that his wife had told him that she had lost the band on which was the setting from which the ring was lost. This statement does not appear to have been spontaneous; it was narrative and not a part of the *res gestæ.* It was competent, however, for plaintiff to testify that he did not have the band at the time of the trial. This was a circumstance to be considered by the jury in determining the credibility of the witness' testimony as to the identity of the diamond. It was immaterial why he did not then have the band, if in fact he did not have it, and we cannot hold that the refusal of this motion is reversible error.

The fact that the witness did not offer his wife as a witness in his behalf was doubtless urged in the argument against his contentions; his failure, however, to produce her as a witness did not render his testimony as to her declaration that she had lost the diamond incompetent, for while it was hearsay, it was part of the *res gestæ.* His failure to produce the setting from which he contended that the diamond in

possession of defendant was lost, so that the jury might ascertain whether or not the diamond would fit in the setting, was a circumstance doubtless urged upon the jury in the argument as affecting his credibility; his failure to show why he did not produce the band at the trial, was not material, except as affecting his credibility.

Plaintiff testified on cross-examination that the diamond which he owned, and which he then had in his possession, was weighed by Mr. Hight, a jeweler, at Henderson, N. C.; that the diamond, of which he alleged he was the owner, and which was then in the possession of defendant, was weighed by Mr. Mahler, a jeweler at Raleigh, N. C.; that he was present when each jeweler weighed the diamond. He further testified that Mr. Hight, at the time, stated that the diamond weighed between 3 and 4 karats; that Mr. Mahler, stated that the weight of the diamond in defendant's possession, was 3 and 51-100 karats. In response to a question from the court, witness stated that the weight of the diamond weighed by Mr. Hight corresponded very well with the weight of the diamond weighed by Mr. Mahler. Defendant assigns as error the refusal of the court to sustain his objections to this testimony. The record discloses that defendant excepted to the refusal of the court to sustain these objections, but does not disclose that defendant moved that the answers to the questions on his cross-examination be stricken out. Conceding that the answers were based on hearsay, and that the statements of the jewelers are not part of the *res gestæ,* or within any exception to the general rule, excluding hearsay as evidence, the assignments of error cannot be sustained, for they are not based upon exceptions to the refusal of a motion to strike out the answers; *S. v. Green, supra.* Plaintiff had testified on his direct examination that he knew the weight of the diamond, which was lost by his wife in the Chautauqua tent. Defendant later testified that an employee of Mr. Mahler weighed the diamond in his possession, and said that it weighed 3 and 51-100 karats.

Other assignments of error based upon exceptions to the admission or exclusion of evidence cannot be sustained; to constitute reversible error, the evidence admitted must not only be incompetent, but it must be prejudicial and calculated to influence the minds of the jurors against the appellant; *King v. Bynum, supra.* Unless the testimony excluded clearly would have affected the jury in answering the issue, we cannot hold such exclusion to be reversible error. There is sufficient evidence in this record, unobjected to, and clearly competent, to support the verdict; both the testimony admitted as evidence, and that excluded, upon objection, influenced the minds of the jurors, or could have influenced them only in determining the credibility of plaintiff as a witness.

There was no error in the refusal of the court to limit the argument of counsel. There had been no agreement as to time for arguments to the jury. The suggestion of the judge made before the argument began, that counsel for both parties agree upon time for argument, was not accepted by counsel, and the matter was in the court's discretion. Nor does it appear clearly that the jurors did not hear the judge, while he was reading the statement of defendant's contentions, as requested by counsel for defendants, because the judge read the same in a low tone of voice. His Honor replied to the suggestion of counsel that the jurors were not hearing him for this reason, "I'm doing the best I can." Upon a renewal of the suggestion by counsel, at the conclusion of the charge, his Honor stated, "If any of the jury say that they did not hear them, somebody else may read it again, but I shall not read it again." No one of the jurors said that he had not heard the contentions as his Honor read them; it must be presumed that they did hear the contentions as read by his Honor.

The motion for a new trial first made in this Court on the ground of newly discovered evidence must be declined. This is an affidavit of Mr. Mahler of Raleigh to the effect that he had never personally weighed a diamond for plaintiff or defendant; that he had been informed by Mr. Snider, his employee, that he weighed a diamond for defendant, and that it weighed 3 and 51-100 karats. This is merely in contradiction of plaintiff's testimony and is not sufficient to support the motion; *Land Co. v. Bostic,* 168 N. C., 99.

Upon a careful consideration of the assignments of error relied upon by appellant, we conclude that there is

No error.

A. WYLIE MOORE, JOS. B. CHESHIRE, JR., THEO. G. EMPIE, S. H. JORDAN, E. T. STEDMAN, E. G. THOMPSON, J. J. LAWSON AND W. L. RANKIN, ON BEHALF OF THEMSELVES AND ALL OTHER CITIZENS AND RESIDENTS OF THE STATE OF NORTH CAROLINA, v. B. B. BELL, R. P. MIDGETT, R. L. GRIGGS, PIERCE HAMPTON AND W. S. NEWBERN, MEMBERS OF THE GAME COMMISSION OF CURRITUCK COUNTY, NORTH CAROLINA.

(Filed 3 March, 1926.)

1. Game—Hunting.

Neither residents of the State nor nonresidents thereof have a right to hunt game except as is conferred by the State, and the Legislature has the constitutional authority to regulate or prohibit hunting, to fix licenses therefor upon the payment of money, and generally to regulate hunting, making the violation of statutes on the subject a criminal offense and punishable.

2. Same—Police Regulations—Statutes.

The imposition by statute of a license fee for hunting game comes within the police powers of the State, and is not a revenue measure on the subject of taxation.

3. Game—Constitutional Law—Statutes—Several Readings—"Aye" and "No" Vote.

A statute regulating the hunting of game and imposing a privilege fee therefor, is not required by our Constitution for its validity to pass on several days in each branch of the Legislature, with "aye" and "no" vote taken on its several readings.

4. Same—Property Rights.

A resident of the State who has no property in a county subject to legal game laws and regulations, is not deprived of any right absolute or relative because of the local regulations of game requiring the payment for the privilege of hunting and making a violation of the law a criminal offense.

5. Injunction—Game—Equity—Remedies—Suits—Actions.

The remedy by injunction to test the constitutionality of a local game law, making a violation of the statute a criminal offense, when property rights are not affected, is not open to one who has not violated the act, the remedy being at law, upon the violation of the criminal statute creating the offense.

CLARKSON, J., concurring.

APPEAL by defendants from order of his Honor, *James L. Webb,* Judge Superior Court, at Chambers, dated 22 October, 1925, from MECKLENBURG. Reversed and dismissed.

Action by plaintiffs, citizens and residents of the State of North Carolina, to restrain and enjoin defendants, members of the Game Commission of Currituck County, from enforcing the provisions of certain statutes enacted by the General Assembly of North Carolina, creating a Game Commission for Currituck County, and conferring upon said commission certain powers relative to the protection of game in said county, upon the ground that said statutes are in violation of the Constitution of North Carolina, and therefore void. From order restraining and enjoining defendants from acting as members of said game commission, or in any way carrying out or attempting to carry out the provisions of said statutes, until the final hearing of the action, defendants appealed to the Supreme Court.

C. A. Cochran and Cansler & Cansler for plaintiffs.

A. M. Simmons and J. C. B. Ehringhaus for defendants.

CONNOR, J. Section 1 of chapter 266, Public-Local Laws 1921, entitled "An act for the improvement of the roads and for the better protection of game in Currituck County," is as follows:

"Section 1. That no one shall hunt, shoot, kill or trap any wild duck, geese, brant, or other wild fowl, or act as guide to any one so engaged, from shore, marsh, blind or battery or other floating device, on or adjacent to the waters of Currituck Sound, or its tributaries in Currituck County, unless he shall have obtained from the clerk of the Superior Court a hunter's license as hereinafter provided."

Section 2 of said chapter prescribes the amounts to be charged for a hunter's license, and makes it the duty of the clerk of the Superior Court of Currituck County to issue license upon receipt by him of application therefor, and payment by the applicant of the amount prescribed by the statute. This amount varies, dependent upon whether or not the applicant is a resident of the State of North Carolina, and, if he is a resident of the State, whether or not he is a resident of Currituck County. The amount to be paid by a nonresident of the State is $75, with a fee of $2.00 to the clerk; by a resident of the State, who is not a resident of Currituck County, $5.00, with a fee of fifty cents to the clerk; and by a resident of Currituck County, a fee of twenty-five cents to the clerk. All applicants for a hunter's license, who are not residents of said county, are required to furnish information, in their applications, for the purpose of identification.

Section 3 of said chapter provides that no one but a resident of Currituck County shall own or operate a battery or other floating device used in the hunting of wild fowl on the waters of Currituck Sound or its tributaries in Currituck County, and requires that a resident of said county who owns or operates such battery or other device shall secure from said clerk a battery license, for which the sum of $25.00, with a fee of fifty cents to the clerk is to be charged; the number of batteries for any one season is limited to thirty, and priority in the issuance of battery licenses is given by the statute to persons who owned and operated batteries during the season of 1919-1920, provided applications are made by such persons not later than 15 October. After said date, priority is given to applicants in the order of the filing of their applications. The owner of a battery may sell and transfer his battery, together with his right to priority in the issuance of license for the succeeding season, as provided in the statute.

Section 10 of said chapter provides that "the funds received by the clerk of the Superior Court from the sale of licenses provided for in this act shall be turned over to the treasurer of Currituck County, and from the funds so received the said treasurer shall pay such sums as may be approved by the game commission, hereinafter provided for, as necessary to secure the proper enforcement of the game laws of Currituck County, and shall turn the balance of such money into the road fund of said county."

Section 11 of said chapter prescribes penalties for violation of the provisions of the statute. The minimum penalty is a fine of $25.00; the court is empowered to impose a fine of twice the amount fixed by statute for a proper license, upon any one convicted for such violation. In addition to the fine, a license issued in accordance with the provisions of the statute may be revoked, when the holder of such license has been convicted of a violation of any of the provisions of the statute applicable to him.

Section 12 of said chapter provides for a game commission for Currituck County, to consist of five members; three of these are the clerk of the Superior Court, the chairman of the board of county commissioners, and the chairman of the road commission of said county, who are members *ex officio;* the other two members are citizens of Currituck County, elected by the three members *ex officio.* It is provided that members *ex officio* shall serve during the terms of their respective offices; each of the two elected members holds for a term of two years.

"The Game Commission shall have charge of the enforcement of this and other game laws of Currituck County and the appointment of a game warden, or of game wardens, and shall fix his or their compensation. The said commission is authorized and empowered to prescribe rules and regulations for the enforcement of the game laws and the protection of game in said county, not inconsistent with the provisions of this act."

"The Game Commission herein established shall have the power to reduce the license fees named in this act to such sums as they may find to be best from a revenue standpoint for Currituck County. The said game commission shall also have power, and it shall be its duty to make such rules and regulations in regard to applications for and the granting of licenses as the actual operation of this law and its interpretations by the courts may disclose to be helpful in or necessary to the reasonable execution and enforcement of the law; provided such rules and regulations shall not be inconsistent with the terms of the act itself, or with the law of the land." It is further provided that "if any section or subsection of this act shall be repealed or held invalid, all the other sections and subsections shall remain in full force and effect."

Chapter 266, Public-Local Laws 1921, was amended by chapter 168, Public-Local Laws, Extra Session, 1921, and was further amended by chapter 543, Public-Local Laws 1925, chapter 488, Public-Local Laws 1923, entitled "An act for the better protection of game in Currituck County," provides "that a person or persons using a stationary or float blind in the waters of Currituck Sound for the accommodation of sportsmen shall pay a license tax to said county of five dollars on each

and every blind so used. Said license to be issued by the clerk of the Superior Court of said county. The said clerk's fee shall be fifty cents for each and every set of licenses used under this act." Any person convicted of the violation of this act shall pay a fine of ten dollars. All sums collected for licenses under this act shall be applied to the highways of Currituck County.

Plaintiffs allege that said statutes are invalid for that they are revenue measures. It is admitted that the bills providing for their enactment were not read three several times in each house of the General Assembly; did not pass their three several readings in each house on three different days, and that the yeas and nays on the second and third readings were not entered on the journals as required by Article II, sec. 14, of the Constitution of North Carolina. Plaintiffs further allege that the statutes are invalid for that they arbitrarily and unlawfully discriminate in favor of residents of Currituck County and against residents of other counties in the State, with respect to the amount of the license fee for hunters in said county, and with respect to the ownership and operation of batteries or other floating devices used in the hunting of wild fowl on the waters of Currituck Sound and its tributaries in said county; and they further allege that said statutes are invalid for that they unlawfully and wrongfully undertake to create a monopoly and perpetuity in the ownership and right to operate batteries and other floating devices to be used in the hunting of wild fowl on the waters of Currituck Sound, or its tributaries in said county for the benefit of a favored class, to wit, those persons who owned and operated such batteries or other floating devices during the season immediately preceding the enactment of the act.

Upon motion of plaintiffs, an order requiring defendants to appear before the resident judge of the Fourteenth Judicial District, at Charlotte, N. C., to show cause why injunction prayed for in the complaint should not be granted was served on defendants in Currituck County. At the hearing, the court was of the opinion that the statutes are invalid upon all three grounds, upon which they are attacked by plaintiffs, and thereupon ordered that "defendants and each of them, be and they are hereby enjoined and restrained from and after 1 December, 1925, and until the hearing of this action upon its merits, from acting as members of a Game Commission for Currituck County, or in any way carrying out or attempting to carry out any of the provisions of chapter 266, Public-Local Laws 1921, or of chapter 168, Public-Local Laws, Extra Session, 1921, or of chapter 488, Public-Local Laws 1923, or of the act known as House Bill 1624, Senate Bill 1429 of the session of the General Assembly of North Carolina for the year 1925." (Chapter

543, Public-Local Laws 1925.) Defendants excepted to this order, and assign same as error.

Defendants' first contention, upon their appeal to this Court, is that the order herein is erroneous, for that this is an action to restrain and enjoin the enforcement of a statute, defining certain acts as crimes, and prescribing punishments therefor. Defendants contend that for this reason the action cannot be maintained.

Neither of plaintiffs is a resident of Currituck County. It is not alleged in the complaint, nor is it found by the court that either of plaintiffs has any property or property rights which are or may be affected by the enforcement of any of the provisions of these statutes, which plaintiffs allege are invalid, because in contravention of the Constitution of North Carolina. These statutes do not deprive plaintiffs of any rights, absolute or relative; neither of them has any right, natural or by virtue of his citizenship in North Carolina to hunt, shoot, kill or trap any wild fowl, or to own or operate batteries or other devices for hunting wild fowl on the waters of Currituck Sound, or its tributaries in Currituck County. No person, whether a resident or nonresident of the State, has a right to fish in the waters or to hunt game on the lands of this State except as such right is conferred upon him by the State. "The right of fishery, as well as of hunting, rests in the State, and is subject absolutely to such regulations as the General Assembly may prescribe and can be exercised only at such times and by such methods as it may see fit to permit." *Daniels v. Homer,* 139 N. C., 219.

"The ownership of game is in the people of the State, and the Legislature may withhold or grant to individuals the right to hunt and kill game, or qualify or restrict it, as in its opinion will best subserve the public welfare." "So well recognized is it that ownership of game and fish is in the State and not in individuals, that the decisions are uniform that a State may confer exclusive right of fishing and hunting upon its citizens and expressly exclude nonresidents, without infringing that provision of the Constitution of the United States (Art. IV, sec. 2) which provides that 'the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.'" *S. v. Gallop,* 126 N. C., 979. The right of the State, in the exercise of its police power, to make the hunting of game, without a license, unlawful, is too well established to be now the subject of controversy. Nor can the right of the State to require the payment of a fee for such license be questioned.

It is only in the event that plaintiffs, or any one of them, hunt, shoot, kill or trap wild duck, geese, brant or other wild fowl, or act as guide to one so engaged, from shore, marsh, blind, battery or other floating

device, or own or operate a battery or other floating device, used for the hunting of wild fowl, or use a stationary or floating blind for the accommodation of sportsmen, without having first obtained the license required by the statutes, that they or either of them can be affected by the provisions of the statute, which make such acts unlawful. Only those whose conduct is in violation of these statutes may be prosecuted. If either of the plaintiffs shall be charged with a violation of these statutes, and prosecuted therefor in a court of competent jurisdiction, he may plead in defense the invalidity of the statutes upon the same grounds as those alleged in the complaint in this action. If such plea be sustained, he cannot be convicted or punished. His remedy at law is complete. Plaintiffs by this action have invoked the equitable jurisdiction of the Superior Court of Mecklenburg County to determine the validity of this plea, and have thus sought to restrain and enjoin the enforcement of statutes, enacted by the General Assembly, applicable by their very terms only to acts which may be done in Currituck County. They neither allege nor show that the enforcement of these statutes will result in an irrevocable injury to, or a destruction of their property or property rights, or will subject them to oppression or vexatious litigation.

In *Advertising Co. v. Asheville,* 189 N. C., 737, *Justice Adams,* in the opinion for the Court, says: "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 well 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 addition to the authorities cited by *Justice Adams,* see *New Jersey v. Sargent,* decided 4 January, 1925, and reported in 70 L. Ed., 177.

The validity of a statute enacted by the General Assembly of North Carolina, declaring certain acts therein defined to be unlawful, and imposing punishment therefor, as crimes which do not affect property

or property rights, and which do not expose to oppression or vexatious litigation one who denies the power of the General Assembly, under the Constitution of the State to enact such statute, in the event that he shall violate its provisions, may not be determined in an action to restrain and enjoin a public officer who is required by the statute to enforce it. The invalidity of a statute, upon the ground that it is in violation of the Constitution of the State, is a good defense upon a prosecution in the courts for a violation of its provisions. Upon such prosecution his plea may be heard; its validity will then be determined by the courts in the exercise of their jurisdiction to see that no person is "taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

We are precluded, upon this appeal, from considering or deciding whether or not the statutes are void for the reasons assigned by plaintiffs. The order restraining and enjoining defendants from acting as the Game Commission of Currituck County, and from enforcing the game laws in said county as they are required to do by the statutes, is erroneous. It must be reversed. This action cannot be maintained. It is

Dismissed.

CLARKSON, J., concurring: I concur in the main opinion *on the sole ground* that the validity of a statute enacted by the General Assembly, declaring certain acts therein defined to be unlawful and imposing punishment therefor, as crimes, that no injunction or equitable proceeding will lie. The State, or a State agency, county or municipality cannot be enjoined from executing its criminal laws. Remedy is never given in equity when it can be obtained by law. To have presented to this Court the constitutionality of the Currituck County Game Law, it must appear that the party who violated the provision of the law was duly charged with the crime, convicted and appeal taken to this Court. *Cohen v. Comrs.*, 77 N. C., 2; *Busbee v. Lewis*, 85 N. C., 332; *Wardens v. Washington*, 109 N. C., 21; *Scott v. Smith*, 121 N. C., 94; *Paul v. Washington*, 134 N. C., 363; *Hargett v. Bell*, 134 N. C., 395; *S. v. R. R.*, 145 N. C., 521; *Thompson v. Lumberton*, 182 N. C., 260; *Turner v. New Bern*, 187 N. C., 548.

For the reasons given, the constitutionality of the Currituck County Game Law is not passed upon in the present opinion.

STANDARD SAND & GRAVEL CO. v. McCLAY AND FIDELITY & CASUALTY CO.

(Filed 3 March, 1926.)

1. Contracts—Offer and Acceptance.

In order to create a contract of sale of personal property, the acceptance of the offer must be identical therewith, imposing no new element into the transaction that would require an acceptance by the bargainor.

2. Same.

Where the price of sand and gravel have been agreed upon, it is an unconditional acceptance by the purchaser, when he has written can you ship to a certain point; reply that we think we can do so at or before a specified time; answer giving quantity, etc., and requesting shipment at time prior to that stated, if possible, followed by delivery to the railroad company: *Held*, sufficient evidence of the unconditional acceptance of the offer to sell.

3. Contracts—Carbon Copies—Duplicate Originals—Vendor and Vendee —Carriers.

A duplicate carbon of an original bill of lading, with sufficient evidence of identity, is regarded as a duplicate original of a contract of shipment, with a delivery to the carrier, and may be introduced in evidence without a previous notice to the opposing party, in an action by the vendor to recover the purchase price of the vendee, as evidence of delivery of the goods purchased.

4. Contracts—Personal Property—Implied Warranty.

In the sale of personal property, there is an implied warranty that the goods sold are reasonably suitable for the uses and purposes for which they were sold.

5. Highways — Contracts — Materialmen — Rejection —Inspection—Evidence—Burden of Proof.

Where a surety bond covers material furnished to a contractor to build a highway for the State Highway Commission, and liability is denied on the ground that it was refused by the Commission's engineer, it is a question for the jury to determine on conflicting evidence, whether the contractor has rejected the material before the engineer had been given an opportunity to inspect it.

6. Highways—Materialmen—Principal and Surety—Contracts.

Where the payment for material furnished for the building of a state highway is embraced by the surety bond of the contractor, it is not required that the material furnisher prove that it was used in the construction, it being required only that he show that it was furnished under contract with the contractor to build the highway, and that the contractor is liable for its payment. The analogy to the lien statutes, pointed out by *Brogden, J.*

CIVIL ACTION, tried before *Devin, J.*, November Term, 1925, of HARNETT.

The plaintiff instituted this action to recover from the defendant the sum of $833.23 for eleven cars of gravel and eight cars of sand, which the plaintiff alleged the defendant purchased for constructing Project No. 364-B, contract for which had been awarded by the State Highway Commission to the defendant. The defendant McClay denied that he had contracted to purchase said material for said project from the plaintiff, and notwithstanding the fact that no contract had been made, the plaintiff shipped certain material to him for use in said road construction, but that said material so shipped was rejected as unfit for the work by the resident engineer and bridge inspector for the State Highway Commission.

There was further evidence tending to show that the material so shipped was sold by the Atlantic Coast Line Railroad for demurrage charges and was never incorporated in the work.

The defendant McClay gave bond for the faithful performance of his contract with the State Highway Commission, said bond having been duly executed by the defendant, Fidelity and Casualty Company. The portion of the contract and bond defining the liability of the defendant Casualty Company is as follows: "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 defendant bonding company contends that by reason of the fact that none of said material was actually used by the contractor and incorporated in said work and was rejected and sold by the railroad company to other parties that, therefore, it was not liable in any event for said material.

The evidence disclosed that on 16 September, 1922, the defendant McClay wrote a letter to the plaintiff as follows: "I will want your company to ship sand and gravel to Raeford and also to this job 364-B. I surely would like for you if you can to ship me one or two cars of gravel and one of sand to Raeford right away, as my men are there and waiting. Please steal me one or two to help me out. Will soon be ready here. Now I am going to depend on you. Hoping to see you soon, I am yours, etc." On 16 November, 1922, the defendant McClay wrote the plaintiff as follows: "Can you ship me sand and gravel to Verona and Jacksonville? If so, let me hear from you. I need a good deal at these plants."

On 20 November plaintiff wrote the defendant McClay: "I think we can handle the Verona order O.K., but could not promise you shipments before the first of the month on gravel, but can ship the sand at any time. Please advise if this is satisfactory and the approximate quantities you will want shipped to Verona." In response to this letter,

the defendant wrote the plaintiff on 22 November, 1922, answering the same and using the following language: "I received your letter today. I surely wish you could send me at least two cars of gravel to Jacksonville right away, as I have two culverts I want to get in before the end of December, and I want you to ship to Verona just as soon as you can. If you can see your way to ship before the first of the month, I wish you would do so. . . . I will need about 1100 cubic yards of gravel at Verona and Jacksonville and about 450 cubic yards of sand." There was further evidence on behalf of the plaintiff tending to show that the defendant McClay had given an order for the sand and gravel prior to the time the letter was written with reference to making shipments, and that the order had been accepted by the plaintiff.

On the question of refusal of a State engineer to accept the material shipped by the plaintiff as suitable for project 364-B, there was evidence from the plant inspector of the State Highway Commission, whose duty it was to inspect the materials sent out by plaintiff that the materials shipped by plaintiff met the requirements of the State Highway Commission. There was also evidence to the effect that the sand and gravel shipped by the plaintiff was not up to specifications.

The resident engineer for the State Highway Commission, in charge of this particular project, testified as follows: "I never had a chance to permit the use of this material because Mr. McClay turned it down after my inspection before I had an opportunity to turn it down after taking samples. . . . I had instructions from Mr. Hutchinson, head of the Inspection Bureau of the State Highway Commission, not to turn it down if it had inspection cards on it, but I also had further instructions to send samples to the testing department. . . . I did not send it because it was turned down before I did send it. Mr. McClay did not wait to get it tested, but refused it himself."

The issues and answers thereto were as follows: (1) Is the defendant A. W. McClay indebted to the plaintiff, and if so, in what amount? A. $833.23. (2) Is the defendant Fidelity and Casualty Company of New York liable thereon as surety? A. Yes.

Judgment was entered upon the verdict and the defendant appealed.

Charles Ross for plaintiff.
I. M. Bailey and Marshall T. Spears for defendants.

BROGDEN, J. Three questions are presented for determination: (1) Was there sufficient evidence to establish a contract of sale and delivery of materials? (2) Was the defendant relieved of liability by reason of rejection of said material by the resident engineer of the State Highway Commission? (3) Is the defendant Casualty Company

liable under its bond for said materials, it being admitted that they were not actually incorporated in the work?

In reference to the first question presented, it is established law that in order to constitute a binding contract the offer and acceptance must be in identical terms and unequivocal. The rule is thus stated by *Stacy, J.,* in *Rucker v. Sanders,* 182 N. C., 609: "There is no effort to circumvent or deny the well settled principle that an offer must be accepted in its exact terms in order that a contract should arise therefrom, and any attempt to impose new conditions or terms in the acceptance, however slight, will ordinarily deprive it of any efficacy." *Overall Co. v. Holmes,* 186 N. C., 428; *Refining Corporation v. Sanders,* 190 N. C., 203.

Applying this rule to the facts as disclosed by the record, it appears that on 16 November the defendant wrote the plaintiff, "Can you ship me sand and gravel to Verona and Jacksonville?" On 20 November the plaintiff wrote defendant, "I think we can handle the Verona order O.K., but could not promise you shipment before the first of the month on gravel, but can ship the sand at any time. Please advise if this is satisfactory and the approximate quantities you would want shipped to Verona." In response to that letter, on 22 November, the defendant wrote the plaintiff, "I want you to ship to Verona just as soon as you can. If you can see your way to ship before the first of the month I wish you would do so. I will need about 1100 cubic yards of gravel and about 450 cubic yards of sand." This language, by fair deduction, compels the conclusion that there was such an offer and acceptance thereof as the law contemplates, and, therefore, a binding contract. While the price for the material was not mentioned in the correspondence, it appears from the record that the plaintiff had quoted the defendant gravel and sand for shipment to Onslow County at the price of $1.50 on the inch and a half gravel per ton and fifty cents on sand.

The plaintiff offered in evidence twenty-one way bills issued by the railroad company for thirteen cars of gravel and eight cars of sand, showing shipment of material to the defendant. The defendant objected to these documents for the reason that they were carbon copies of the originals, and that the originals were in the possession of the railroad. The evidence was admitted over the objection of the defendant, and the ruling of the trial judge presents the question of admissibility of carbon copies of the bills of lading where no notice was given to produce the original and where the original was in the possession of the railroad company.

There was evidence that the carbon copies were made at the same time and by the same mechanical operation as the originals. In *International Harvester Co. of America v. Elfstrom,* 112 N. W., 252, it is

said: "It is well settled that, where a writing is executed in duplicate or multiplicate, each of the parts is the writing which is to be proved, because by the act of the parties each is made as much the legal act as the other." In *Chesapeake Ry. Co. v. Stock,* 51 S. E., 161, the Court held: "That a carbon copy made at the same time and by the same impression of type is to be regarded as a duplicate original and admissible in evidence without notice to produce the other original." *Federal Union Surety Co. v. Ind. Lumber and Mfg. Co.,* 95 N. E., 1104; 22 C. J., 1024; *McLendon v. Ebbs,* 173 N. C., 605; *Ins. Co. v. R. R.,* 138 N. C., 42; *Beard v. R. R.,* 143 N. C., 142.

We conclude, therefore, that his Honor was correct in admitting the evidence.

The second question involves the rejection of the material by the resident engineer of the State Highway Commission. Upon this aspect of the case the judge charged the jury in part: "If you are satisfied from the evidence and by the greater weight thereof that the materials were contracted for by the defendant, and were loaded on the car and shipped by the plaintiff in accordance with the contract, and the materials were the kind and quality contracted for and suitable for the purpose for which they were ordered, and the defendant failed to pay therefor, the plaintiff would be entitled to recover the contract price therefor, provided the plaintiff had received nothing from the sale of the material." This charge is a correct interpretation of the law applicable to the facts. In sales of personal property where there is no warranty of quality, it is nevertheless the duty of the seller to furnish property reasonably suitable for the uses and purposes for which the property was intended. *Ashford v. Shrader,* 167 N. C., 45; *Furniture Co. v. Mfg. Co.,* 169 N. C., 41; *Farquhar Co. v. Hardware Co.,* 174 N. C., 369. It also appeared from the testimony of the resident engineer of the State Highway Commission that the defendant did not wait to get the material tested, but refused it himself, and hence this aspect of the case is immaterial.

In reference to the third question, it appears from the testimony that the material was sold at the instance of the Atlantic Coast Line Railroad Company, and, therefore, not actually incorporated in the work. The pertinent provision of the bond obligated the bondsman *to truly pay every person furnishing labor and material for all labor and materials for which the contractor is liable.*

The jury, by its verdict, under proper instruction from the court, found that the defendant made a valid contract for the material, and that in pursuance thereof material reasonably fit and suitable for the contemplated work was delivered to a common carrier consigned to the defendant. The material was therefore "furnished" to the contractor,

and, hence of necessity the contractor was liable for the purchase price. Therefore, the contractor being liable, the bond, by its express terms, guaranteed payment.

Counsel, in able briefs, have called our attention to no case in this State determining the question of liability of a bondsman for material not actually incorporated in the work. In construing lien statutes, the courts are divided. Some hold that no lien can be acquired by a materialman unless the material is actually incorporated in the structure. These are "strict constructions." The more liberal view is that, if material, fit and proper, is delivered to the owner, the materialman having done all that he is required to do and all that he can do, is entitled to a lien whether the material is actually used or not. The divergence of judicial decision is classified in an exhaustive note in 13 A. & E. Anno. Cas., p. 13. The liberal interpretation of such statutes was adopted in North Carolina in *Womble v. Leach,* 83 N. C., 86, which held that a landlord, furnishing supplies was not bound to see that the supplies to the tenant were actually used on his farm.

In the present case, however, we are not construing a lien statute but a contract. *Town of Cornelius v. Lampton,* 189 N. C., 718. As stated by *Justice Clarkson* in *Aderholt v. Condon,* 189 N. C., 755: "The bond is to pay for the work and material for which the contractor—Costello Brothers-Condon & Condon—is liable."

In lien statutes the lien is the security for the laborer and the materialman. In cases like the case now under consideration where no lien can be secured, the bond is the security for laborers and materialman. In *Crane v. U. S. Fidelity and Guaranty Co.,* 132 Pac., 872, the contract provided for the construction of an annex to a public school building in the city of Seattle. The contractor bought material, part of which was not used in the structure. The Court held that the liability of a contractor for materials ordered and supplied for the work, but not actually used therein, is within the contractor's bond conditioned on payment of materialmen furnishing materials for the work, the contractor not reserving the right to return any material not used. *Trammel v. Mount,* 68 Texas, 213. Indeed, if any other rule of liability should be applied, materialmen would be compelled to stand guard over materials furnished and compel the contractor to incorporate them in the work in order to collect the purchase price. The logical result of such a rule would be to undermine and destroy business confidence and security.

By reason of the importance of the principles involved, we have given the record careful consideration and are convinced that the merits of the controversy have been determined in accordance with the law.

Affirmed.

FAY B. SITTERSON v. W. J. SITTERSON.

(Filed 3 March, 1926.)

1. Judgments—Verdict.

The judgment of the court must conform to the verdict as a matter of right to the one in whose favor it was rendered.

2. Appeal and Error—Judgments—Discretion of Court—Record.

Where the judgment has been set aside as a matter within the discretion of the trial judge, an appeal will not be considered; but this should appear of record.

3. Verdict—Pleadings—Evidence—Instructions.

A verdict of the jury will be considered on appeal in connection with the pleadings, the evidence, and the instruction of the court.

4. Divorce—Statutes—Husband and Wife—Separation—Criminal Law.

A separation by the husband from his wife for a period of five years by reason of his incarceration for the commission of a crime, under sentence of a court, is not sufficient for the wife to obtain a divorce *a vinculo*, under our statute.

CIVIL ACTION for absolute divorce, tried before *Sinclair, J.*, of HERTFORD.

The plaintiff instituted this action for absolute divorce from the defendant upon the ground of separation of husband and wife for a period of five successive years.

Plaintiff testified as to the marriage, and there was testimony to the effect that the defendant had been convicted of murder at the February Term, 1915, of the Superior Court for Hertford County and sentenced to the State's prison for twenty years. There was also testimony by the plaintiff to the effect that the plaintiff and the defendant had lived separate and apart for more than ten years, and the plaintiff had not seen her husband in ten years, and that she had resided in the State all her life.

The following issues were submitted to the jury:

1. Were the plaintiff and the defendant married as alleged in the complaint?

2. Was there a separation between the plaintiff and the defendant, without fault on the part of the plaintiff, and have they lived separate and apart for five successive years as alleged in the complaint?

3. Has the plaintiff resided in this State for five years next prior to the bringing of this action?

The judge charged the jury with respect to each issue as follows: "If you find the facts as testified to you will answer the issue 'Yes'—with your permission I will answer it for you." Thereupon each issue was answered "Yes."

The plaintiff tendered a judgment in accordance with the issues and verdict, decreeing that the bonds of matrimony existing between the plaintiff and the defendant be dissolved. The trial judge refused to sign the judgment so tendered by the plaintiff, but signed the following judgment:

"This cause coming on to be heard before his Honor, N. A. Sinclair, judge, and jury, and being heard upon the following issues submitted to the jury, to wit:

1. Were the plaintiff and defendant married as alleged in the complaint?

2. Was there a separation between the plaintiff and defendant, without cause on the part of the plaintiff, and have they lived separate and apart for five successive years, as alleged in the complaint?

3. Has the plaintiff resided in this State for five years next prior to the bringing of this action?

And the jury having answered to each and every issue "Yes":

It is ordered, adjudged and decreed that plaintiff recover nothing by her said action, and pay the costs thereof to be taxed by the clerk of this court.

N. A. SINCLAIR,
Judge Presiding."

Plaintiff excepted and appealed, the record showing the following: "The only exception was to the judgment as signed."

Lloyd J. Lawrence for plaintiff.
No counsel for defendant.

BROGDEN, J. C. S., 1659, prescribes the grounds upon which an absolute divorce may be granted by the courts. Subsection 4 provides that an absolute divorce may be granted on application of the party injured "if there has been a separation of husband and wife, and they have lived separate and apart for five successive years, and the plaintiff in the suit for divorce has resided in this State for that period." Therefore, the injured party, in order to secure an absolute divorce, is required to allege and prove:

1. The marriage.

2. Separation for five successive years.

3. That the plaintiff in the suit has resided in this State for that period prior to bringing the suit.

The verdict of the jury, under proper instructions from the court, has established all the essential requirements for an absolute divorce.

A verdict is the unanimous decision made by a jury and reported to the court. *Smith v. Paul,* 133 N. C., 69. It is also a substantial right. *Wood v. R. R.,* 131 N. C., 48.

If the verdict, as rendered by the jury, was allowed to stand, nothing else appearing, the plaintiff was entitled in law, and as a matter of right, to a judgment thereon and in accordance therewith. *Winn v. Finch,* 171 N. C., 276; *Durham v. Davis,* 171 N. C., 308.

In the *Durham case, supra,* the principle is tersely expressed as follows: "There is no principle of law more firmly established than that the judgment must follow and conform to the verdict or findings."

The principle is amplified by *Hoke, J.,* in *Lawrence v. Beck,* 185 N. C., 200, in the following language: "In this jurisdiction, and others basing their system of jurisprudence on common-law principles, a judgment is but the conclusion that the law makes upon the facts admitted or authoritatively established in the course of a properly constituted suit, and where in such a proceeding the ultimate facts have been so ascertained and declared, the correct judgment must follow and be entered thereon as of right." *Beard v. Hall,* 79 N. C., 506; *Durham v. Hamilton,* 181 N. C., 232.

The court had the power to set aside the verdict, but none to reverse the answers of the jury. *Sprinkle v. Wellborn,* 140 N. C., 163; *Bartholomew v. Parrish,* 186 N. C., 81. It cannot be contended that the judgment as signed was in effect equivalent to setting aside the verdict, because when a verdict is set aside by the trial judge, it should appear of record whether it was set aside as a matter of law or in his discretion. *Abernethy v. Yount,* 138 N. C., 337; *Jarrett v. Trunk Co.,* 142 N. C., 468; *Garland v. Arrowood,* 177 N. C., 371. No such entry appears in this case.

However, there is another principle of law applicable to this case which bears a vital relation to the determination of the merits of the appeal, and that is, that the verdict must be construed with the evidence and pleadings. *Bank v. Wysong & Miles Co.,* 177 N. C., 289; *Jones v. R. R.,* 176 N. C., 260; *Weldon v. R. R.,* 177 N. C., 182. The rule is thus stated by *Hoke, J.,* in *Reynolds v. Express Co.,* 172 N. C., 491: "It is a recognized principle in our system of procedure that a verdict may be interpreted and allowed significance by proper reference to the pleadings, evidence, and the charge of the court." *S. v. Snipes,* 185 N. C., 747. The complaint alleges that the plaintiff and the defendant were married 17 October, 1913, and at the February Term, 1915, of the Superior Court of Hertford County the defendant was convicted of murder in the second degree and sentenced to the State's prison for a period of twenty years, and was immediately incarcerated therein, and that there has been a *"separation of the plaintiff and the defendant* ever since said February Term, 1915, of said Superior Court," the defendant having abandoned the plaintiff and continuously lived separate and apart from said defendant ever since said February Term of said

court; that defendant was pardoned on or about 1 January, 1925, and the plaintiff has not seen or heard from the defendant for a period of over five years."

These allegations in the pleadings raise the question as to whether or not imprisonment for crime for a period of five years or more effects a separation of husband and wife so as to permit either party to secure a divorce under C. S., 1659, subsec. 4.

In the case of *Lee v. Lee,* 182 N. C., 61, it was held that a husband whose wife had been placed in the asylum had not been wronged by her, and he had no ground for divorce by reason of the incarceration of the wife for a period in excess of the statutory time prescribed as a basis for absolute divorce. The plaintiff insists that the principle announced in the *Lee case* is not applicable for the reason that the defendant was confined in the asylum for no fault on her part; whereas, in the present case, this defendant was sentenced to the State's prison because of his own voluntary wrong against society and her. The separation in the *Lee case* was involuntary. Involuntary separation is not such a severance of the marital relation as the law contemplates. The separation in the present case was involuntary. The defendant was incarcerated in the State's prison by force of law. It would impose too great a burden upon reason to suggest that the defendant committed the crime of murder for the purpose of being incarcerated in the penitentiary in order to effect a separation from his wife or to sever the marital relation. Certainly, allegation and proof to that effect would be necessary. The underlying idea of separation is an intent by one or both of the parties to sever the marital status. To hold that a separation brought about by imprisonment for more than five years would constitute a cause of action for absolute divorce, would in effect constitute a *judicial enactment* of a new ground for divorce in North Carolina, to wit, imprisonment for five years. If such ground for divorce is desirable, its appeal should be made to the Legislature and not to the courts. Indeed, it would seem that the policy of the law, as it now stands, condemns imprisonment for a felony as a ground for "absolute divorce." In 1887 the Legislature of North Carolina enacted chapter 100, Public Laws 1887, amending section 1285 of The Code of 1883, by prescribing a new ground for divorce, to wit: "If the husband shall be indicted for a felony and flee the State and does not return within one year from the time the indictment is found." This statute was expressly repealed by chapter 490, Public Laws 1905. The repealing clause was strong and sweeping and is in this language: "That all laws creating any cause for divorce enacted since the Session of 1883 be and the same are hereby repealed." While, perhaps, this has no direct bearing upon the case at issue, yet, by fair deduction, it would seem to

be the expressed policy of the law to eliminate felonies and imprisonment therefor as grounds for absolute divorce, and to further declare that such grounds should not only be no further extended, but entirely eliminated, for the reason that no legislative enactment since 1905 has attempted to restore the former statute.

It may be that the plaintiff in this action has been greatly wronged and humiliated by the unlawful shedding of blood done by her husband; but, as stated by the late *Chief Justice Clark* in the case of *Lee v. Lee, supra,* "With us the law-making power has adhered to the obligation of the marriage vow, that the parties 'take each other for better or for worse, to live together in sickness and in health till death do them part,' with the exceptions only where the misconduct of the parties, and not their misfortunes, are made by our statute to justify the divorce."

Upon the record, we hold that the ruling of his Honor in dismissing the action was correct.

Affirmed.

HOWARD-BOBBITT CO. v. NEVER FAIL LAND CO.

(Filed 3 March, 1926.)

1. Principal and Agent—Implied Authority—Scope of Agency—Secret Limitation of Authority.

An agent may not only bind his principal by acts for which specific authority as such agent is given, but also for all acts necessary to the performance thereof, and generally within the powers conferred on like agents and within the apparent scope of their authority; and to escape liability the principal may not set up secret limitations unknown to one advancing the agent money on the strength of the relationship, when such is ordinarily implied by agencies of like character.

2. Same—Farming Supplies—Evidence—Questions for Jury.

Evidence that the principal sought to be bound received bills for farming supplies furnished the supposed agent, and remitted for same, is sufficient to sustain a verdict binding the principal for the payment of a balance of the running account, notwithstanding conflicting evidence in behalf of the principal that the agent purchased the goods on his own account under an arrangement unknown to the plaintiff, by which the principal had agreed only to advance a limited amount of money for the farming purposes, under a rental contract with the alleged agent.

APPEAL by defendant from *Devin, J.,* and a jury, September Term, 1925, of LEE. No error.

Plaintiff alleges:

"1st. That it is a corporation, organized and doing business under the laws of the State of North Carolina, with its principal office and place of business in the city of Sanford, county of Lee, said State, and,

among other things, is and was at the time hereinafter set out, engaged in the wholesale grocery business; and that the defendant is a corporation, and as plaintiff is informed and believes, organized and doing business under the laws of the State of North Carolina, with its principal office in the city of Oxford, county of Granville, and State aforesaid, and, among other things, is engaged in farming on a large scale in the county of Harnett in said State.

2d. That during the year 1923 the plaintiff sold and delivered to the defendant, at its farm at Pineview, Harnett County, North Carolina, large quantities of merchandise, amounting to the sum of $476.14, and charged the same against the defendant."

Plaintiff alleges the amount is due and owing, and demands judgment for the $476.14, interest and cost.

Defendant answers and says:

"1st. That the defendant admits that it is a corporation organized and doing business under the laws of the State of North Carolina with its principal place of business at Oxford, North Carolina, and that it is engaged in farming in Harnett County; as to the other allegations of paragraph 1 of the complaint the defendant has no sufficient information upon which to form a belief, and therefore denies the same, and demands strict proof thereof.

"2d. The allegations of paragraph 2 of the complaint are untrue and are denied."

Defendant denies that it owes any sum to plaintiff, and asks that it go without day, etc.

The issue submitted to the jury and their answer thereto was as follows: "Is the defendant indebted to the plaintiff, and, if so, in what amount? Answer: $476.14."

A judgment was rendered on the verdict. Defendant assigned error. Numerous other assignments of error were made by defendant and appeal taken to the Supreme Court. The material ones will be considered in the opinion.

Gavin & Jackson for plaintiff.
Marshall T. Spears and Williams & Williams for defendant.

CLARKSON, J. The material facts are: Howard-Bobbitt Co., the plaintiff, is a corporation doing a wholesale grocery business in Sanford, N. C. The Never Fail Land Co., the defendant, is a corporation engaged in farming in the county of Harnett, at Pineview, N. C., with its principal office in Oxford, N. C. S. S. Puckett rented, the year 1923, from the Never Fail Land Co., certain of its land in Harnett County and cultivated 341 acres in tobacco. Puckett's contract was to pay for the land one-fourth of the crop raised as rent. Puckett had

eighteen or twenty tenants, and had to furnish supplies to the tenants, but did not have money to run the farm. The Never Fail Land Company agreed to make advances in money and help to run the farm. It was agreed that $6,800 should be borrowed from the bank in Oxford; the discount, etc., reduced the fund to $6,600. This amount was placed to the credit of Puckett, and the Never Fail Land Company to be used in buying supplies for Puckett and his tenants. The $6,600 was gotten for a period of six months. It was exhausted in August. Plaintiff shipped the supplies by trucks sent from the farm or by freight to the farm at Pineview. The bill of lading and itemized statements were sent with the shipments and the bills of lading were made out "From Howard-Bobbitt Company to Never Fail Land Farm, Pineview, N. C." All the statements for supplies plaintiff made out to Never Fail Land Company. They were given Puckett and he OK'd them and sent them to Never Fail Land Company at Oxford.

R. E. Bobbitt, secretary and treasurer of plaintiff, testified: "They would send the check in settlement of the statement. We sold defendant Never Fail Farm goods amounting to something over $2,000 during the year 1923, and they paid the bills and statements as rendered at different intervals during the summer of 1923: on 30 May they paid us with check for $269.03; 2 July, $367.99; 6 August, check for $477.79; 3 September, $487.75; 3 September, $335.85, all of which checks were credited on the account of the defendant." The amount now sued for is for supplies furnished from 30 August to 30 October, 1923. In payment Puckett brought the checks to plaintiff from defendant, which were signed by the Never Fail Land Company. "The Never Fail Land Company" was printed on the checks. The credit was extended to Never Fail Land Company. None of the items of supplies were charged to Puckett, but were charged to Never Fail Land Company. The supplies were delivered to Puckett, who stated he was manager, and had stationery as follows:

"NEVER FAIL LAND COMPANY
Owners of
THE NEVER FAIL FARM
Growers of Fancy Bright-Leaf Tobacco, Grain, and Golden-Fleece Cotton
Pineview, Harnett County, N. C.
Branch Office Oxford, N. C. S. S. Puckett, Manager."

During the time the supplies were furnished plaintiff did not know that Puckett was a tenant. The supplies were all for the farm, Puckett and his tenants, and used on the Never Fail Land Company Farm.

After Puckett OK'd the bills he sent them to Never Fail Land Company at Oxford, N. C. The checks were made direct to Howard-Bobbitt Company, plaintiff. The invoices sued on were OK'd by Puckett and sent to defendant. Puckett was to do the buying for the farm. Puckett informed defendant that he preferred buying from plaintiff, and was told to "go ahead and trade where he wanted to." The plaintiff was never informed of the arrangement between defendant and Puckett, but Puckett told plaintiff the Never Fail Land Company would pay for the supplies. Plaintiff knew nothing about Puckett being a tenant of defendant or that the arrangement for supplies was limited. The President of defendant company testified that the first notice that defendant had of the bills sued on was a letter on 8 December, 1923, and another letter 26 February, 1924, from plaintiff. Both of these letters were answered and it was denied that Puckett was authorized to buy goods on its credit. That the $6,600 was exhausted before the supplies in the present suit were purchased. Puckett was a tenant, not a manager for defendant. That defendant received no invoices for goods for which the suit was brought. The contention of defendants is set forth in its letter to plaintiff dated 8 December, 1923, as follows: "We acknowledge receipt of your letter of 6 December, with enclosure of statement amounting to $475.14 ($476.14) against Never Fail Farms. We are writing you at the first opportunity after receipt of your letter to advise you that we do not owe you anything and that the account in question must have been intended for Mr. S. S. Puckett. Under our agreement with Mr. Puckett we were to advance him certain amounts of money each month from March through August, inclusive. This we have done. As you know, all statements which you have heretofore made out against Mr. Puckett were presented to him and in turn sent to us after Mr. Puckett had OK'd the bills and ordered them charged against his advances. Your statement contains an item of $90.01 as of 30 August, and I am very sorry that you did not include it in your statement to Mr. Puckett for the month of August. We sent you check covering Mr. Puckett's account for that month and do not understand why this item was not included. We are in nowise or under any condition liable or responsible for accounts made by Mr. Puckett except such accounts as are made at our request and with our knowledge and consent. Mr. Puckett occupies the relationship with us as our tenant and pays us only one-fourth of the crops. We are quite sure that Mr. Puckett can arrange to meet this account as soon as the crop which he is interested in has been sold. He is a good fellow and I am sure recognized this obligation, and if given a little time will pay it in full. It is very hard for us to understand why he should ever knowingly permit this statement to be sent to us and I feel quite confident that he will explain it to you when you take it up with him."

Defendant's president testified: That all the checks sent by defendant to plaintiff had on the left-hand margin of the check "for S. S. Puckett account." He further testified: "Mr. Puckett had a right to use $1,100 a month. He had authority to draw on us for $1,100 a month on his account. It was in his name and Never Fail Land Company. We did not notify Howard-Bobbitt Company that this account was limited. It was a matter with Mr. Puckett and Mr. Bobbitt. Did not notify them that the time that we were to furnish them advances had expired, or that the amount we were to furnish had been exhausted or that his limit had been taken up. I told Mr. Puckett he could trade anywhere he wanted to."

The court charged the jury, in part, as follows: "A person is bound by the acts of his agent, if the agent acts within the limits, within the bounds, of his authority conferred upon him by the principal. A principal is likewise bound by the acts of his agent while acting within the apparent scope of his authority, that is, where the principal holds the agent out, or holds a person out, as his agent or knowingly permits him to act as his agent in dealing with others. If he does so, he will be bound by the acts of such agent while acting within the apparent scope of his authority, if such apparent authority is relied upon by such other parties in their dealings with him and the credit is given to the principal." This we consider the only material assignment of error in the record. The contentions of both sides were fairly given by the court below.

Walker, J., in *Latham v. Field,* 163 N. C., p. 360, said: "The rule in regard to agency may be thus stated: A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the precise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it, or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent, within the scope of his authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. *Bank v. Hay,* 143 N. C., 326; *Law v. Stokes,* 3 Vroom (N. J.), 249; Mechem on Agency, sec. 84. 'The principal is bound by all the acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions, unknown to the persons dealing with him; and this is founded on the

doctrine that where one or two persons must suffer by the act of a third person, he who has held that person out as worthy of trust and confidence, and as having authority in the matter, shall be bound by it.' *Carmichael v. Buck,* 10 Rich. Law, 332 (70 Am. Dec., 226); Story on Agency, sec. 127. 'Where a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even if no agency existed in fact.' *Trollinger v. Fleer,* 157 N. C., 81; *Metzger v. Whitehurst,* 147 N. C., 171. These cases fairly illustrate this doctrine and define its limits." Mechem on Agency (2d ed.) part sec. 1722-3; Page on Law of Contracts, sec. 1758.

Hoke, J., in *Powell v. Lumber Co.,* 168 N. C., p. 635, speaking to the question, says: "A general agent is said to be one who is authorized to act for his principal in all matters concerning a particular business or employment of a particular nature. Tiffany on Agency, p. 191. And it is the recognized rule that such an agent may usually bind his principal as to all acts within the scope of his agency, including not only the authority actually conferred, but such as is usually 'confided to an agent employed to transact the business which is given him to do,' and it is held that, as to third persons, this real and apparent authority is one and the same, and may not be restricted by special or private instructions of the principal unless the limitations sought to be placed upon it are known to such persons or the act or power in question is of such an unusual character as to put a man of reasonable business prudence upon inquiry as to the existence of the particular authority claimed. *Latham v. Fields,* 163 N. C., 356; *Stephens v. Lumber Co.,* 160 N. C., 107; *Gooding v. Moore,* 150 N. C., pp. 195-198; Tiffany on Agency, pp. 180, 184, 191 *et seq.* The power of an agent, then, to bind his principal may include not only the authority actually conferred, but the authority implied as usual and necessary to the proper performance of the work intrusted to him, and it may be further extended by reason of acts indicating authority which the principal has approved or knowingly or, at times, even negligently permitted the agent to do in the course of his employment. *Law Reporting Co. v. Grain Co.,* 135 Mo., App. Rep., pp. 10-15; 31 Cyc., pp. 1326-1331." *Furniture Co. v. Russell,* 171 N. C., 485; *Ferguson v. Amusement Co., ibid.,* 665; *Brimmer v. Brimmer,* 174 N. C., 439; *Lumber Co. v. Johnson,* 177 N. C., 51; *Cardwell v. Garrison,* 179 N. C., 478; *Strickland v. Kress,* 183 N. C., 536.

We think the charge of the court below correct under the well-settled law of this jurisdiction. We find

No error.

VIRGINIA-CAROLINA POWER CO. v. JOB TAYLOR.

(Filed 3 March, 1926.)

1. Ejectment—Title—"Color"—Evidence — Landlord and Tenant — Instructions—Appeal and Error.

Where the plaintiff in ejectment has shown paper title by mesne conveyances from a State grant of the lands in controversy, and the defendant, claiming under sufficient evidence of adverse possession with and without color, C. S., 428, 430, and denies a lease introduced by the plaintiff to the defendant's predecessor in title: *Held*, reversible error for the court to instruct the jury that defendant's possession is conclusively presumed to be that of a tenant for twenty years under the provisions of C. S., 433, and exclude evidence of ownership of his predecessor in title during the continuance of the lease and for twenty years thereafter.

2. Same—Landlord and Tenant—Leases—Evidence—Issues — Questions for Jury.

Where the defendant in ejectment claims the *locus in quo* by sufficient evidence of adverse possession with and without "color," as against plaintiff's chain of paper title, and the defendant denies the genuineness of a lease to his predecessor which the plaintiff has introduced, an issue of fact is raised for the determination of the jury.

3. Same—Statutes—Limitation of Actions—Presumptions.

The presumption that the possession of the landlord is that of the tenant who has entered under him until the expiration of twenty years from the termination of the tenancy, etc., exists no longer than the period provided by the statute.

4. Tenants in Common—Deeds and Conveyances—Division of Lands—Title.

Mutual deeds given by tenants in common to hold the lands divided in severalty do not affect the title to the lands, but is only a severance of the possession.

5. Limitation of Actions—Ejectment—Tenants in Common—Landlord and Tenant—Possession—Title—Deeds and Conveyances.

Evidence that a tenant in common with defendant in ejectment claiming the *locus in quo* by adverse possession, paid rent to another, prior to the existence of the cotenancy, is not evidence that the defendant entered into possession under the title of such other person.

APPEAL by defendant from *Dunn, J.*, at August Term, 1925, of NORTHAMPTON.

Civil action in ejectment brought to recover the possession of a tract of land, consisting of approximately 97 acres and covered by the waters of Roanoke River, a non-navigable stream, save a small island of about five acres, known as Sturgeon Island, located near the center of the stream.

The usual issues in ejectment were submitted to the jury and answered in favor of the plaintiff. From the judgment entered thereon, the defendant appeals, assigning errors.

Geo. C. Green for plaintiff.

Travis & Travis, Burgwyn & Norfleet and Daniel & Daniel for defendant.

STACY, C. J. The case at bar has been tried twice in the Superior Court, and this is the second appeal here. See former opinion as reported in 188 N. C., 351, for fuller statement of the facts. And desirable as an ending of the litigation may be, there are several exceptions, appearing on the present record, which seem to necessitate another hearing.

The land in question consists of approximately 97 acres in the bed of Roanoke River, a non-navigable stream, and includes a small island of about five acres capable of cultivation, known as Sturgeon Island. The plaintiff claims title under a grant issued by the State to William Eaton in 1790, and mesne conveyances connecting the plaintiff with said grant. *Mobley v. Griffin,* 104 N. C., 112. The defendant, on the other hand, claims title by adverse possession, and, on the hearing, undertook to show such possession (1) for seven years under color, and (2) for twenty years without color, either method being sufficient to establish title in this jurisdiction. C. S., 428 and 430.

There was evidence on behalf of the defendant that part of the land, including Sturgeon Island, was at one time held by Samuel Miles, the defendant's predecessor in title. And in order to rebut this testimony the plaintiff introduced two alleged leases from Wilkins & Broadnax, under whom the plaintiff claims, to Samuel Miles, for the purpose of showing that said Miles held the land as tenant and not in his own right or adversely to the plaintiff's predecessor in title. The last of these alleged leases expired 1 January, 1868.

The defendant denied the execution and delivery of these leases. There was evidence tending to show that the signatures of Samuel Miles to said leases were in his handwriting and that the leases were found among the papers of E. W. Wilkins, one of the alleged lessors. Upon this showing, the court ruled and announced from the bench in the presence of the jury "that Samuel Miles was the tenant of Wilkins & Broadnax, and held possession of Sturgeon Island and the fish slides as such during the term covered by the leases admitted in evidence."

This ruling was erroneous and prejudicial to the defendant. The leases were denied, hence it was a question for the jury to say whether they were genuine and whether the relation of landlord and tenant

existed between Wilkins & Broadnax and Samuel Miles. *Dobbins v. Dobbins,* 141 N. C., 210; *Smith v. Lumber Co.,* 140 N. C., 375.

After the above ruling, his Honor further held that "any acts of possession by Samuel Miles or anyone claiming under him during the term of the two leases, or within 20 years after the expiration of the last term, were presumed to be done under the leases, and that such acts, if any, were not to be considered as adverse to the possession of Wilkins and Broadnax, and those claiming under them during such period."

Under this holding, the defendant was not allowed to show any acts of ownership on the part of Samuel Miles prior to 1888; the basis of this ruling was that, as the possession of the tenant is deemed to be the possession of the landlord, until the expiration of 20 years from the termination of the tenancy, it would take twenty years longer, or forty years in all, to ripen title by possession of anyone claiming under Samuel Miles. This we think was an erroneous construction of C. S., 433, which is as follows:

"When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited."

Under this statute, when the relation of landlord and tenant has once been established, the possession of the tenant is presumed to be the possession of the landlord for a period of twenty years, following the termination of the tenancy, or, where there has been no written lease, for twenty years from the time of the last payment of rent, but such presumption is not to be made after the periods limited in the statute. In other words, the presumption which attaches to the possession of a tenant following the termination of a tenancy, is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. *Melvin v. Waddell,* 75 N. C., 361.

It is practically conceded by the plaintiff that the above rulings cannot be sustained unless they are rendered harmless by the evidence of W. F. Horner, under whom, it is alleged, the defendant claims, he having testified that he paid rent for Sturgeon Island from 1910 to 1914 to Miss Nellie Broadnax, one of plaintiff's predecessors in title. But it is not conceded that the defendant claims under W. F. Horner. The evidence is that the defendant and W. F. Horner purchased the

locus in quo and other lands in 1917 and executed division deeds therefor in 1919. Partition deeds between tenants in common operate only to sever the unity of possession and convey no title. *Harrington v. Rawls,* 136 N. C., 65; *Harrison v. Ray,* 108 N. C., 215. Furthermore it will be observed that W. F. Horner says he paid Miss Broadnax rent on Sturgeon Island from 1910 to 1914, and this was before he became a tenant in common of said property with the defendant. There was other evidence to the effect that the Lobdell Car Wheel Company, defendant's grantor and predecessor in title, held possession of Sturgeon Island from 1876 to 1917, which, of course, included the period from 1910 to 1914.

For the errors as indicated, there must be a new trial, and it is so ordered.

New trial.

JOSEPH J. VASSAR v. J. B. VASSAR ET AL.

(Filed 3 March, 1926.)

Estates—Contingent Limitations—Defeasible Fee—Deeds and Conveyances.

A devise to testator's wife for life, remainder to his son, and should the son die without bodily heirs, then to the other of testator's children: *Held,* after the death of the life tenant, the son took a defeasible fee-simple title contingent upon his dying leaving children, the rule in *Shelley's case* not applying, and a deed from the son and the testator's children could not convey a fee simple absolute, such being further dependent upon the unascertained contingency of who would take the estate in the event of the death of the son.

APPEAL by plaintiff from *Sinclair, J.,* at November Term, 1925, of NORTHAMPTON.

Civil action to recover the balance alleged to be due on the purchase price of a tract of land sold by the plaintiff to the defendant, W. L. Harris. The other defendants have been made parties because of their alleged interest in the land and to bar their claims by judgment should it be decided that the title conveyed to the defendant is absolute and indefeasible.

The plaintiff, Joseph J. Vassar, by deed dated 13 January, 1922, conveyed and intended to convey to the defendant, W. L. Harris, all his right, title, interest and estate in and to a certain tract of land, with the understanding that if the title conveyed was a defeasible fee—the plaintiff having acquired the land by devise under item 6 of his father's will—the purchase price should be $20 per acre, but if plaintiff estab-

lished, by proper proceeding, within five years thereafter that the title conveyed was an indefeasible fee simple, the defendant agreed to pay an additional $20 per acre.

This suit is to recover the additional $20 per acre. It was adjudged by the Superior Court that the plaintiff's deed did not convey an indefeasible fee-simple title to the land in question and hence denied any recovery to the plaintiff. From this judgment, the plaintiff appeals.

D. M. Clark and Dink James for plaintiff.
Geo. C. Green for defendant, W. L. Harris.

STACY, C. J., after stating the case: The plaintiff derives title to the land in question by devise from his father, and, on the hearing, the title offered was properly made to depend upon the construction of item 6 of the will of James Vassar, which is as follows:

"I loan unto my son, Joseph J. Vassar, at my wife's death (Mary L. Vassar) all the land loaned my wife, Mary L. Vassar, except 47 acres which is to go to John B. Vassar, and Hattie M. Vassar, to be taken off the west side next to the Egg Branch road, and if my son Joseph J. Vassar should die without bodily heirs, then in that event, it is my desire that the land loaned to him shall go to the rest of my children then living or their heirs."

It appears from the record that Mary L. Vassar, widow of the testator, and who survived him, is now dead; and further that the plaintiff, Joseph J. Vassar, has two children, both of whom were living at the time the testator made his will and who are still living.

It is conceded that unless the plaintiff, aided by the rule in *Shelley's case,* took a fee simple absolute to the land devised to him in item 6 of his father's will, subject only to the life estate of Mary L. Vassar, the title offered and conveyed by him to the defendant is only a defeasible fee. It is apparent from the language used in item 6 of the will, as above set out, that the rule in *Shelley's case* has no application to the devise made to the plaintiff therein. *Hampton v. Griggs,* 184 N. C., 13.

Nor would a deed executed by the plaintiff and his brothers and sisters convey a fee-simple absolute title to the land in question, because it cannot be known until the plaintiff's death, "without bodily heirs," as to who would take the ulterior devise under the designation, "the rest of my children then living or their heirs." *Mercer v. Downs, ante,* 203.

The record presents no reversible error, hence the verdict and judgment must be upheld.

No error.

F. E., L. A. AND J. H. RANDOLPH, TRADING AS RANDOLPH BROTHERS, v. SAM EDWARDS.

(Filed 10 March, 1926.)

1. Evidence—Findings of Fact—Appeal and Error.

The findings of fact by the lower court, under agreement of the parties, will not be disturbed on appeal when supported by sufficient legal evidence.

2. Same—Husband and Wife—Homestead—Estates by Entireties.

Upon the record on this appeal, evidence contained in the judgment of former proceedings: *Held*, sufficient to sustain a finding of fact that the *locus in quo* was a homestead interest and it and surplus over homestead conveyed by entirety to a husband and wife.

3. Same—Judgments—Execution.

An estate by entireties held by husband and wife, is not subject to the debts of either during the life of both, except by mutual consent legally given, or subject to execution under judgment against either one.

4. Same—Deeds and Conveyances.

A deed to lands made to husband and wife conveys an estate by entireties when there is nothing else therein which can be construed to the contrary.

5. Same—Wills—Estoppel—Dissent of Widow.

The right of survivorship of an estate by entireties is not lost by the wife when she has not dissented from her husband's will, attempting to dispose of this right, and creates no estoppel on her.

6. Judgment—Parties—Estoppel.

Parties to an action who fail to set up their rights, which are included within the scope of the inquiry, are thereafter estopped by the judgment from asserting them.

APPEAL by plaintiffs from *Bond, J.*, September Term, 1925, of PITT. Affirmed.

Plaintiffs recovered judgment against defendant on 16 February, 1907, before a justice of the peace in Pitt County, for the sum of $133.90. The said judgment was duly docketed on the judgment docket the same date in the Superior Court of Pitt County. Notice was issued on 6 February, 1917, and an order made reviving the judgment on 24 March, 1917, to the end that execution may issue. From the order Sam Edwards appealed to the Superior Court. Edwards filed answer 2 March, 1917, and amended answer on 28 September, 1922. Thereafter Edwards died in 1924, and L. A. Randolph was appointed his administrator. Plaintiffs obtained leave of court to file amended petition with parties as follows: "L. A., J. H. and F. E. Randolph, trading

as Randolph Brothers, and L. A. Randolph, administrator of Samuel Edwards, deceased, v. The North Carolina Joint Stock Land Bank of Durham, the First National Trust Company, Whitehurst-Andrews Company, Albion Dunn, trustee, Jackie Ann Edwards, Edward Chapman, Maggie Lee Chapman, Frank Pitt, Cherry Ann Malissa Pitt, W. C. Whitehurst, and J. B. Bowers." Summons was duly issued and all the defendants served. The petition set forth fully the contentions of plaintiffs, why their judgment should be a lien on the lands of Sam Edwards. The defendants answered, denied any lien of the judgment and set up certain encumbrances held by them on the land of defendant. Jackie Ann Edwards claimed that the land was held by her husband and herself as tenants by the entireties, and at his death subject to the encumbrances on it, she having joined in the conveyances; she was the owner by survivorship and the land was subject to no judgment lien of Randolph Brothers or other judgment creditors.

The parties agreed that the court below should find the facts "it having been agreed, by both the plaintiffs and the defendants, that the court find the facts and render its judgment thereon."

The material facts found for the decision of the case, and assignments of error, will be considered in the opinion.

F. M. Wooten for plaintiffs.

M. K. Blount, Dink James and F. G. James & Son for defendants.

CLARKSON, J. The plaintiffs contend that there was no evidence to support "the finding of fact to the effect that all the land of which Samuel Edwards was seized and possessed outside of the boundaries of the homestead were sold by Dudley, sheriff, and to the further finding: 'The said W. A. and J. C. Taylor to be the owners of said land, subject to a parol trust in favor of Samuel Edwards and wife, as tenants by the entireties, and said decree directed the said W. A. and J. C. Taylor, to execute and deliver to said Samuel Edwards and wife, as tenants by the entireties deed for the following described portions of said lands.' " We cannot so hold on the record.

In *Clegg v. Clegg,* 186 N. C., p. 34, it was said: "This Court is bound by the findings of fact made by the court below, if such findings are supported by any competent evidence. This is now the well-settled law of this State." *Gaster v. Thomas,* 188 N. C., p. 351; *Turner v. Grain Co.,* 190 N. C., 331; *Foster v. Allison Corp., ante,* 166.

The finding of fact 3, is as follows: "That a judgment was rendered on January 3, 1902, in favor of R. L. Smith & Co. v. Samuel Edwards, and under and by virtue of said judgment, the homestead of Samuel

Edwards was allotted to him, on 16 June, 1909. Said homestead being described, etc., containing by estimation 150 acres. The allegation of plaintiffs in their complaint is a basis of this finding of fact.

In the record is a deed dated 18 May, 1911, from S. I. Dudley, sheriff of Pitt County, to W. A. Taylor—sale under execution of the following land: "One tract of land lying and being in Bethel Township, Pitt County, North Carolina, beginning at a large pine stump, corner of *Samuel Edwards homestead* and running a southwestern course with the line of *Samuel Edwards homestead* to the run of Grindle Creek, thence down the creek to J. J. Jones' line, thence with J. J. Jones' line to the road, thence with the road to the beginning, containing by estimation 75 acres, more or less. One other tract, in Bethel Township, Pitt County, North Carolina, lying on the east side of the road and being all of the land that Samuel Edwards owned on the east side of the road bounded by the lands of J. J. Jones, the *homestead of Samuel Edwards* and others, containing 25 acres, more or less." The description of this deed calls for Samuel Edwards' homestead. In the petition of Samuel Edwards and wife, Jackie Ann Edwards, to intervene in case of "W. A. and J. C. Taylor v. W. J. Robertson and R. L. Barnhill," it is alleged "that in order to perfect the title to said land it would be necessary to have the *excess* over and above the homestead allotment" sold, etc. . . . "and thereafter in accordance with said agreement and understanding the said excess was sold by the sheriff and W. A. Taylor was last and highest bidder and deed was made to him on 18 May, 1911." The evidence was ample to support the finding, viz.: "That under said last mentioned execution, all the lands of which the said Samuel Edwards was then seized and possessed, *outside of the boundaries of the homestead,* above referred to and above described, were sold by S. I. Dudley, sheriff, after due advertisement, as provided by law and at said sale W. A. Taylor was the last and highest bidder and became the purchaser thereof, as is evidenced by deed from S. I. Dudley, sheriff, to W. A. Taylor, of record in Book T-9, page 497, of the office of the register of deeds of Pitt County."

The court below found as a fact "that prior to the rendition of any of the judgments above mentioned, and prior to the rendition of any of the judgments docketed against Samuel Edwards, in favor of Randolph Brothers, or any other persons, *Samuel Edwards and wife executed and delivered under date of 21 February, 1888,* that *certain mortgage* which appears of record in the public registry of Pitt County in Book R-4, page 241, to Alfred Forbes, securing the indebtedness therein described," describing the land.

The note, secured by mortgage, made to Alfred Forbes was purchased by J. C. and W. A. Taylor. The Taylors purchased several other liens

on the land. They then brought an action to establish the debts and foreclose the mortgage. The title of the suit was: "W. A. Taylor and J. C. Taylor v. Samuel Edwards and wife, Jackie Ann Edwards, *F. E. Randolph, L. A. Randolph and J. H. Randolph,* Robert Staton, J. R. Bunting and Macclesfield Supply Company."

It is alleged in the complaint in this case that the land set forth in the Alfred Forbes mortgage was the *same land allotted to Samuel Edwards as his homestead.* The court below found: "That at the September Civil Term, 1912, of Pitt Superior Court, in the aforesaid action of W. A. and J. C. Taylor v. Samuel Edwards and wife, Jackie Ann Edwards, F. E. Randolph, L. A. Randolph, J. H. Randolph, Robert Staton, J. R. Bunting and Macclesfield Supply Co., before his Honor, E. B. Cline, judge presiding, judgment rendered in favor of the plaintiff and against the defendants, in which, among other things, it was adjudged and decreed as follows: '*It is further ordered, adjudged and decreed that Samuel Edwards and wife, Jackie Ann Edwards, mortgagors aforesaid, and L. A. Randolph, F. E. Randolph and J. H. Randolph,* Robert Staton, J. R. Bunting and the Macclesfield Supply Company, judgment creditors, be and they are hereby *forever foreclosed of all legal rights and all equities of redemption in said land.*'"

Mr. F. C. Harding was appointed commissioner to sell this "homestead" (which was allotted to Samuel Edwards), under the decree of the court. This was duly and regularly done and W. A. Taylor became the last and highest bidder and the commissioner made a deed to him. This was done under what is known as the "Cline judgment."

From the record, W. A. Taylor became the owner of all the lands of Samuel Edwards (1) By deed of Sheriff Dudley *excess of homestead;* (2) Foreclosure of mortgage *on the homestead* made prior to plaintiffs' judgment and all other judgment creditors. All interested persons having been made parties to this proceeding, including the plaintiffs and other judgment creditors.

The court below found: "That thereafter, W. A. and J. C. Taylor became financially involved and thereafter in an action entitled 'W. A. Taylor and J. C. Taylor v. W. A. Roberson and R. L. Barnhill,' a receiver was appointed for the said W. A. and J. C. Taylor, which said receiver took possession of all of the property, of the said W. A. and J. C. Taylor, both real and personal, including the Samuel Edwards lands, etc. That pending said receivership proceedings, Samuel Edwards and wife, Jackie Ann Edwards, were permitted by the court to intervene," by petition in the case. "That, as will appear from the petition of the said Samuel Edwards and wife, Jackie Ann Edwards, the said W. A. and J. C. Taylor purchased said lands, pursuant to a

parol agreement, had by the said W. A. and J. C. Taylor with the said Samuel Edwards and wife, that the said W. A. and J. C. Taylor would take title thereto in their own names, pay off all indebtedness of the said Samuel Edwards and wife, and execute to them a deed therefor, the said Samuel Edwards and wife, in turn, to execute a mortgage securing said indebtedness. In said proceedings, issues were duly submitted to the jury, which issues were found in favor of the said Samuel Edwards and wife, Jackie Ann Edwards. The material one is as follows: "Did W. A. Taylor purchase the lands described in the pleadings with the parol agreement and understanding had with Samuel Edwards and wife, Jackie Ann Edwards, that he would purchase and hold the same for the joint use and benefit of the said Samuel Edwards and wife, Jackie Ann Edwards, subject to the indebtedness of the intervenors to W. A. and J. C. Taylor? Answer: Yes." The lands set forth in the petition to intervenee of Samuel Edwards and wife, Jackie Ann Edwards, included the "homestead" and "excess." "That after the issues were found by the jury in favor of Samuel Edwards and wife, Jackie Ann Edwards, as above set forth, judgment was duly rendered by the court, Devin, J., declaring, in substance, that the said W. A. Taylor held said land subject to a parol trust in favor of Samuel Edwards and wife, as tenants by the entireties, and said decree directed the said W. A. Taylor to execute and deliver to the said Samuel Edwards and wife, as tenants by the entireties, deed for portions of said land" (describing them); which is the land in controversy. The adjustment of the indebtedness, etc., between the parties is not necessary to set out.

The court found: "And thereafter, the said W. A. and J. C. Taylor, pursuant to said judgment, did execute and deliver to the said Samuel Edwards and wife, Jackie Ann Edwards, a deed for said lands, which said deed, however, was never recorded; and thereafter the said Samuel Edwards and wife, Jackie Ann Edwards, continued in possession of said lands as tenants by the entireties, up to the death of the said Samuel Edwards, in 1924."

It is found that Samuel Edwards and wife, Jackie Ann Edwards, continued in possession of said lands as tenants by the entireties up to the death of the said Samuel Edwards in 1924. Plaintiffs were regularly made parties and under the Cline judgment their rights were foreclosed. Samuel Edwards and wife, Jackie Ann Edwards, made a parol agreement that the land purchased by W. A. Taylor should belong to him and his wife, Jackie Ann Edwards. The decree signed by Devin, J., ordered that a deed be made by W. A. Taylor to "Samuel Edwards and wife, Jackie Ann Edwards, as tenants by the entireties." This deed was made in accordance with the decree.

"When land is conveyed or devised to husband and wife, nothing else appearing, they take by the entireties and upon the death of either, the other takes the whole by right of survivorship." *Turlington v. Lucas,* 186 N. C., p. 285. "That a conveyance of land in fee to husband and wife, they take by entireties with right of survivorship, and during their lives the lands are not subject to the debts of either, except with consent of both properly given." *Turlington case, supra,* p. 286; *Bruce v. Nicholson,* 109 N. C., 202; *Johnson v. Leavitt,* 188 N. C., 683.

We think the facts as established by the Devin judgment and deed made in compliance created an estate by entireties. The case of *Harrison v. Ray,* 108 N. C., 215, cited by plaintiffs does not militate against the position here taken.

It is further found as a fact that Samuel Edwards made a will purporting to dispose of this land and Jackie Ann Edwards has not dissented therefrom. It is further found as a fact that Samuel Edwards and wife, Jackie Ann Edwards, continued in possession of the land as tenants by the entireties up to Edwards' death in 1924. The fact that her husband attempted to dispose of the land belonging to her as survivor cannot deprive her of the land.

In *Cook v. Sink,* 190 N. C., p. 625, it was said: " 'Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct to the prejudice of another.' 16 Cyc., p. 785; *Holloman v. R. R.,* 172 N. C., p. 376."

Jackie Ann Edwards is now claiming the land as the survivor under an estate by the entireties. The fact that she has not dissented from the will of her husband cannot deprive her of the title to her land. She has never acted or conducted herself in such a manner or asserted any claim, title or right or assumed a position inconsistent with such act, claim or conduct to the prejudice of another. On the entire record there was ample evidence to sustain the facts found by the court below.

We do not think Jackie Ann Edwards estopped from claiming the land. Plaintiffs, Randolph Brothers, had their day in court. They were parties to the action in which their rights were foreclosed. They could have bid at the F. C. Harding, commissioner, sale—they did not do so. This was their chance to save their debt. It may be hard that the plaintiffs have to lose their debt, but their rights have been foreclosed in a legal manner. The judgment must be

Affirmed.

JOHN D. LANCASTER, W. L. DUNN, S. L. PARKER, M. T. HARRELL, A. M. WOOTEN, HARRY FAGAN, RILEY PHILLIPS, S. R. JENKINS, C. W. DUNN, J. B. NORVILLE AND W. D. WEBB v. E. F. STANFIELD.

(Filed 10 March, 1926.)

1. Bills and Notes—Negotiable Instruments—Endorser—Sureties—Equity—Contribution.

An endorser of a negotiable instrument is not subject to contribution among all others who may have endorsed the same, but only liable to those who are subsequent in date to his endorsement, to the full amount of their payment, as an indemnitor.

2. Same—Parol Evidence—Statutes.

As between the original parties to the agreement it may be shown by parol evidence that though on the face of the instrument those whose names appeared as endorsers, in fact signed their names as sureties or comakers, among whom equity will enforce contribution in proper instances. C. S., 3049.

3. Same—Corporations—Shareholders—Evidence—Nonsuit.

Where the stockholders at a meeting have agreed to and did endorse its negotiable note to enable the corporation to get money with which to carry on its business, it may be shown by parol evidence as between themselves, that though their names appeared on the face of the instrument as endorsers thereof, in fact they did so as sureties, among whom contribution will be enforced in equity in favor of those who have paid off the corporation note, and upon sufficient evidence, a motion as of nonsuit will be denied.

4. Same—Payment—Actions.

The right of action of one who signs a negotiable instrument as surety, arises against his cosureties to enforce contribution at the time he pays the instrument within the date the same is enforceable, and not from the date of its maturity.

5. Same—Payment—Interest—Limitation of Actions.

Those who are liable on a negotiable instrument as endorsers and sureties, etc., under an agreement thereon that they will continue to be bound notwithstanding an extension given to the maker, are bound by its terms, and a payment by the principal of the interest thereon will repel the bar of the statute of limitations in an action against them.

6. Bills and Notes—Negotiable Instruments—Renewals—Payment—Parol Evidence—Endorsers—Sureties—Actions—Defenses.

Where sureties on a note have agreed to continue bound notwithstanding an extension of time given by the payee to the maker, and a renewal note is given thus extending the time of payment, the question of whether the original note marked paid was in fact paid or renewed, is a question of the intent of the parties, which may be shown by parol evidence in an action against one of the sureties who pleads payment as a defense.

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

In an action for contribution against a surety on the original negotiable note, remaining bound thereon notwithstanding an extension given to the maker, who did not sign a renewal thereof, where the evidence is conflicting as to whether the original note marked paid was in fact discharged by the renewal, the question of the running of the statute of limitations pleaded in bar of recovery, depends upon the finding by the jury upon this issue of fact, and it is reversible error for the judge to instruct a verdict upon the evidence.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1925, of EDGECOMBE. New trial.

Civil action commenced on 27 May, 1924, to recover of defendant one-twelfth of the amount paid by plaintiffs in discharge of liability of plaintiffs and defendant as joint-makers, or cosureties, upon two notes dated 28 April, 1920, executed by Pinetops Drying Plant, Inc., payable to Pinetops Banking Company or order, due on 24 October, 1920, and alleged to have been paid by plaintiffs on 29 December, 1923. Upon defendants' denial of liability, issues were submitted to and answered by the jury, as follows:

1. In what sum, if any, is the defendant indebted to the plaintiffs, as alleged in the complaint? Answer: $909.09, with interest from 1 August, 1923.

2. Is the indebtedness declared on in the complaint barred by the statute of limitations, as alleged in the answer? Answer: No.

From judgment upon this verdict, defendant appealed to the Supreme Court.

H. H. Philips for plaintiffs.
Gilliam & Bond for defendant.

CONNOR, J. Plaintiffs and defendant, and twelve other persons on 28 April, 1920, were the owners of all the stock of the Pinetops Drying Plant, Inc., a corporation organized under the laws of the State of North Carolina, for the purpose of engaging in business in the town of Pinetops, N. C. On said day, Pinetops Drying Plant, Inc., executed two notes, each for the sum of $5,000, both payable one hundred and eighty days after date, to the order of Pinetops Banking Company. On the back of each note, appear the following words:

"All parties to this note, whether as sureties, endorsers, or guarantors, hereby agree, collectively and individually, 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, hereby 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."

Beneath these words, on the back of each note, plaintiffs and defendant wrote, each, his name, defendant's name being fifth in order. At the trial, each of said notes bore the endorsement of the Pinetops Banking Company, by W. E. Cobb, Vice-President, this indorsement being below the names of plaintiffs and defendant. The allegation in the complaint that plaintiffs and defendant were joint-makers, or cosureties to said notes, in accordance with an express agreement to that effect, entered into before the delivery of the notes, is denied in the answer; defendant alleges that he signed the note as an endorser only, and contends that, therefore, he is not liable to plaintiffs for contribution. It is admitted that Pinetops Drying Plant, Inc., has not paid the notes, and that it is now insolvent.

Plaintiffs' cause of action, as set out in the complaint, is not upon the notes; they do not sue as holders, by virtue of the indorsement of Pinetops Banking Company, payee. They allege that they have paid the notes, and that defendant, as joint-maker, or cosurety, by virtue of an express agreement, is liable to them for one-twelfth the amount so paid by them upon the principle of contribution. Whether defendant is so liable, must be determined by his relation to plaintiffs with respect to the notes. The liability to contribution does not arise from contract but from equitable principles, applicable, by reason of relationship between or among parties to an obligation to a third party. Defendant admits that he signed his name on the back of the notes, as it appears thereon, with the names of plaintiffs; nothing else appearing, defendant is an indorser, and liable only as such. C. S., 3044. If defendant is liable only as an indorser on the notes, contribution cannct be enforced against him by plaintiffs, who have paid the notes by reason of their liability for "as respects one another, indorsers are liable prima facie in the order in which they indorse." C. S., 3049. "Indorsing an instrument, in its literal sense, means writing one's name on the back thereof; and in its technical sense, it means writing one's name thereon with intent to incur the liability of a party who warrants payment of the instrument, provided it is duly presented to the principal at maturity, not paid by him, and such fact is duly notified to the indorser." Daniel, Neg. Inst. (6 ed.), (T. H. Calvert) vol. 1, sec. 666. "When several persons indorse a bill or negotiable note in succession, the legal effect is to subject them as to each other in the order they indorse. The indorsement imports a several and successive, and not a joint obligation, whether the indorsement be made for accommodation, or for value received, unless there be an agreement *aliunde* different from that evidenced

by the indorsements. When the successive indorsements are for accommodation of other parties, the indorsers for accommodation may make an agreement to be jointly and equally bound, but whoever asserts such an agreement must prove it. In cases, therefore, in which no such agreement is proved, the indorsers are not bound to contribution amongst themselves, but each and all are liable to those who succeed them." Daniel, Neg. Inst. (6 ed.), (T. H. Calvert) vol. 1, sec. 703.

If defendant is an indorser only, he is liable, not to all the plaintiffs who have paid the notes, as a coindorser, for contribution, but only to such of them as indorsed the notes subsequent to his indorsement, for the full amount paid by them. As to these he is liable as an indemnitor.

Evidence is admissible, however, to show that as between or among themselves, parties to a negotiable instrument are liable otherwise than appears prima facie. This is especially true as to indorsers under the statute, C. S., 3049. 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; and so it may be shown that, as among themselves, plaintiffs and defendants are mutually liable as joint-makers or cosureties. Brandt Suretyship Guaranty, vol. 1 (3d ed.) pp. 562-3; *Bank v. Burch*, 145 N. C., 316; *Sykes v. Everett*, 167 N. C., 600; *Gillam v. Walker*, 189 N. C., 189; *Dillard v. Mercantile Co.*, 190 N. C., 225. If the relationship between plaintiffs and defendant, with respect to the notes paid by plaintiffs is that of joint-makers or cosureties, defendant is liable to plaintiffs for contribution.

It is alleged in the complaint that at a meeting of the stockholders of the Pinetops Drying Plant, Inc., at which plaintiffs and defendant were present as stockholders, it was "agreed to, between and among themselves and the Pinetops Banking Company that if the said Pinetops Banking Company would loan the sum of $10,000 to them and to the Pinetops Drying Plant, Inc., in order that the latter might have sufficient money to carry on its business at the time, they, the said plaintiffs and defendant, would become joint-makers, sureties or indorsers with the Pinetops Drying Plant, Inc., of two promissory notes or bonds in the sum of $5,000 each"; and that the notes described in the complaint were executed in accordance with said agreement. Evidence offered by plaintiffs tends to establish the truth of these allegations. The fact that plaintiffs and defendant were stockholders of the Pinetops Drying Plant, Inc., and therefore mutually interested in its success, together with the further fact that the money was borrowed from the payee of said notes for the use of said plant, is, at least, evidence that

as among themselves, plaintiffs and defendant were joint-makers or cosureties, and liable to each other for contribution, and not liable as indorsers to indemnify each other according to the priority of their indorsements. Daniel Neg. Inst. vol. 1, (6 ed.), (T. H. Calvert), sec. 703a. A stockholder who has been compelled to pay more than his share of the debts of the corporation may maintain an action against stockholders who are also liable for the debt for contribution. 6 R. C. L., p. 1054. See *Strasburger v. Meyer-Strasburger Co.,* 167 App. Div. 198, 152 N. Y., Supp. 757. See *Houser v. Fassoux,* 168 N. C., 1.

Defendant's motion for judgment as of nonsuit, presenting his contention that upon all the evidence he is not liable for contribution was properly overruled. There was evidence from which the jury could find that defendant was a joint-maker or cosurety with plaintiffs; if the jury should so find, defendant is liable for contribution.

Defendant pleads in his answer as a defense to plaintiff's action the three-year statute of limitations. His Honor instructed the jury upon the second issue, involving this defense, that if they found the facts to be as testified, they should answer the second issue, "No." Defendant excepted to this instruction and assigns same as error.

Plaintiff's right of action against defendant for contribution accrued on the date of the payment of the notes by plaintiffs. It did not accrue at the maturity of the notes dated 28 April, 1920, to wit, 24 October, 1920; the cause of action set out in the complaint is not upon these notes, but upon the implied promise of defendant, arising from his alleged relation to plaintiffs, with respect to said notes, to pay his proportionate part of the amount which plaintiffs might pay in discharge of their common liability on the notes, upon default of the Pinetops Drying Plant, Inc. The action cannot be maintained without allegation and proof that those who seek to enforce contribution have paid the debt for which it is alleged plaintiffs and defendant were liable as joint-makers or cosureties. Story's Eq. Jur. (14 ed.), (W. H. Lyon), vol. 2, sec. 671, and cases cited. "As the right to enforce contribution is not complete and enforceable until payment or discharge in whole or in part of the common obligation, the statute of limitations does not begin to run against a claim for contribution until plaintiff has discharged the common debt or has paid more than his share of it." 13 C. J., 833 and cases cited.

The evidence offered by plaintiff tends to show that at the maturity of the notes, dated 28 April, 1920, the Pinetops Drying Plant, Inc., delivered to the Pinetops Banking Company two notes, each for $5,000, dated 24 October, 1920, and due 180 days after date; these notes were identical in form with the notes dated 28 April, 1920; they were indorsed by plaintiffs, but not by defendant; defendant declined to in-

dorse them, although requested by plaintiffs to do so. The interest was paid by Pinetops Drying Plant, Inc., which was solvent at the time. Upon delivery of these notes to it, the Pinetops Banking Company delivered to the Pinetops Drying Plant, Inc., the notes dated 28 April, 1920. Thereafter as the notes delivered to the Pinetops Banking Company in lieu of notes held by it became due, other notes executed by the Pinetops Drying Plant, Inc., and indorsed by plaintiffs, but not by defendant, for the same amounts, and in the same form, were delivered to said Banking Company in exchange for the notes which had become due, according to their tenor. The last two notes were dated 1 February, 1923, and became due 180 days from date, *i. e.*, 1 August, 1923. These notes were paid by plaintiffs, upon demand of the Pinetops Banking Company, on 29 December, 1923. On said date the Pinetops Drying Plant, Inc., was insolvent.

The notes bearing the date upon which the notes for which they were exchanged matured were marked "Paid," delivered to the Pinetops Drying Plant, Inc., and placed in its files. Plaintiffs allege that these were renewal notes, and that the indebtedness, as evidenced by the notes dated 28 April, 1920, was paid on 29 December, 1923. This allegation was denied by defendant; defendant contends that the notes which he indorsed were paid and discharged by the notes accepted by the Pinetops Banking Company, at their maturity. This action was begun on 27 May, 1924—within three years from 29 December, 1923, but not within three years from 25 April, 1921, when the first two notes given by the Pinetops Drying Plant, Inc., in exchange for the notes dated 28 April, 1920, which became due on 24 October, 1920, were delivered to the Pinetops Drying Plant, Inc., marked "paid." Whether or not plaintiffs' action for contribution is barred by the statute of limitations depends upon the date on which the cause of action accrued, to wit, the date on which plaintiffs paid the amount for which they demand of defendant contribution. If the notes which are marked "paid" are in fact renewal notes—the only effect of which was to extend the time of payment of the indebtedness evidenced by the original notes, (*Bank v. Howard,* 188 N. C., 543), the indebtedness for which defendant is liable to plaintiffs, upon the principle of contribution, was not paid until 29 December, 1923; in that event, the cause of action accrued on that date, and the action for contribution is not barred; on the other hand, if the original notes were in fact paid by the new notes, or if the new notes were paid at maturity, and not merely renewed, *i. e.,* if there was a novation, the cause of action accrued not later than 25 April, 1921, and the action is barred.

Whether the original notes were paid and discharged by the new notes, or whether the new notes were merely renewals of the original notes, depends upon the intention of the parties. 8 C. J., 572; *Taylor*

v. Bank, 190 N. C., 175; *Bank v. Hall*, 174 N. C., 476. The fact that the old notes were marked "paid," and surrendered to the maker, is not conclusive. The burden was upon plaintiffs to show the date of the payment of the amount for which they seek contribution. There was error in the instruction to the jury upon the second issue. The contentions of both plaintiffs and defendant, upon all the evidence, should have been submitted to the jury, with appropriate instructions.

If the jury shall find that payment was made by plaintiffs on 29 December, 1923, and that this action was not barred, for that the cause of action accrued on that date, and the action was begun on 27 May, 1924, then defendant contends that he is not liable for contribution, for that payment was made by plaintiffs, voluntarily, after the cause of action on the note, which he had endorsed, with the plaintiffs, was barred. These notes became due on 24 October, 1920; if they were paid on 29 December, 1923, more than three years had elapsed from the date on which the cause of action on these notes had accrued. Nothing else appearing, an action on the notes by the holder was barred at the date of the payment by plaintiffs. It is said by the author of the article on Contribution, in 6 R. C. L., p. 1040, "The fact that the obligation for the payment of which contribution is sought was barred by limitations when the payment was made has been considered not to defeat the right to contribution, on the theory that a revival of a barred debt by a joint contractor recovers it as to his cocontractors, as well as that such a contractor is not bound to plead the statute, though good authority exists to the contrary, based on the reasoning that the obligation of a debt, the remedy on which is barred by the statute of limitations cannot be said to be subsisting and legal, and payment compulsory on a party in whose favor the bar has attached. He may successfully resist the obligation and decline the payment."

There is evidence, however, that the interest on the indebtedness evidenced by the notes, dated 28 April, 1920, was paid by the Pinetops Drying Plant, Inc., to 1 August, 1923; if these notes were not paid, but were merely renewed, the payment of interest by the principal, before the debt was barred, renewed the debt, both as to principal and sureties, to 1 August, 1923, and an action on the notes was not barred as against defendant on 29 December, 1923, if he is a joint-maker, or surety on the note, defendant having waived notice of such extension; *Houser v. Fassoux*, 168 N. C., 1; *Barber v. Absher Co.*, 175 N. C., 602. This contention therefore involves both the question as to defendant's relation to the notes, and as to whether same were paid or renewed. Upon the new trial appropriate issues should be submitted to the jury that they may pass upon the contentions of the parties with respect to these matters and say by their verdict what the facts are.

New trial.

W. C. ERNUL v. ROSA L. ERNUL, EXECUTRIX OF THE ESTATE OF F. S. ERNUL, DECEASED, AND ROSA L. ERNUL, GUARDIAN OF THE ESTATE OF MILDRED NELSON, AND MILDRED NELSON.

(Filed 10 March, 1926.)

1. Trusts—Executors and Administrators—Courts—Advice.

A trustee or executrix under a will may submit the construction of the will relating to a trust imposed, and its administration thereof, to the courts for advice therein for their protection.

2. Same—Estates—Contingent Remainders—Money—Personal Property—Beneficiaries—Possession—Security.

Where there is a bequest of personal property by will, a certain sum of money, with contingent limitation over, the beneficiary is ordinarily entitled to the possession, but should be required to give a bond for the protection of the interest of the contingent remainderman, when the beneficiary is a resident beyond the jurisdiction of our courts, or otherwise where the facts and circumstances apparently require that this precaution should be taken, unless the testator's contrary intent otherwise appears from a proper interpretation of the instrument.

3. Wills—Interpretation—Estates—Contingent Remainders—Trusts.

A devise of a certain sum of money to testator's minor daughter by an item of her father's will, but if she die before she marries and has children, her share "of my estate go back to my children," with a later residuary clause in which she is to share alike with the testator's other children: *Held*, the two items will be construed together as subject to the contingent limitation expressed in the preceding item.

4. Same—Receiver—Investment of Funds—Interest.

Held, under the facts of this case for a devise to the testator's daughter, a receiver will be appointed to invest the funds if she fails to give the security required, and the interest paid to her semiannually, after deducting taxes and legal expenses until the happening of the contingency, etc.

APPEAL by Rosa L. Ernul, executrix of the estate of F. S. Ernul, deceased, from *Bond, J.*, at October Term, 1925, of CRAVEN. Modified and affirmed.

Submission of controversy without action. *Facts*:

"(1) That W. C. Ernul is one of the children of F. S. Ernul named in the will of F. S. Ernul as hereinafter set out. And Mildred Nelson is the granddaughter of F. S. Ernul named in said will, and resides in the State of Illinois; all other parties are residents of North Carolina.

"(2) That F. S. Ernul died in Craven County on 10 May, 1923, leaving a last will and testament." The material items to be considered are:

" '6. I give, bequeath and devise to my granddaughter Mildred Nelson, five thousand dollars; I appoint my wife, Rosa L. Ernul, guardian

for Mildred Nelson, and if Mildred should die before she marries and has children her share of my estate go back to my children.

" '9. All other property I may have not disposed of, I want equally divided between by wife, W. C. Ernul, Mattie J. Robinson, Katherine Gaskins, Nancy Tuton and Mildred Nelson.'

"(3) That the executrix therein named, qualified on 17 May, 1923, and is still acting.

"(4) That Mildred Nelson named in items 6 and 9 of the will was a minor at the time of the death of the testator and on 15 June, 1923, Rosa L. Ernul, widow of the testator qualified in the Superior Court of Craven County as guardian of the said Mildred Nelson, and is still acting.

"(5) That the $5,000, bequeathed to Mildred Nelson in item 6 of the will, has been paid over by Rosa L. Ernul, executrix, to Rosa L. Ernul, guardian of Mildred Nelson; and under the residuary clause item 9 of the will, Rosa L. Ernul, executrix, has paid over to Rosa L. Ernul, guardian, the sum of $1,600; that upon the final settlement of the estate of F. S. Ernul, there will be several hundred dollars additional to be distributed under the residuary clause.

"(6) That the guardian has paid to Mildred Nelson for her support and maintenance all income accrued upon the moneys in her hands and has paid the expenses of the guardianship, and the further sum of $426 from the principal under authority of an order of the court for necessary expenses incurred in a surgical operation upon Mildred Nelson.

"(7) That Mildred Nelson is now of age and demands a settlement of the guardianship and the payment over to her of all sums in the hands of her guardian.

"(8) That Mildred Nelson is unmarried and has no children.

"(9) That W. C. Ernul, one of the children of F. S. Ernul, for himself and the other children of F. S. Ernul, contends that no part of the principal either under item 5 or item 9 of the will, should be paid directly to Mildred Nelson. But that it should be paid into the hands of a trustee under bond; to pay to Mildred Nelson only the income until she marries and has children and to preserve the principal to be paid over to the children of F. S. Ernul in the event that Mildred Nelson dies before she marries and has children.

"The executrix and guardian prays the advice and guidance of the court upon the conflicting contentions of Mildred Nelson and the children of F. S. Ernul."

The court below rendered the following judgment:

"This cause coming on to be heard before his Honor, W. M. Bond, J., upon a submission of controversy without action, and being heard upon the facts agreed:

It is thereupon ordered, adjudged and decreed that Mildred Nelson is entitled to the possession of the five thousand dollars bequeathed to her in item six of the will of F. S. Ernul, less any sums heretofore expended by the guardian from the principal, and that such balance be paid over to said Mildred Nelson, the guardian taking a receipt from her for the benefit of the children of F. S. Ernul; that the sixteen hundred dollars paid to the guardian under the residuary clause of the will together with any further sums distributable as Mildred Nelson's share under the residuary clause be paid over to Rosa L. Ernul, the executrix, as trustee without bond, to hold and invest the same and pay the interest to Mildred Nelson until she shall marry and have children, and upon such happening to pay the entire sum to said Mildred Nelson; but if Mildred Nelson shall die without marrying and having children of such marriage, then to pay said sum over to the children of F. S. Ernul."

The only exception and assignment of error is to the judgment rendered. From the judgment, Rosa L. Ernul, executrix, appealed to the Supreme Court.

Guion & Guion, for Rosa L. Ernul, executrix, appellant.

CLARKSON, J. The appellant in her brief says: "This was a submission of controversy without action, for the construction of the will of F. S. Ernul, deceased, submitted at the October Term, 1925, of Craven County Superior Court. Upon the submission, judgment was rendered by his Honor, W. M. Bond, judge presiding, as set out in the record. The executrix, Rosa L. Ernul, appealed to the Supreme Court. Neither the plaintiff, W. C. Ernul, nor the appellants' codefendant, Mildred Nelson, are represented by counsel. The appellant, executrix, prays the judgment of the Court for her protection in making settlement of the estate."

Ashe, J., in *Alsbrook v. Reid,* 89 N. C., p. 153, says: "The former courts of equity entertained, and our Superior Courts still entertain applications for advice and instructions from executors and other trustees, as to the discharge of trusts confided to them, and incidentally thereto, the construction and legal effect of the instrument by which they are created. But the courts of equity never exercised this advisory jurisdiction when the estate devised is a legal one, and the question as to construction is purely legal. The jurisdiction is incident to that over trusts. Where there is no trust or trustee to be directed, the court of equity never takes jurisdiction." *Bank v. Alexander,* 188 N. C., 670.

We think appellant, under the facts disclosed in this case, is within her rights in asking advice.

"The plaintiff contends that all the money, both that bequeathed under item six, and that bequeathed under item nine should be held by the executrix as trustee, until such time as Mildred Nelson shall marry and have children, or shall die without having married and having children; or that if the money or any part of it is turned over to Mildred Nelson, she should be required to give bond to insure its safe-keeping, and contend that she is young and incompetent to preserve the money for the use of the remaindermen, and that she is a nonresident of the State."

In construing the present will we are dealing with personal property. The general rule gathered from the authorities, is stated in *Burwell v. Bank,* 186 N. C., 119, as follows: "It is fully recognized that where real property is devised to one for life, remainder over, unless a contrary intent appears in the will, the life tenant is entitled to its possession and control during the continuance of the estate, subject always to its liability to creditors, under the provisions of law. And the same principle usually prevails as a direct bequest of personal property except where it is given as a residuary bequest to be enjoyed by persons in succession, etc., in which case the property is converted into money and the interest paid to the legatees during the existence of their respective estates. *Bryan v. Harper,* 177 N. C., 309; *Simmons v. Fleming,* 157 N. C., 389; *In re Knowles,* 148 N. C., 461-466; *Britt v. Smith,* 86 N. C., 305; *Ritch v. Morris,* 78 N. C., 377; *Smith v. Barham,* 17 N. C., 420."

The general rule stated in the *Burwell case, supra,* (1) where there is a *direct bequest* of personal property with remainder over, the life tenant is entitled to its possession and control during the continuance of the estate; (2) where personal property is given as a *residuary bequest* to be enjoyed by persons in succession, etc., the personal property is converted into money and the interest paid to the legatees during the existence of their respective estates. If a contrary intent appears in the will, the *direct bequest* may not come under the general rule. The kind of personal property left by the *direct bequest,* the relationship and the setting of the parties all have a bearing so that the intent of the testator may be ascertained.

The language of item 6 is as follows: "I give, bequeath and devise to my granddaughter Mildred Nelson, five thousand dollars; I appoint my wife, Rosa L. Ernul, guardian for Mildred Nelson, and if Mildred should die before she marries and has children her share of my estate go back to my children."

It will be noted that after the bequest to Mildred Nelson, the testator appointed his wife her guardian. If Mildred should die before she is married and has children—the $5,000 is to go to the testator's children. Mildred now resides in the State of Illinois.

In *Rowe's Executors v. White*, 16 N. J., Eq., p. 411, 84 Am. Dec., p. 169, an interesting case, the principle laid down is the same as in the *Burwell case, supra.*

In the *Rowe's Executors case,* the following is said at p. 172: "Either in the case of a legatee for life, or subject to a limitation over, in order to justify the requisition of security from the first legatee, there must be danger of the loss of the property in the hands of the first taker; *Slanning v. Style,* 3 P. Wms., 334; *Conduitt v. Soane,* 1 Coll., 285; *Homer v. Shelton,* 2 Met., 194; *Fiske v. Cobb,* 6 Gray, 144; *Hudson v. Wadsworth,* 8 Conn., 249; *Langworthy v. Chadwick,* 13 Id., 46." In that case it is further said (p. 173): "If any real ground of apprehension of danger appeared upon the face of the pleadings, and was admitted or supported by evidence, the court would require the security." Note: (84 Am. Dec. p. 173) "Security is unnecessary from legatee for life, unless there is danger of waste or loss: *Covenhoven v. Shuler,* 21 Am. Dec., 73; *Pelham v. Taylor,* 59 Id., 604; see *Clark v. Clark,* 35 Id., 676; *Roper v. Roper,* 75 Id., 427; *Drummond's Executor. v. Drummond,* 26 N. J., Eq., 239, citing the principal case. The principal case is also cited to the point that the well settled rule in equity is that where it appears that there is danger that the principal of the legacy will be wasted or lost, a court of equity will protect the interest of the legatee in remainder by compelling the legatee for life to give security for the safe return of the principal; *Howard v. Howard's Ex'rs,* 16 Id., 488." 17 R. C. L., p. 627.

Security should be required whenever it is shown that the property is in actual danger of loss or injury or where it has been removed from the state or there is actual danger of its being removed, or where the life tenant is a nonresident. 21 C. J., p. 966. *Moon v. Moon,* 16 S. C. Eq., p. 327; *Riddle v. Kellum,* 8 Ga., 374.

By analogy we quote from *Cobb v. Fountain,* 187 N. C., 338, where it is said: "As it is more prudent for a guardian to invest trust funds in his own state, where they may be kept under his immediate observation and within the jurisdiction of the domestic courts, we think the investment of his ward's money in securities which are beyond the jurisdiction should be disapproved unless made under rare and exceptional circumstances. . . . Other courts have reached substantially the same conclusion, as will appear from a few excerpts. 'While, therefore, we are not disposed to say that an investment by a trustee in another state can never be consistent with the prudence and diligence required of him by law, we still feel bound to say that such an investment, which takes the trust fund beyond our own jurisdiction, subjects it to other laws and the risk and inconvenience of distance and of foreign tribunals, will not be upheld by us as a general rule, and never unless

in the presence of a clear and strong necessity, or a very pressing emergency.' *Ormiston v. Alcott,* 84 N. Y., 339, 343."

Item 9 is as follows: "All other property I may have not disposed of, I want equally divided between my wife, W. C. Ernul, Mattie J. Robinson, Katherine Gaskins, Nancy Tuton and Mildred Nelson."

Item 6 must be construed with item 9. Mildred Nelson gets a part under the residuary clause of item 9, but item 6 says: "and if Mildred should die before she marries and has children, her share *of my estate* go back to my children." It is clear that this means the $5,000 and what is realized under the residuary clause in item 9. From the language of the will, the nonresidence of Mildred Nelson, and the facts and circumstances of this case, security must be given for the $5,000 under item 6 and the fund realized under item 9. If Mildred Nelson is unable to give security the court should appoint a receiver to loan the fund first lien on real estate, with sufficient margin, or other gilt-edge security, and the *corpus* be held in accordance with the construction given in this opinion as to the meaning of items 6 and 9 of the will. Interest on the fund should be paid to Mildred Nelson semi-annually after deducting taxes and legal expenses, until the happening of the contingency set forth in item 6 of the will.

The judgment of the court below, in accordance with this opinion, is Modified and affirmed.

THE BANK OF HOLLISTER v. A. B. SCHLICHTER AND FOSBURG LUMBER COMPANY.

(Filed 10 March, 1926.)

1. Corporations—Shares of Stock—Liens.

A corporation has no lien upon its stock or dividends declared thereon for a debt due by its shareholder.

2. Corporations—Shares of Stock—Registered Shareholders—Dividends—Management.

The stipulations on a certificate of stock issued by a corporation that the certificate is transferable only on the books of the corporation by the holder thereof, in person or by attorney, upon the surrender of this certificate properly endorsed, is for the protection of the company, which it may waive at its pleasure, in paying dividends to its shareholders thus appearing of record, and with reference to its management as a corporate entity.

3. Corporations—Pledges of Shares of Stock—Transfer of Shares on Corporation Books—Endorsement in Blank—Actions.

Where the registered holder of a certificate of shares of stock in a corporation containing the condition that it is transferable only on the

books of the corporation, endorses it in blank, and pledges it as collateral security to a note he has given to a third person, such transferee may maintain its action to compel the corporation to transfer the certificates on its books to him, to avail himself of the security under its terms.

4. Corporations—Receivers—Liquidation—Transfer of Shares in Blank—Dividends.

Where a corporation in liquidation has through its receiver paid dividends upon its stock to a shareholder appearing upon the books of the company, without notice that such holder has endorsed in blank the shares as collateral security to a note he has given to a third person, the corporation is not liable to such transferee for the dividends it has paid the registered holder of the shares, but only for such dividends as it has continued to pay after notice, under the provisions appearing on the face of its certificate, requiring that a transfer of the shares must be made on its own books, etc.

APPEAL by plaintiff from *Lyon, J.*, at October Special Term, 1925, of HALIFAX. Affirmed.

The parties to this action submitted to the court an agreed statement of facts. It was agreed:

"1. That on or about 6 November, 1920, A. B. Schlichter deposited with the Bank of Hollister, a banking corporation under the laws of North Carolina, now in the hands of C. W. Cope and W. R. Vaughn, as receivers, 20 shares of stock of Fosburg Lumber Company, a Virginia corporation, as collateral security for the payment of a note of that date for $2,000; and on 10 October, 1920, said Schlichter deposited with said bank 30 additional shares of said stock as collateral security for the payment of another note for $2,000. All of said stock, at the time it was so deposited stood on the books of the Fosburg Lumber Company in the name of said Schlichter, and has continued to so stand until this time. Said two notes have not been paid.

"2. That the Fosburg Lumber Company had no notice of the fact that said stock, or any part of it, had been deposited with the Bank of Hollister as aforesaid, and until 3 October, 1923.

"3. That the said Fosburg Lumber Company, being in liquidation, declared liquidating dividends on the said stock as follows: 8% or $400 on 1 May, 1920; 5% or $250 on 1 June, 1921; and 2% or $100 on 1 February, 1922; which amounts were respectively on said dates credited on the account of said Schlichter on the books of said company.

"4. That the statement filed as Exhibit 'A' with the original answer of the Fosburg Lumber Company is a true and correct statement of the account of said Schlichter and so appears on the books of the company.

"5. That the Fosburg Lumber Company commenced to liquidate its affairs on 20 January, 1920."

The first two items in the statement of account, referred to as Exhibit "A" are dated 1 May, 1920, and 1 June, 1921, and are the amounts of

the dividend declared on said dates, to wit, $400, and $250 respectively; these items appear as credits; the next two items are each dated 18 August, 1921, and are for $44.83, and $1,500 respectively; these items appear as debits; the last item is dated 1 February, 1922, and is a credit for $100, for 2% dividend of that date; the total of the debit items is $1,546.83; the total of the credit items is $1,696.16; the balance due Schlichter by the company is $149.33 for which amount judgment was tendered when the action was brought on 3 October, 1923. The certificates of stock issued by Fosburg Lumber Company to A. B. Schlichter, contain the following words upon the face of the certificate: "This certifies that A. B. Schlichter is the owner of ..... shares of one hundred dollars each of the capital stock of the Fosburg Lumber Company, transferable only on the books of the corporation by the holder thereof in person, or by attorney, upon surrender of this certificate properly endorsed." The certificates were endorsed by A. B. Schlichter in blank.

Upon the foregoing agreed statement of facts, supplemented by an inspection of the certificates of stock, it was adjudged that plaintiff recover of Fosburg Lumber Company the sum of $149.33, with interest from 3 October, 1923. From this judgment plaintiff appealed.

Daniel & Daniel, E. L. Travis and Garland B. Daniel for plaintiff.
James Mann and Spruill & Spruill for defendant.

CONNOR, J. Plaintiff by this appeal presents this question: Is a corporation, which has outstanding a certificate of stock, issued to a stockholder named therein, and bearing on its face the statement that the certificate is "transferable only on the books of the corporation by the holder thereof, in person or by attorney, upon the surrender of this certificate properly endorsed" liable to a third person, who is the holder of the certificate, endorsed in blank, but not transferred on the books of the corporation, as collateral security, for dividends apportioned to the stock, during the liquidation of the corporation begun prior to the pledge of the certificate, and paid to the stockholder, prior to notice to the corporation of the transfer of the certificate to the creditor? Defendant does not resist plaintiff's right to recover in this action upon the contention that the corporation has a lien on the stock or on the sums apportioned as dividends for the indebtedness of the stockholder to it; *Boyd v. Redd,* 120 N. C., 335, and other authorities cited by plaintiff's counsel in their brief to sustain the proposition that a corporation has no lien upon the shares of its stockholders for debts due by them to the corporation have no application to the question involved in this appeal.

In *Havens v. Bank,* 132 N. C., 214, it was held that the bank was liable to the pledgee of a certificate of stock, fraudulently issued to himself by the cashier of the bank, and by him pledged to plaintiff as col-

lateral security for the cashier's note, upon the principle that the bank was liable for the fraudulent act of its agent, made possible in that case by the negligence of the bank. The transfer of the certificate, endorsed in blank was held to pass the entire title, legal and equitable, in the shares, notwithstanding that by the terms of the charter and by-laws of the corporation the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; the holder of the certificate, by omitting to cause the same to be transferred on the books of the corporation, may lose his stock by a fraudulent transfer on the books of the company, by the registered holder to a bona fide purchaser. He also takes the risk of collection of dividends by his assignor, who remains a stockholder of record.

In *Bank v. Dew,* 175 N. C., 79, the right of plaintiff which had received the stock in pledge as security for its debt, in good faith, and for value, and without notice of the company's rights or equities, to recover was sustained upon the doctrine of equitable estoppel, it being held that plaintiff acquired a good title to the stock as against the company, notwithstanding that the stock had not been transferred to plaintiff on the books of the company. The rights or equities relied upon by the company existed at the date of the pledge of the stock; plaintiff had no notice of these rights or equities. The action was to compel the company to transfer the stock on its books to plaintiff. It was held that plaintiff was entitled to the relief demanded. In this action, plaintiff is not demanding that the certificates be transferred to it, on the books of the defendant corporation. It would doubtless be entitled to this relief, and upon such transfer, it would be entitled to all dividends, apportioned during liquidation, to the stock and not paid prior to such transfer, as well as to all dividends, thereafter apportioned, for its title to the stock, good as against its assignor from the date of the transfer of the certificate, would be good as against the corporation from the date of the transfer on its books. The right of the corporation to plead debts due to it by the original stockholder, incurred either before or after the transfer on its books, as set-offs or counterclaims to the demand of the transferee for such dividends is not presented upon the facts agreed in this case.

In *Bleakley v. Candler,* 169 N. C., 16, *Justice Allen* says that "the weight of authority is in favor of the position that the purpose of the statute requiring a transfer upon the books of the corporation is to prevent fraudulent transfers and to protect the corporation in determining the questions of membership, the right to vote, the right to participate in the management of the corporation, and the payment of dividends." The Fosburg Lumber Company is a Virginia corporation.

The principles enacted as statutes in C. S., 1164, that shares of stock in corporations organized under the laws of this State are transferable on the books of the corporation, and in C. S., 1170, that the books of the corporation shall be the only evidence as to who are the stockholders entitled to examine them and to vote at elections are applicable by reason of the provision on the face of the certificates issued to A. B. Schlichter, notwithstanding that the Fosburg Lumber Company is not a North Carolina corporation.

The general rule with respect to a dividend declared from the profits of a corporation, that the corporation must pay such dividends to the person in whose name the stock stands, registered upon the corporate stock book, at the time the dividend is declared, and that such payment may be made without requiring the production of the certificate issued for such stock, is applicable to the payment of dividends apportioned out of the assets of the corporation upon its liquidation. Cook on Corporations, vol. 2, sec. 538 and cases cited. 14 C. J., 819, note 41, 14 C. J., a. 1197. The dividends which are the subject-matter of this action were credited to the account of A. B. Schlichter, who was, at the time they were apportioned, as apeared upon the books of the company, the owner of the stock to which they were so apportioned; the said account was subsequently debited by amounts due by Schlichter to the Fosburg Lumber Company, prior to notice to said company that plaintiff held the certificates for said stock, endorsed in blank, by Schlichter. This was in effect a payment by the Fosburg Lumber Company to Schlichter, the stockholder of record, of the dividends prior to notice of the transfer of the certificates to plaintiff. The Fosburg Lumber Company cannot be held liable to plaintiff on account of the dividends thus apportioned and so paid without notice of the claims of plaintiff. It is liable only for such portion of the dividends as had not been paid, at date of notice that plaintiff was the holder of the certificate, transferred by A. B. Schlichter.

There is no error in the judgment. It is

Affirmed.

HELEN S. POWELL AND J. K. POWELL v. WESTERN UNION TELEGRAPH CO.

(Filed 10 March, 1926.)

Telegrams—Negligence—Mental Anguish—Damages—Notice.

Damages for mental anguish alone is not recoverable for the negligence of a telegraph company in failing to promptly deliver a telegram from a husband to his wife, informing her of his delay in reaching home, when

the message itself, did not from its wording give any information to the company that mental anguish would be caused by the delay in delivery, and there was nothing said to the agents of the company that would put them upon notice thereof.

CIVIL ACTION, tried before *Barnhill, J.*, Fall Term, 1925, of DUPLIN.

This action was brought by the plaintiff, Helen S. Powell, for mental anguish and suffering resulting from the failure of the defendant to transmit and deliver the following telegram, to wit: "Warsaw, N. C., 11 July, 1925. 6 o'clock p. m. Helen S. Powell, Pomander Walks No. 8, Wrightsville Beach, N. C. Going by Whiteville. Will see you in the morning. Junius." The telegram was sent by Junius K. Powell, husband of the plaintiff, and was not delivered to the plaintiff until 13 July, 1925, at 10:05 a. m. By reason of failure to deliver the telegram the plaintiff alleged that she "was very much disturbed and distressed in mind during the entire night of 11 July, 1925, and up until 12:30 o'clock on 12 July, when her husband, Junius K. Powell, arrived at the summer cottage; that she was unable to sleep and did not go to bed during the entire night of 11 July, 1925, but sat up the entire night and watched each and every car as it arrived, expecting her husband to arrive, and could think of nothing other but that he had been painfully or seriously injured in an automobile accident, and for more than fifteen hours plaintiff was very much distressed and disturbed in mind and suffered great pain and mental anguish and distress to her great damage in the sum of $2,750."

The only notice given the defendant at the time the telegram was sent is contained in the allegation "that at the time the telegram was sent the sender, Junius K. Powell, delivered the telegram 'with the request at the time that it be sent immediately in order that his wife might receive the same.' "

The action was for mental anguish alone. The defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action for mental anguish suffered by the addressee of the telegram, there being no allegation as to any damage suffered by the husband, Junius K. Powell. The demurrer was overruled and the defendant appealed.

Gavin & Boney for plaintiffs.
John D. Bellamy & Sons for defendants.

BROGDEN, J. Does the complaint state a cause of action for mental anguish? If so, the demurrer was properly overruled. If not, it should have been sustained.

At the threshold of the inquiry it is necessary to determine the essential elements constituting a cause of action for mental anguish. An

analysis of pertinent decisions upon the subject will disclose that the essential elements are: (1) Negligent failure to transmit and deliver the message. (2) Notice to defendant company that mental anguish will follow as a reasonable and natural result of such negligent failure to perform the duty imposed by accepting the message. Notice of the importance of a message or of the reasonable probability that mental suffering will ensue by reason of failure to deliver within a reasonable time may result from: (1) The character and contents of the message itself. (2) Facts within the knowledge of the company at the time the message is delivered. (3) Extraneous knowledge or information given the company at the time of delivering the message. In *Kennon v. Telegraph Co.,* 126 N. C., 232, the Court held that it was error to refuse the following instruction to the jury: "As there was nothing in the message to indicate the importance of prompt delivery, nor was the attention of the company in anyway called to such matters, the plaintiff cannot recover any damages for mental suffering, and you will not take that into consideration in making up your verdict." The principle is further stated in *Ellison v. Tel. Co.,* 163 N. C., p. 11, by *Walker, J.*: "We stated the rule to be that there can be no recovery of damages for mental suffering in such cases, unless it is shown that the defendant could reasonably have foreseen from the face of the message that such damage would result from a breach of its contract or duty to transmit correctly, or that it had extraneous information which should have caused it to anticipate just such a consequence from a neglect of its duty towards the plaintiff." *Suttle v. Tel. Co.,* 148 N. C., 483; *Harrison v. Tel. Co.,* 143 N. C., 149; *Bowers v. Tel. Co.,* 135 N. C., 504; *Williams v. Tel. Co.,* 136 N. C., 82; *Dayvis v. Tel. Co.,* 139 N. C., 79.

The plaintiff relies upon the *Dayvis case,* and it is conceded that the *Dayvis case* is very similar to the present case so far as the nature of the message is concerned. The negligent failure to transmit the telegram promptly was clear in the *Dayvis case,* and also in the present case. However, in the *Dayvis case* the notice required by law, although not appearing on the face of the message, was communicated and impressed upon the defendant company by the sender of the message. It appeared that Mrs. Dayvis went to the telegraph office, gave the message to the operator, told him that she had been thrown over in Weldon, had two children with her, they were sick, her husband was to meet her, and would be worried unless he got the message. She went to the office a second time to inquire about the message and to know if it had been sent and received the information that "it got off all right." This notice was full, explicit and ample. In the present case the only notice given the company was "the request at the time that it be sent immediately in order that his wife might receive the same."

As the message did not bear upon its face any indication of its importance, and as there was no extraneous notice or information indicating its importance, and as there is no allegation of damages except for mental anguish alone, the conclusion is imperative that in obedience to the settled rules of law the demurrer should have been sustained.

Reversed.

LEE v. CHARITABLE BROTHERHOOD.

(Filed 10 March, 1926.)

1. Equity—Deeds and Conveyances—Reformation of Deeds—Evidence—Questions for Jury.

Equity will reform or correct a deed to lands on the ground of mutual mistake of the parties, or the mistake of the draftsman in incorporating other lands of the owner not intended to be conveyed, on strong, cogent and convincing proof, which upon conflicting evidence is a question for the jury.

2. Same—Registration.

Equity will not correct a deed to lands for mistake or inadvertence of the parties as against a subsequently made deed of the same land from the same grantor, but prior in registration.

3. Same—Intent—Evidence.

Upon the question of the mutual mistake of the parties in a suit to reform a deed, parol evidence of the owner of his intent to have excepted the *locus in quo* from the lands conveyed in the deed the subject of the suit is competent.

4. Evidence—Witnesses—Inconsistent Testimony—Questions for Jury.

Where the testimony of a witness at the trial of an action is inconsistent, its weight and credibility are for the jury.

CIVIL ACTION, tried before *Bond, J.*, at November Term, 1925, of PAMLICO.

On 7 October, 1909, W. C. Dixon conveyed to Charitable Brotherhood No. 4, a lot of land 40 by 45 feet, the deed not having been recorded until 9 November, 1922. On 3 February, 1921, the said Dixon conveyed the entire five-acre lot, including defendant's lot, to the plaintiff, Lee, who recorded his deed on 7 February, 1921. This suit was instituted by the plaintiff against the defendant for the purpose of setting aside defendant's deed to the end that plaintiff's title "be quieted." The defendant in its answer alleged that at the time the said Dixon

conveyed the entire property to the plaintiff it was understood and agreed that defendant's lot should be excepted from the operation of said deed and that by mutual mistake of the parties and inadvertence of the draftsman defendant's lot was not excepted from plaintiff's deed, and the defendant prayed that the deed be reformed to carry out and effectuate the intention of the parties and to correct the mistake so made.

The following issues were submitted to the jury: (1) Did the parties by inadvertence and mutual mistake fail to except in the deed from W. C. Dixon and wife to R. H. Lee, the land described in the deed from W. C. Dixon and wife to Charitable Brotherhood Lodge No. 4, Grantsboro, North Carolina? (2) Is the plaintiff, R. H. Lee, the owner and entitled to the possession of the land described in the deed from W. C. Dixon and wife to Charitable Brotherhood Lodge No. 4, at Grantsboro, North Carolina?

The jury for its verdict answered the first issue, "Yes," and the second issue, "No." Judgment was entered upon the verdict and the plaintiff appealed.

Z. V. Rawls for plaintiff.
D. L. Ward and F. C. Brinson for defendant.

BROGDEN, J. The decisive question, presented, is whether or not the grantee in a deed for a portion of property, prior in date, though subsequently registered, is entitled to invoke the equity of reformation, occasioned by mutual mistake, against the grantee in a deed for the entire property, subsequent in date but prior in registration, it being conceded that both deeds were made by the same grantor, who is not a party to the action.

The identical question was presented and answered in the affirmative in the case of *Sills v. Ford,* 171 N. C., 733. In that case the defendant tendered an issue as to mutual mistake in failing to omit his timber from the plaintiffs' deed. The issue was refused by the court upon the following grounds: (1) That the grantors were not parties to the action. (2) That there was no evidence to show that the reservation was left out by mutual mistake. (3) That the defendant was guilty of gross negligence in not having his deed recorded. In discussing the questions raised, *Walker, J.,* said: "Equity will correct a mistake, either as to fact or law, made by a draftsman of a conveyance or other instrument which does not fulfill or which violates the manifest intention of the parties to the agreement. And the denial of one of the parties that there was any mistake will not defeat the equity, but it

depends altogether upon the finding of the jury from the pertinent evidence, which is of a clear, satisfactory, and convincing character, that a mistake was made in expressing the real agreement."

The *Sills case, supra,* has been cited with approval many times, and the principle announced disposes of the main question involved in this appeal.

The plaintiff, however, excepts to the ruling of the trial judge in admitting testimony of the grantor of his intention to exempt from the conveyance the lot of defendant. This evidence was competent. In *Maxwell v. Bank,* 175 N. C., 183, *Brown, J.,* states the rule thus: "To ascertain whether a mistake has been made in describing property in a deed, it is essential to know the intent of the parties, the one in selling and the other in buying, respecting the subject-matter of the conveyance; and if the deed fails to express their intention there is a mutual mistake, relievable in equity by way of reformation, where the proof is clear, convincing and satisfactory."

Plaintiff further assigns as error the testimony of the grantor as to a "verbal option" given to real estate agents to sell the land. The exact testimony of the witness was: "I put it in the hands of Rawls & Tingle, the real estate men, to sell for me. It was a verbal option." It is clear that the contract referred to was no more than a mere authority to a broker to sell real estate and such authority is not required to be in writing. *Abbott v. Hunt,* 129 N. C., 403; *Lamb v. Baxter,* 130 N. C., 67; *Smith v. Browne,* 132 N. C., 365; *Palmer v. Lowder,* 167 N. C., 333; *Henderson v. Forrest,* 184 N. C., 234.

The plaintiff excepts to the testimony of the stenographer who drew the deed and who was instructed to exempt the defendant's lot therefrom. She testified as follows: "I drew the deed. I have forgotten what instructions were given me with reference to the Brotherhood lot." Thereupon, this question was asked: "What was said about where the Brotherhood land was to go, whether in the lot or not?" The witness answered "to exempt the Brotherhood lot." The plaintiff contends that the witness having first said that she had forgotten what instructions were given, and having afterwards said that she was instructed to exempt the Brotherhood lot, that her testimony should be stricken out. This only raises the question as to the credibility of the witness, and her credibility and the weight to be given her testimony was for the jury.

The record discloses no reversible error and the judgment must be Affirmed.

GREENVILLE BANKING & TRUST COMPANY, RECEIVER OF THE PLANTERS BANK v. TALITHA LEGGETT.

(Filed 10 March, 1926.)

1. Banks—Insolvency—Courts—Jurisdiction—Appeal—Individual Liability of Shareholders.

The Superior Court has exclusive jurisdiction over the affairs of an insolvent bank incorporated in this State, and before a shareholder may be called upon to pay an assessment against the shares he owns therein, it is required that the court ascertain the amount of the insolvent bank's indebtedness with reference to its assets, and what the individual liability, if anything, is assessable against the stock. C. S., 239.

2. Same—Actions—Justices' Courts.

A justice of the peace has no jurisdiction over an action of the receiver of an insolvent State banking corporation to collect over payment of dividends in liquidation to a shareholder, though the amount sought is less than two hundred dollars, when the individual indebtedness has not been ascertained by the Superior Court as required by law, C. S., 239, and the Superior Court cannot acquire jurisdiction by an appeal.

APPEAL by defendant from *Stack, J.*, at December Special Term, 1925, of PITT. Action dismissed.

On 4 July, 1923, the Corporation Commission brought suit against The Planters Bank, alleging its insolvency, and obtained an order appointing the plaintiff as permanent receiver of its assets. The receiver made its report on 6 May, 1924, and the judge of the Fifth Judicial District made an order on 7 May, 1924, authorizing the payment to creditors of a dividend of 33⅓ per cent, but withholding any dividend which would otherwise be due the stockholders until their individual liability should be adjusted. In the order it was provided that the receiver should make an assessment against the stockholders to the extent of their liability as provided in case of a bank's insolvency and should bring suit or should take such legal proceedings as was necessary to enforce collection.

The defendant had two shares of stock in the insolvent bank, each of the par value of $50. She had on deposit $102. By mistake she was paid $34, presumably under the order authorizing a dividend of 33⅓ per cent; and she was paid $17 in addition as a dividend of 16⅔ per cent, making a total of $51. According to this calculation there was a remainder of $49 which was the measure of her liability for the assessment on her stock. The plaintiff brought suit before a justice of the peace to recover this amount. The following instruction was given the jury: "Under the law, a stockholder in a bank is liable for double the amount of the stock, in this case, she, the defendant, admits she had two shares of the par value of $50 each, which would make $100

but the plaintiff admits credits, bringing it down to $49. The court instructs you, if you believe the evidence in the case, your answer should be $49, with interest from 8 June, 1925, which was the date this action was brought, if you don't believe it, answer it, nothing." The defendant excepted. Judgment for the plaintiff. Appeal by the defendant upon exceptions.

Julius Brown for the plaintiff.
J. C. Lanier and S. J. Everett for defendant.

ADAMS, J. The defendant excepted to the instruction given, and in the argument here she contended that neither the justice of the peace nor the Superior Court on appeal had jurisdiction of the action. The jurisdiction of the Superior Court was derivative; it could not proceed to judgment, therefore, unless the justice had original jurisdiction. *Drainage Comrs. v. Sparks,* 179 N. C., 581; *Sewing Machine Co. v. Berger,* 181 N. C., 241, 248; *Hall v. Artis,* 186 N. C., 105. The plaintiff says the question of jurisdiction was not raised in the trial court and should not now be considered; but it has been held that a motion to dismiss for want of jurisdiction may be made for the first time in the Supreme Court. *Tillery v. Benefit Society,* 165 N. C., 262; *McDonald v. MacArthur,* 154 N. C., 122.

A statute enacted in 1897 provided that the stockholders of every bank or banking association chartered in this State should be individually responsible equally and ratably for all contracts, debts, and agreements of such association to the extent of the par value of their stock. This statute as amended is C. S., 237. It was construed in *Smathers v. Bank,* 135 N. C., 410, the Court saying: "In winding up the affairs of an insolvent corporation it is best that, as nearly as may be, the court having original jurisdiction bring all parties interested in the final decree before it, and to the end that their right and equities be adjusted and administered. The usual and better practice is to have an assessment upon the stockholders made by the court, upon an ascertainment from the report of the receiver and notice issued to each stockholder to show cause why such assessment should not be enforced. The act of 1891 (chapter 155), in regard to winding up the affairs of insolvent banks, as amended by Laws 1899, ch. 164, transferring to the Corporation Commission the power and duties conferred upon the Treasurer, contemplates this procedure. While, as we have seen, the receiver may recover the amount due from the stockholder, he should be permitted to do so only upon its appearing that there is a deficit in the other assets of the bank, and he should recover only such amount as may be necessary to cover such deficit. It is within the power of the court to make such assessment. *Langston v. Upton,* 91 U. S., 56;

Hawkins v. Glenn, 131 U. S., 319. It may be that it would be wise to confer upon the Corporation Commission, having charge of the management of banks, the power to make such assessments after the manner provided in the National Banking Act, by which the comptroller does so."

The act of 1911, C. S., 239, is in line with this opinion: "When a banking corporation chartered by the State becomes insolvent, and it appears to the court with jurisdiction of the cause that the bank's assets are insufficient to discharge the obligations, and that it will be necessary to assess the shares of stock issued by such bank as provided by law, an accounting may be had in the original action and the shareholders made parties defendant thereto. When upon the facts found it is adjudged that such deficiency exists and the amount thereof is determined, the court shall assess the stock of the corporation equally and ratably, and not in excess of the limitation provided by statute, and adjudge the holders indebted to the receiver of the corporation in proportion to the amount of stock therein credited to them upon the books of the bank within thirty days next preceding its suspension. The certificates of stock are thereafter evidence as against all stockholders of an indebtedness due the receiver equivalent to the assessment thereon, and the judgment shall establish the amount of the deficiency, the necessity of the assessment, the names of the shareholders, and their several liabilities as such."

It will be noted that provision is made for an accounting in the original action, to which the shareholders may be made parties. There should be therein a finding and a judgment as to the fact and as to the amount of the deficiency; and then the court should assess the stock of the corporation equally and ratably and determine and adjudge the amount of each holder's indebtedness. The statute contemplates a uniform rule by which the assessments shall be made; and the necessity of such a rule is exemplified by the facts in the present record. There is evidence from which it may be inferred that the receiver made the assessment in this case pursuant to the judge's order; but it was erroneous in amount and there is no evidence of a judgment in the Superior Court as to the liability of the defendant or any of the other stockholders. The liability of all should have been adjudged in the original action.

The receiver brought a separate action in a justice's court to recover an amount which had not been determined by the Superior Court. We think that the individual liability of the stockholders should be adjudged in the suit pending in the Superior Court, and that the present action should be dismissed.

Action dismissed.

N. W. HARDISON v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 10 March, 1926.)

Carriers—Freight—Railroads—Negligence—Damaged Shipment—Refusal by Consignee—Actions—Parties.

The consignor of a shipment may maintain his action for damages arising from the negligence of a railroad company to a shipment of potatoes that arrived at destination in a worthless condition when refused by consignee for that reason and thrown back on the hands of the consignor.

APPEAL by defendant from *Bond, J.*, at October Term, 1925, of CRAVEN.

Civil action to recover damages for an alleged negligent injury to a quantity of Irish potatoes shipped from New Bern, N. C., to Middlesboro, Ky.

Plaintiff sold to Lovett Fruit & Produce Company of Middlesboro, Ky., 175 barrels of potatoes at the agreed price of $875.00 f. o. b. New Bern, N. C. The potatoes were delivered to the defendant on 8 June, 1922, in good condition; they were so damaged in transit as to render them unmerchantable, and for this reason the consignee refused to accept them when they arrived at destination. The railroad company sold the potatoes and applied the proceeds to its charges for freight.

Plaintiff brings this action to recover the value of said potatoes, alleging that they were damaged in transit by negligent handling and unreasonable delay in transportation.

Upon denial of liability, and issues joined, there was a verdict and judgment for plaintiff, from which the defendant appeals, assigning errors.

D. L. Ward for plaintiff.
Moore & Dunn for defendant.

STACY, C. J. Several exceptions were taken to the introduction of evidence, but these are untenable, and the assignments of error based thereon are not sustained.

The exception addressed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit, made first at the close of plaintiff's evidence and renewed at the close of all the evidence, principally upon the ground that the consignee of said shipment, and not the consignor, is the real party in interest and alone entitled to maintain an action for its loss or damage, must also be overruled on authority of *Piner Bros. v. R. R.*, 188 N. C., 339, where it was held that when a consignee of freight refuses to accept same on account

of damage in transit, and the shipment is subsequently thrown back on the hands of the consignor, the latter may maintain an action for such damage against the carrier.

It was in evidence, and not denied, in fact offered by the defendant, that the shipment of potatoes here in question was rejected by the consignee and thrown back on the hands of the consignor, hence the motion to nonsuit, on the ground stated, was properly overruled. *Anderson v. Express Co.*, 187 N. C., 171.

The remaining exceptions present no new or novel questions of law not heretofore covered by our decisions; they call for no elaboration. The verdict and judgment must be upheld.

No error.

HOWARD AND BEAUFORT REALTY CORPORATION v. JOHN HINSON.

(Filed 10 March, 1926.)

1. Courts—Jurisdiction—Clerks of Court—Dismissal of Appeal—Remand.

Where the clerk of the Superior Court has denied plaintiff's motion for judgment for the want of an answer, and permitted the answer to be filed, and the Superior Court judge has dismissed the plaintiff's appeal, it is equivalent to an order remanding the cause to the clerk.

2. Removal of Causes—Pleadings—Procedure—Answer—Demurrer.

Defendant in a civil action must appear and demur or answer within twenty days after the return day of the summons, or after service of the complaint upon him, or within twenty days after the final determination of a motion to remove as a matter of right. C. S., 509.

3. Removal of Causes—Convenience of Witness—Discretion of Court.

A petition for the removal of a cause from one county in the State to another for the convenience of witnesses, is addressed to the discretionary power of the court.

4. Removal of Causes—Appeal and Error.

All motions to remove a cause for trial should be made before the clerk of the court of the county wherein the action was brought, when claimed as a matter of right, and from his judgment an appeal will lie to the judge.

5. Courts—Pleadings—Discretionary Power.

The broad discretionary power given by statute to the trial judge to permit the filing of pleadings, is not affected by the separate jurisdiction given by statute to the Superior Court. 3 C. S., 509, 536.

6. Same—Appeal.

Where the defendant has filed petition to transfer a cause to another county for trial, and thereafter, and after the time to answer before the

clerk has expired, the clerk permits the answer to be filed and declines to sign judgment by default for plaintiff, on plaintiff's appeal: *Held*, the judge could exercise the discretion given him by statute to permit the answer to be filed after the time for answering had expired.

APPEAL by plaintiffs from an order of *Bond, J.*, at the October Term, 1925, of CRAVEN, granting the defendant leave to file an answer. Affirmed.

T. D. Warren for plaintiffs.
J. Faison Thomson for defendant.

ADAMS, J. The plaintiffs brought this action to recover damages for injury to an automobile alleged to have been caused by the defendant's negligence. The summons, returnable 10 June, 1925, was issued 28 May, and served 3 June. The complaint duly verified was filed 29 May. On 26 June the defendant moved upon affidavit that the cause be removed from Craven to Wayne on the ground that the convenience of witnesses and the ends of justice would be promoted by the change. C. S., 470(2). On 6 July, the plaintiffs prepared a judgment by default and inquiry and tendered it to the clerk for his signature. He denied the motion for judgment and the plaintiffs excepted and appealed to the Superior Court. The appeal was heard at the October Term in Craven. Meantime, on 24 July, 1925, the defendant filed his verified answer. On the hearing of the appeal Judge Bond approved the action of the clerk, made an order permitting the defendant to file his answer, and dismissed the appeal. The plaintiffs excepted and appealed to the Supreme Court.

Since the defendant was granted leave to file an answer we may treat the dismissal of the appeal as equivalent to an order remanding the cause to the clerk and determine the question on its merits.

The defendant in a civil action must appear and demur or answer within twenty days after the return day of the summons or after service of the complaint upon each of the defendants, or within twenty days after the final determination of a motion to remove as a matter of right. 3 C. S., 509. The removal of a cause from one county to another for the convenience of witnesses is not a matter of right because it involves the exercise of discretion. *Oettinger v. Livestock Co.*, 170 N. C., 152. All motions to remove as a matter of right and all motions to remove to the Federal Court shall be made before the clerk, and from his order an appeal may be taken (3 C. S., 913(a); Laws 1925, ch. 282); but a motion to remove for the convenience of witnesses may be made before the judge at any time during the term. *Riley v. Pelletier*, 134 N. C., 316. See, also, *Lumber Co. v. Arnold*, 179 N. C., 269, 275;

Zucker v. Oettinger, 179 N. C., 277. The clerk refused to sign the judgment tendered by the plaintiffs on the ground that the motion for removal was pending; but as the removal was discretionary the statute did not enlarge the time for filing the answer until determination of the motion. In the record there is no order of the clerk extending the time, but one of the appellants' assignments of error is the statement that the clerk erred in permitting the defendant to file his answer on 24 July, as the statutory time had expired; and in the appellee's brief it is said the clerk made an order to this effect. We assume, then, that on 24 July the clerk permitted the defendant to file his answer; but the time fixed by the statute had then expired.

The appellants contend that the clerk had no authority to direct that the answer be filed after the expiration of the time prescribed by the statute. If this be granted, the question is whether the judge had such authority when the case was before him on appeal; and this question, we think, has practically been resolved against the position of the appellants. In *McNair v. Yarboro,* 186 N. C., 111, it is said that section 509 (3 C. S.; Laws 1921, ch. 92), applies to the clerk and does not impair the broad powers conferred on the judge by section 536, and that he may 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 enlarge the time. *Greenville v. Munford, post,* 373. In *McNair's case* the clerk entered judgment by default final for want of an answer and afterwards refused to set aside the judgment on the ground of irregularity. When the appeal was heard the judge held that the verification of the complaint was defective, vacated the clerk's judgment, and gave the defendant leave to answer. In *Cahoon v. Everton,* 187 N. C., 369, it was held that the plaintiff waived his right to judgment for want of an answer by delaying his motion therefor until the answer had been filed and the case had been transferred to the Superior Court for trial. Likewise in *Roberts v. Merritt,* 189 N. C., 194, it appeared that although the answer had not been filed in time, the plaintiff instead of insisting on his right to judgment twice procured a continuance of the cause in term; and it was held that retaining or striking out the answer was a matter addressed to the discretion of the presiding judge. In the first of these cases the decision involved a question of law; in the last two it involved waiver by a party and the exercise of discretion by the judge.

The record in the case before us does not definitely show whether the defendant's failure to answer was due to his mistake of the law (*Battle v. Mercer,* 187 N. C., 437), or to the ruling of the clerk. We appreciate the import of a decision to the effect that the judge may exercise his discretion (sec. 536) on an appeal from the adverse ruling of the clerk

which raises primarily only a question of law; but such a decision logically results from a liberal interpretation of the several statutes, which, while restricting the clerk, enlarge the discretionary powers of the judge. Our assurance against abuse is the experience and wisdom of the judiciary. We must therefore affirm the order of Judge Bond permitting the defendant to file his answer.

Affirmed.

HIGGS-TAFT FURNITURE COMPANY v. JOHN G. CLARK.

(Filed 10 March, 1926.)

1. Courts—Jurisdiction—Justices' Courts—Appeal — Contract — Tort—Constitutional Law.

Where the record of the justice of the peace has been lost, and only the judgment showing a recovery of the jurisdictional amount *ex contractu* appears in the trial on appeal, upon defendant's motion to dismiss for want of jurisdiction, an affidavit of the justice to the effect that the action was in tort is not conclusive. Const., Art. IV, sec. 27; C. S., 1474.

2. Same—Pleadings—Contracts—Tort.

To sustain jurisdiction over the subject-matter of an action, the court will liberally construe the pleadings in the pleader's favor, and where the question is whether a justice of the peace had jurisdiction in contract, and the movant contends the case was *ex delicto*, and that it was beyond the jurisdiction of the justice of the peace, the court will sustain its jurisdiction if it reasonably appears from the pleadings that it was tried as *ex contractu* in the justice's court.

3. Appeal and Error—Records—Briefs.

The Supreme Court is bound by the record on appeal, and will disregard matters presented only in the briefs.

APPEAL by defendant from *Stack, J.*, at November Term, 1925, of PITT.

Nonsuit as to G. A. Clark. Judgment against John G. Clark. No error.

The action was heard on appeal from the judgment of a justice of the peace. The original papers were lost, the only available record being the following transcript of the justice's judgment: "Judgment was rendered on 18 January, 1924, in favor of the plaintiff and against the defendant for the sum of one hundred and twenty-two and 50/100 dollars, with interest on same from 9 January, 1924, till paid and for costs." In the Superior Court the issue—"In what amount, if anything, is the defendant John Clark indebted to the plaintiff?"—was answered in favor of the plaintiff. Judgment for the plaintiff; exceptions and appeal by the defendant.

S. J. Everett for plaintiff.
D. M. Clark for defendant.

ADAMS, J. On the trial in the Superior Court there was evidence tending to show that the defendant had "rented" a team, for which he had "hired" a driver; that in some way the team had broken a plate-glass window in the plaintiff's store; and that the plaintiff had brought suit to recover the sum of $122.50 as the measure of its loss. With the exception of a transcript of the judgment the justice's record has been lost, and the transcript does not state the nature of the action. The case on appeal shows that throughout the trial in the Superior Court the action was treated as *ex contractu.* In the judge's charge to the jury the plaintiff's right to recover was made to depend upon the defendant's alleged promise to pay the plaintiff the amount they had agreed on as proper compensation for the loss; and in the judgment there is a recital of the plaintiff's recovery upon the defendant's promise to pay for the broken plate glass. Before the judgment was signed the defendant made a motion to set aside the verdict and read an affidavit made by the justice who had tried the case for the purpose of showing that the basis of the action before the magistrate was tort, not contract, and that, as the amount demanded exceeds $50.00, neither court had jurisdiction. Const., Art. IV, sec. 27; C. S., 1474.

This affidavit was not offered during the progress of the trial as secondary evidence of the contents of the lost papers; it would not have been competent for this purpose. *Avery v. Stewart,* 134 N. C., 287; *Greene v. Grocery Company,* 159 N. C., 119; *Byrd v. Collins, ibid.,* 641; *Mahoney v. Osborne,* 189 N. C., 445. The presiding judge denied the motion, and instead of adopting the allegations in the affidavit he permitted an amendment, presumably after investigation, to show that the pleadings as originally filed were sufficient to include both tort and contract, and that in the trial before the magistrate the plaintiff waived the tort and sued in contract, that is, on the defendant's express promise to pay the plaintiff to the extent of its loss.

We see no good reason to disapprove this ruling. In *Mitchem v. Pasour,* 173 N. C., 487, it is said: "The uniform rule under our system of pleading is to construe the allegations liberally in favor of the pleader, with a view to substantial justice between the parties (*Brewer v. Wynne,* 154 N. C., 471), and 'when the action can be fairly treated as based either in contract or in tort, the courts, in favor of jurisdiction, will sustain the election made by the plaintiff.' (*Schulhofer v. R. R.,* 118 N. C., 1096, approved in *White v. Ely,* 145 N. C., 36); and further: 'If the complaint is so worded that under the liberal procedure of The Code it could have been construed to be either an action on an

express or implied contract (*Stokes v. Taylor,* 104 N. C., 394; *Fulps v. Mock,* 108 N. C., 601; *Holden v. Warren,* 118 N. C., 326) or either in tort or contract (*Brittain v. Payne,* 118 N. C., 989, *Schulhofer v. R. R.,* 118 N. C., 1096; *Timber Co. v. Brooks,* 109 N. C., 698; *Bowers v. R. R.,* 107 N. C., 721), or as a common-law action or one under the statute (*Roberson v. Morgan,* 118 N. C., 991), the Court will sustain the jurisdiction.' *Sams v. Price,* 119 N. C., 573."

The defendant's motion for nonsuit, therefore, cannot be sustained. The other exceptions are untenable. In the defendant's brief reference is made to matters which do not appear in the case on appeal, but we are bound by the record. We find

No error.

STATE v. Z. V. JONES.

(Filed 10 March, 1926.)

Automobiles — Taxation — License Tax — Municipal Corporations—Ordinances.

An ordinance requiring the owner of an automobile to pay a driver's license tax of five dollars, under a penalty for failure to do so, is void as contrary to the provisions of C. S., 2787 (vol. 3), which limits the license tax to be paid by the owner to a municipality to one dollar.

APPEAL by the State from *Dunn, J.,* at January Term, 1926, of CRAVEN. No error.

On an appeal from the mayor the defendant was prosecuted in the Superior Court for a breach of the following ordinance of the city of New Bern: "That a tax of five dollars be and the same hereby is levied on the owner of each and every automobile, truck or other motor vehicle for driver's license and the same shall be paid to the tax collector on or before 1 November, 1925. Upon payment of such license the tax collector shall issue to the owner of such vehicle a plate which shall be attached to such vehicle. Whoever operates or drives any such vehicle owned by a resident of the city after 1 November, 1925, without such plate attached thereto, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined the sum of $25.00."

The State introduced section 27 of the charter of New Bern: "That the board of aldermen shall have power to make and provide for the execution thereof of such ordinances for the government of the city as it may deem necessary, not inconsistent with the laws of the land. It shall have power by all needful ordinances to secure order, health, quiet and safety within the same and for one mile beyond the city limits, etc."

The jury returned this special verdict: "That said defendant Z. V. Jones owns an automobile and is a resident of the city of New Bern, and that he did operate and drive the said automobile in the streets of said city on 9 November, 1925, without having paid the fee as provided in said ordinance, and without having a license plate issued by the tax collector of said city attached to said automobile, contrary to section 9 of chapter 23 of the ordinances of the city of New Bern; that said Jones on said day was a resident of said city and the owner of said automobile; that said ordinance, viz.: section 9, of chapter 23, of the ordinances of said city was duly and properly adopted by the board of aldermen of said city in July, 1925. If upon these facts the court be of the opinion that the defendant is guilty, the jury so find; otherwise not guilty."

Upon the return of the special verdict the court adjudged the ordinance to be invalid and the defendant to be not guilty. The State excepted and appealed. C. S., 4649.

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

Guion & Guion and W. D. Henderson for defendant.

ADAMS, J. The validity or invalidity of the ordinance imposing the tax, the only point to be considered, may be determined by reference to C. S., 2612 and 2612 a; for neither section 27 of the charter of New Bern nor section 2787 (3 C. S.), is inconsistent with these two statutes. The former (section 2612), contains a schedule of license fees on motor vehicles; and the latter (2612 a) provides: "The fees provided for in section 2612, shall be paid to the Secretary of State at the time of issuance of said registration certificates, permits, or licenses. They shall include all costs of registration, issuance of permits, licenses, and certificates, and the furnishing of registration plates, and shall be in lieu of all other State or local taxes (except ad valorem), registration, or license fees, privilege taxes, or other charges: *Provided, however,* a county, city, or town may charge a license or registration fee on motor vehicles in the sum of one dollar ($1) per annum: *Provided further,* that no county, city, or town shall charge or collect an additional fee for the privilege of operating a motor vehicle, either as chauffeur's or driver's license: *Provided,* nothing herein shall prevent the governing authorities of any city from regulating, licensing, controlling of chauffeurs and drivers of any such car or vehicle, and charging a reasonable fee: *Provided further,* that any city or town may charge a license not to exceed fifty dollars ($50) for any motor vehicle used in trans-

porting persons or property for hire in lieu of all other charges, fees, and licenses now charged."

It will be seen, then, that the fees for the registration and licensing of motor vehicles include the cost of registration, permits, licenses, certificates, and plates and exclude all other State and local taxes except an ad valorem tax and a license or registration fee of one dollar, which may be charged by a county, city, or town. But no county, city or town shall charge or collect an additional fee under the guise of a chauffeur's license for the privilege of operating a motor vehicle; although the governing authorities may regulate, license, and control chauffeurs and drivers and charge therefor a reasonable fee.

The ordinance imposes the tax on the owner, not on the driver. Upon payment of such license the tax collector shall give the owner a plate which shall be attached to his vehicle; and any person who, after a designated time, operates a motor vehicle owned by a resident of the city when the plate is not attached shall be guilty of a misdemeanor. The ordinance does not purport to regulate, license, or control chauffeurs and drivers, but it purports to impose a privilege tax of five dollars on the owner of the car, and by the terms of the statute this tax cannot exceed one dollar. It follows that the ordinance is invalid and that the prosecution must fail. *S. v. Prevo,* 178 N. C., 740; *S. v. Fink,* 179 N. C., 712. It is hardly necessary to say that the cases of *Thompson v. Lumberton,* 182 N. C., 260, and *S. v. Denson,* 189 N. C., 173, have reference to ordinances providing for a driver's license and that they may readily be distinguished from the case at bar.

No error.

TOWN OF GREENVILLE v. C. T. MUNFORD AND J. CAROLINA MUNFORD.

(Filed 10 March, 1926.)

1. Judgments—Consent—Attorney and Client.

Where through mistake or otherwise an attorney not representing a party to an action, has signed his consent to an order making a temporary restraining order permanent, the judgment so entered is not binding upon the party litigant.

2. Pleadings—Extension of Time—Clerks of Court—Judge — Court—Jurisdiction—Statutes.

Where a consent judgment has been entered by mistake, and the trial judge has held that it did not operate as an estoppel on the defendant, and has set it aside, it is within his broad discretionary power conferred

by statute to permit the answer to be then filed, as such authority is not taken away under the procedure in such instances now given by a separate statute to the clerk of the court.

3. Appeal and Error—Findings of Fact—Motion.

The findings of fact by the trial judge in relation to his rulings as to the law applicable on appellant's motion, are conclusive on appeal.

APPEAL by plaintiff from *Dunn, J.*, at January Term, 1926, of PITT. Affirmed.

The defendants own a lot on Evans Street in the town of Greenville. It is alleged that they are attempting to appropriate a part of the street to their private use by building beyond their line a brick wall, which when completed will be a permanent structure. The plaintiff brought suit and obtained an order temporarily restraining the defendants from putting up the wall. On 11 December, 1925, the order was made permanent and it was adjudged that the plaintiff recover its costs. Soon afterwards upon the defendants' motion Judge Dunn modified the former judgment and gave the defendants leave to answer. The plaintiff excepted and appealed.

D. M. Clark for plaintiff.
Skinner & Whedbee for defendants.

ADAMS, J. This was a motion to set aside a judgment for surprise under C. S., 600. The judgment recites his Honor's finding of the facts. The summons and the complaint were served on the defendants on 2 December, 1925, and on 11 December, the temporary restraining order was made permanent. This judgment, which in effect, was final, was presented for approval to an attorney who, as the plaintiff thought, represented the defendants. The attorney did not represent the defendants and for this reason his approval, which apparently had been given through some sort of inadvertence or mistake, was not binding on them. The time for filing an answer had not expired, as only nine days had elapsed between the service of the summons and the signing of the final judgment; and the defendants have a meritorious defense. Judge Dunn declined to vacate or modify the restraining order, but he held that the judgment did not operate as an estoppel against the defendants' right to set up this defense and granted an extension of time for answering the complaint.

In this we find no error. The findings of fact are conclusive and the judge was authorized to grant an extension of time beyond twenty days for filing the answer. In *McNair v. Yarboro,* 186 N. C., 111, it is said: "And we consider it well to state further that, while this chapter 92, in

section 3, (Laws 1921), provides that 'where a copy of the complaint has been served upon each of the defendants the clerk shall not extend the time for filing answer beyond twenty days after such service,' this restriction applies to the clerk, and does not and is not intended to impair the broad powers conferred on the judge in this respect by C. S., 536, to the effect that when the cause is properly before him 'he may, in his discretion and upon such terms as may be just, allow an answer or reply to be made or other act done after the time or by an order to enlarge the time.'" The judgment is

Affirmed.

STATE v. JOHN L. HORNE.

(Filed 10 March, 1926.)

Courts—Inferior Courts—Jurisdiction—Constitutional Law—Statutes.

Art. II, sec. 29, of the State Constitution prohibits the Legislature from establishing courts inferior to the Superior Court, by any local, private or special act, and does not apply to increasing the jurisdiction of such courts as are already established.

APPEAL by defendant from *Dunn, J.*, at August Term, 1925, of PITT.

Criminal prosecutions tried upon two warrants, issued by the mayor of the town of Farmville and heard *de novo* on appeal to the Superior Court of Pitt County, from which latter court, this appeal is prosecuted.

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

David W. Isear for defendant.

STACY, C. J. The appeal questions the constitutionality of chapter 189, Private Laws 1925, which confers certain additional jurisdiction in criminal matters on the mayor's court of the town of Farmville, Pitt County. The legislation is assailed by the defendant on the ground that it is in violation of Art. II, sec. 29 of the State Constitution, which provides: "The General Assembly shall not pass any local, private or special act or resolution relating to the establishment of courts inferior to the Superior Court," etc. There is nothing in this section of the Constitution which prohibits the Legislature from increasing or decreasing the jurisdiction of these inferior courts already in existence. The prohibition is against the *establishment* of courts inferior to the Superior

Court, by any local, private or special act or resolution. This was the holding in *Provision Co. v. Daves,* 190 N. C., 9, and on authority of that case, the present ruling must be upheld.

The only other exception appearing on the record has been covered by prior adjudications, and it needs no elaboration. *S. v. Abernethy,* 190 N. C., 768; *S. v. Stallings,* 189 N. C., 104.

No error.

G. B. OVERTON ET AL. v. W. H. HIGHSMITH ET AL.

(Filed 10 March, 1926.)

1. Homestead—Partition—Tenants in Common—Title—Adverse Possession—Evidence—Constitutional Law.

The record evidence that a homestead had been laid off to the original owner under execution, is *Held* in this action among heirs at law sufficient to be submitted to the jury where some of the tenants in common deny the title of the others under claim of adverse possession without "color."

2. Instructions—Appeal and Error—Harmless Error—Adverse Possession.

Where the defendants claim to be the owners of the *locus in quo* by twenty years possession without "color," a charge to the jury that "such possession must have continued for twenty years and more," is rendered harmless when the evidence conclusively shows that it had not continued for twenty years.

APPEAL by defendants from *Bond, J.,* at September Term, 1925, of PITT.

Special proceedings to sell land for partition, tried in the Superior Court on the defendants' plea of sole seizin.

From a verdict and judgment in favor of the plaintiffs, the defendants appeal, assigning errors.

S. J. Everett for plaintiffs.
Julius Brown for defendants.

STACY, C. J. The essential facts as admitted, or established by the verdict, are as follows:

1. The plaintiffs are the children and grandchildren of Robert S. Highsmith by a first marriage, while the defendants are his children and grandchildren by a second marriage.

2. It is conceded that the land in question was deeded to Robert S. Highsmith in 1859. Thereafter, other adjacent lands were acquired by him. On 14 April, 1880, all of his real estate was sold under execution to

William Whitehead by Allen Warren, sheriff of Pitt County, save and except his homestead exemption, which was allotted to him in the particular land now in controversy.

3. Robert S. Highsmith died in November, 1882, leaving him surviving a widow, who died in March, 1920, and several minor children, the youngest of whom became of age in October, 1902.

4. The widow and her children have been in the possession of the land in question, adversely, they say, since 1882.

5. Summons in this proceeding was issued in September, 1920.

On these, the facts chiefly pertinent, the right of the plaintiffs to share in the proceeds arising from a sale of the land, or to take their part of it in severalty, is not seriously questioned, as this proceeding was instituted within twenty years after the falling in of the homestead in 1902, at the time the youngest child became of age. *Spence v. Goodwin*, 128 N. C., 273; Const., Art. X, sec. 3.

The position of the defendants is based on the contention that all the lands of Robert S. Highsmith were sold under execution in 1880; that the property now in controversy, therefore, was not owned by him at the time of his death; that they have held it adversely to all the world since 1882, and especially as against William Whitehead, who acquired title to it under the sheriff's deed in 1880; and that no sufficient evidence has been offered to show any allotment of Robert S. Highsmith's homestead in the particular land in question. We think there was ample evidence to warrant the jury in finding, as it did, that the homestead was laid off in this particular land. It lay between two other tracts, which William Whitehead acquired under the sheriff's deed, and the instant tract had upon it the homesteader's dwelling. It is the same land purchased by Robert S. Highsmith in 1859. The sheriff's return, offered in evidence by the defendants, contained the following entry: "Executed 13 February, 1880, by levying on two tracts of land, one containing 290 acres, adjoining the lands of Mathew James, Burton James, S. E. Moore *et als.*, and the other tract containing 100 acres, adjoining the lands of Simon Nobles, Godfrey Stancil *et als.*"

The defendants also except to the charge because the court instructed the jury that before title could be acquired by adverse possession "such possession must have continued for as long as 20 years and more before the beginning of this action." Even if the use of the words "and more" was slightly inadvertent, the defendants are not in position to complain, for at best they have shown possession adversely for only 19 years after the falling in of the homestead.

The assignments of error, as made by the defendants, are not sufficient to upset the verdict. The judgment must be upheld.

No error.

STATE v. RORY MATTHEWS.

(Filed 17 March, 1926.)

1. Criminal Law—Judgments—Verdict—Punishment—Death—Statutes—Constitutional Law.

Where death is imposed by statute under the provisions of our Constitution, Art. XI, sec. 2, there is no discretionary power vested in the trial judge, and upon a conviction the prescribed punishment follows and the sentence must be imposed accordingly. C. S., 4200.

2. Same—Judgments—Courts—Discretion—Capital Felonies.

Upon the conviction of a crime made punishable by death, and the jury have incorporated in their verdict a recommendation of mercy, of their own volition and without an intimation or instruction by the judge the words of recommendation are regarded as surplusage, and the judgment must be that of death in accordance with the command of the statute. C. S., 4200, 4657, 4665.

3. Same—Instructions—Appeal and Error.

Where in considering their verdict for a homicide involving a capital felony, the jury send the sheriff to the trial judge to inquire as to whether they can return a verdict with recommendation for mercy, and the judge sends back word they can do so, immediately followed by a verdict of murder in the first degree with the recommendation for mercy by the court, it is a clear inference that the jury or some of them, had agreed upon the instruction of the court, and that they understood that the court had the power to exercise clemency, and constitutes prejudicial error to the prisoner on trial for his life.

4. Criminal Law—Punishment—Discretion of Court.

The trial judge has no discretionary power over the punishment to be imposed against an offender of the criminal law, except where such is permitted or prescribed by statute in sentences carrying a punishment less than death, to be found in statutes fixing a maximum and minimum imprisonment.

5. Criminal Law—Trials—Presence of Prisoner—Waiver.

Upon the trial of capital felonies, the prisoner may not waive the right he has to be present at each step of the trial, in homicides in less degree he may waive this right personally, and in case of misdemeanors it may be done by his attorney representing him therein.

6. Photographs—Evidence—Witness Explaining his Testimony.

Upon the trial for a criminal offense, a capital or less offense, a photograph afterwards taken of the scene of the crime, when its accuracy has been properly testified to, may be used by the witness to illustrate his testimony, though it may not be received as substantive evidence.

7. Same—Questions for Court.

Whether a photograph has been rendered competent by a witness testifying to its accuracy is a question of fact for the court.

STATE *v.* MATTHEWS.

APPEAL by defendant from *Devin, J.*, at September Term, 1925, of HARNETT. New trial.

Indictment for murder. From judgment, reciting that "the jury had rendered a verdict, in due form, that the defendant is guilty of murder in the first degree, with recommendation of mercy," and adjudging that "said Rory Matthews shall suffer death by electrocution in the manner provided by law," defendant appealed to the Supreme Court.

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

W. P. Byrd, F. H. Taylor and Young, Best & Young for defendant.

CONNOR, J. The indictment to which defendant, upon his arraignment entered a plea of "Not Guilty," was sufficient in form to support either of four verdicts, to wit: (1) Guilty of murder in the first degree; or (2) guilty of murder in the second degree; or (3) guilty of manslaughter; or (4) not guilty. Upon either of these verdicts, it was the duty of the court, *i. e.*, of the presiding judge, to render judgment as prescribed by the law of this State.

Upon a verdict that the defendant is guilty of murder in the first degree, the judgment prescribed by law is that the defendant suffer death (C. S., 4200), by means of electrocution (C. S., 4657-4665). These statutes were duly enacted by the General Assembly, pursuant to section 2 of Art. XI, of the Constitution of North Carolina. No discretion is vested by these statutes, or by any other law in this State, in the court, or the presiding judge, either as to what the punishment shall be upon a verdict of guilty of murder in the first degree, or as to the means by which, or the manner in which death, as the punishment prescribed by statute, shall be inflicted. The court has discretion only as to the date upon which a defendant convicted of murder in the first degree shall be put to death; if upon appeal by defendant to the Supreme Court, the judgment is affirmed, upon a finding of on error in the trial, a new date for the execution is fixed arbitrarily by the statute. Pub. Laws 1925, ch. 55, amending C. S., 4663. Neither the court nor the Governor now fixes such date.

Upon a verdict of guilty of murder in the second degree, or of guilty of manslaughter, the law prescribes that the judgment shall be that defendant be imprisoned; upon the former verdict, in the State prison, for a term not less than two nor more than thirty years, C. S., 4200; upon the latter verdict, in the county jail or State prison for a term not less than four months, nor more than twenty years, C. S., 4201. While the judge has no discretion as to the kind of punishment to be inflicted, which upon either verdict is imprisonment, a wide discretion

is vested in him as to the term of the imprisonment. The various judges of the Superior Courts of the State are further authorized and directed, in their discretion, in sentencing prisoners to the State prison, to fix a maximum and a minimum number of years for the imprisonment, thus making the sentence indeterminate, C. S., 7738. In exercising the discretion thus vested in him by law, with respect to the term of imprisonment, the judge may take into consideration all the facts and circumstances of the case which he may find from the evidence, either on the trial before the jury, or upon the motion for judgment upon the verdict. Where in his opinion the facts and circumstances justify it, he may temper justice with mercy, mindful that "mercy blesseth him that gives and him that takes"; in other cases, he may feel it his duty to render such judgment, within the law, as will impress the defendant with the vigor and strength of the law, and as will also strike terror into the hearts of evil-doers, thereby deterring them, by fear of like consequences, from the commission of a similar offense.

It is the declared policy of the people of this State, with respect to punishment for crimes, that the object of punishment being not only to satisfy justice, but also to reform offenders and thus prevent crime (Const., of N. C. Art. XI), discretion shall be vested in the courts to determine the extent of punishments to be inflicted upon persons who have been convicted of crime, to the end, not only that the punishment may fit the crime, but also that it may be adapted to the purposes of the State, in dealing with those who have violated its laws, more often because of their infirmities than because of a wicked purpose to do evil. It is therefore declared in the Constitution of the State, that only murder, arson, burglary and rape may be punished with death, if the General Assembly shall so enact. For obvious reasons, the General Assembly has not conferred upon the courts any discretion as to the judgment to be rendered upon a conviction of the crime of murder in the first degree, C. S., 4200; of arson, C. S., 4238; of burglary in the first degree, C. S., 4233; or of rape, C. S., 4204. It may be noted, however, that both the crimes of murder and of burglary, as defined at common-law, have been divided by statute into two degrees; only those who are convicted of either of these crimes, in the first degree, may be put to death.

If the verdict of the jury is "Not Guilty," upon an indictment for murder, the judgment must, of course, be that the defendant be discharged from custody. There is no provision by statute or otherwise in this State for the rendition of a verdict of guilty of any crime, with a recommendation of mercy, by the jury. Punishments for crime are prescribed by law; where the kind or amount of punishment is not fixed by statute, the discretion to be exercised is vested by law in the court or presiding judge. It is a sound, judicial discretion, "a liberty or

privilege allowed to a judge, within the confines of right and justice, but independent of narrow and unbending rules or positive law, to decide and act in accordance with what is fair, equitable and wholesome, as determined upon the peculiar circumstances of the case, and as discerned by his personal wisdom and experience, guided by the spirit, principles and analogies of the law," Black's Law Dictionary, p. 375. A jury has fully discharged its duty, and performed its function, under the law of this State, when its members have sat together, heard the evidence, and rendered their verdict accordingly. As the judge must not invade the true office and province of the jury by giving an opinion in his charge, either in a civil or criminal action, as to whether a fact is fully or sufficiently proven (C. S., 564), so the jury must be content to leave with the judge the grave responsibility imposed upon him to render a judgment, upon their verdict, according to law.

The record upon this appeal discloses that the evidence offered by both the State and the defendant was submitted to the jury under a full and correct charge by the court. This record contains the following statement: "After the jury had been out several hours, they sent a message to his Honor by the court officer to know if they could render a verdict with a recommendation of mercy. His Honor returned a verbal message in the affirmative." To this instruction, defendant excepted. He assigns same as error. Thereafter the jury returned a verdict as follows: "Guilty of murder in the first degree with recommendation of mercy." The court received this verdict as rendered; defendant moved that the verdict be set aside. This motion was denied, and defendant excepted. After judgment had been rendered upon the verdict as recorded, the court stated that the recommendation of mercy would be transmitted at the proper time to the Governor.

It should be noted that the defendant, by this assignment of error, presents his contention, not that it was error to receive the verdict as rendered by the jury, but that it was error for his Honor to instruct the jury that they might render a verdict upon the indictment in this case with a recommendation of mercy. This instruction was manifestly applicable to a verdict of guilty, only; it could not have been understood by the jury as applicable to a verdict of not guilty. The court had, in the charge to the jury, correctly instructed the jury that if they found the defendant guilty, they must say by their verdict, whether he was guilty of murder in the first degree, of murder in the second degree, or of manslaughter. There was evidence submitted to the jury from which they could have found facts, which under the instructions of the court, would have sustained either of the four verdicts permissible under the form of the indictment. Defendant admitted that he killed the deceased with a shot gun; all the evidence showed that de-

ceased, at the time he received the mortal wound, had in his hands a grubbing hoe, with which he had been at work prior to the appearance of defendant upon the scene. The relation between deceased and defendant, for some time prior to the homicide had been unfriendly. Defendant contended that he killed deceased in self-defense; the State contended that he killed him, with malice, and relied not only upon the admission that defendant killed deceased with a deadly weapon, but also upon evidence which tended to show express malice; the State further contended that there was evidence which showed not only that the homicide was murder, but that the murder was deliberate and premeditated, within the meaning of C. S., 4200, as construed repeatedly by this Court. After several hours of deliberation, upon the evidence, under the instructions of the court as to the law applicable to the facts as they might find them to be, the jury had not agreed upon a verdict. Within a short time after receiving the instruction that they could return a verdict, with a recommendation of mercy, they returned the verdict upon which the judgment was rendered. It is manifest that this verdict was rendered pursuant to the instruction of his Honor; the recommendation of mercy was not voluntary upon the part of the jury.

Where a verdict of guilty is rendered by a jury, including the words, "with recommendation of mercy," or words of similar import, there is authority in this State for holding that such words are surplusage, and that they may be disregarded; *S. v. Stewart,* 189 N. C., 340; *S. v. Snipes,* 185 N. C., 743; *S. v. Hancock,* 151 N. C., 699; *S. v. McKay,* 150 N. C., 813. These cases are recognized by us as authorities, sustaining the holding that recommendation of mercy by the jury, in certain cases, may be disregarded as surplusage. Where the words, "with recommendation of mercy," or words of similar import, included in, or forming a part of a verdict of guilty, are voluntary on the part of the jury, and are not so included in or made a part of the verdict, in consequence of an instruction to the jury, that they may return a verdict, with such recommendation, the words may be treated as surplusage, and the verdict received, and recorded, as a verdict of guilty. It is well, however, to be mindful of the words of the late *Chief Justice Hoke,* appearing in the opinion written by him, in *S. v. Murphy,* 157 N. C., 615. In this opinion, writing with wisdom gained from long experience, wide observation and deep reflection, he said: "Our trial courts should always require that juries in capital cases should definitely and expressly say of what degree of murder they convict the prisoner, and that the verdict should be recorded as rendered. In a case of this kind there should be no room for doubt or mistake."

We must hold that it is error for the court to instruct the jury, either in the general charge, or in response to an inquiry made by

the jury that they may return a verdict with recommendation of mercy, or with other words having reference, necessarily, to the judgment to be rendered by the court, and that where under the law there is no discretion vested in the court, as to the kind or amount of punishment which may be imposed, by the judgment, upon the defendant, the error is prejudicial to defendant. If the jury returns a verdict voluntarily, including the words "with recommendation of mercy," or words of similar import, these words may be disregarded as surplusage, if it clearly and definitely appears that the jury, upon a consideration of all the evidence, and under the instructions of the court has agreed upon the verdict as returned by them.

The identical question presented by this appeal was considered by the Supreme Court of Colorado in *Hackett v. People,* 8 Pac., 574. The question was there presented as follows: "The jury, after deliberating for a considerable length of time, and being brought into court at their own request, propounded the following question, 'Can the jury endorse on the verdict a recommendation of mercy?' To which question, the court answered by a written instruction that they could endorse such recommendation upon their verdict should they desire so to do. Thereupon they retired and soon after returned a verdict of guilty in manner and form as charged in the indictment. They also embraced in such verdict the following: 'We, the jury, recommend the defendant to the mercy of the court.'" In the opinion of the Court it is said: "Thus it appears that some of the jurors were opposed to a conviction for the grade of crime finally found in their verdict, and that they only consented thereto upon condition that the recommendation for mercy be incorporated. They must have been led to suppose, from the court's answer to their question, that this might have weight in mitigating the severity of the sentence to be pronounced. Any other explanation of the proceedings would be absurd; and it must be assumed that without such belief the verdict as returned would not have been agreed upon. Yet as the law then stood, the court was powerless to heed their suggestion. Upon a verdict in this form, it was his duty to pronounce a sentence of imprisonment for life. The law fixed the penalty, and he could not subtract a single day. He must either set the verdict aside, and order a new trial, or enter the judgment fixed by the statute. The instruction mentioned was therefore misleading, and under the circumstances a fatal error." See, also, *Territory v. Griego* (N. M.), 42 Pac., 80, citing with approval *Randolph v. Lampkin* (Ky.), 14 S. W., 538; *People v. Harris* (Mich.), 43 N. W., 1060; *McBean v. State* (Wis.), 53 N. W., 497. See, also, 16 C. J., 1026, sec. 2459; 30 C. J., 432, sec. 682.

We have not overlooked the fact that it appears from the record that the communication between his Honor and the jury was by means of messages conveyed by the court officer. Defendant does not rely upon this as error, but we would not be understood as approving this method of instructing a jury, especially in a case where a verdict may be rendered requiring under the law capital punishment. Where the life or death of a defendant is involved in the issue to be determined by a jury, he has a right to be present, in person, and with his counsel, whenever any evidence is submitted or any instruction is given to the jury relative to the issue. This right he cannot waive, *S. v. Dry,* 152 N. C., 813. The late *Chief Justice Clark,* writing the opinion for the Court, in that case says: "In every criminal prosecution it is the right of the accused to be present throughout the trial. In misdemeanors, this right can be waived by the defendant with the consent of the court, through his counsel. In felonies other than capital, the right to be present can be waived only by the party himself, *S. v. Jenkins,* 84 N. C., 813. In capital trials, this right cannot be waived by the prisoner, but it is the duty of the court to see that he is actually present at each and every step taken in the progress of the trial; *S. v. Paylor,* 89 N. C., 539; Wharton Cr. Pl. & Pr. (9 ed.), sec. 540 *et seq.;* 1 Bishop New Cr. Proc., sec. 271 (2), 273." *S. v. Hartsfield,* 188 N. C., 357.

While not necessary to the disposition of this appeal, we deem it proper to consider defendant's assignments of error, based upon his exceptions to the overruling by the court of his objections, (1) to the use of certain photographs by witnesses for the State for the purpose of illustrating their testimony, describing the place where the homicide occurred, and the relative positions of deceased, of defendant, and of witnesses immediately before and at the time of the shooting, and (2) to the introduction of these photographs as evidence.

There was evidence that these photographs were made sometime after the homicide—at least a week; they were made under the direction of a witness for the State, who testified that he was present when defendant shot and killed deceased. Just before deceased was shot by defendant, he was at work, with six men in his employment and under his supervision, constructing a new road; there was an old road, which crossed the creek, and ran straight for about thirty-five yards, then turning to the right; the new road began at the point where the old road turned to the right, and then ran to the left, up a hill; deceased was at work on an embankment, on the left side of the new road, thus being on the far side of said road from the old road; deceased had a grubbing hoe with which he was leveling the dirt hauled by the men to make a fill in the road, when defendant, accompanied by his nephew, appeared on the old road, with a shot gun in his hands; defendant spoke to one of

the men hauling dirt to the fill, telling him where to put the dirt; deceased from the embankment, where he was then at work, saw defendant and said, "Rory, this isn't costing you a cent; I am paying for this work with my own money; go on off from here." He waved his hand and started down from the embankment, with the hoe in his hands, toward the fill; he went toward the center of the road, and stopped; defendant backed several steps and said, "Don't you come down here; I'll shoot you." Deceased was standing not quite in the center of the new road; defendant was in the old road, at a distance of about nine steps, when he "pulled up" his gun, aimed at deceased, and fired; deceased took a few steps and fell dead; defendant walked away, rapidly.

At the time the photograph was made, a witness for the State pointed out to the photographer the position of deceased when he was shot, the position in which he was holding the hoe, the position of defendant at the time he fired the gun, the position in which he held the gun; the positions at which witnesses for the State were standing; also, the position of deceased when he was raking dirt down from the embankment. He placed different persons in these positions, directing the person who represented deceased how to hold the hoe, and the person who represented defendant how to hold the gun. He thus undertook to reconstruct the scene of the homicide at the time of the shooting. The photograph shows correctly the different persons standing in the positions in which they were placed by the witness at the time the photograph was taken, and in which he testified the persons whom they represented were placed at the time of the homicide.

Defendant contends that it was error to permit witnesses to use this photograph to illustrate their testimony or to permit the introduction of the photograph as evidence. Neither defendant nor his counsel were present when the photograph was made.

This Court has held that a photograph correctly representing the premises where the homicide occurred may be used by a witness for the State for the purpose of explaining his testimony; *S. v. Mitchem,* 188 N. C., 608. There must be evidence as to the correctness of the photograph before it can be used for this purpose; *S. v. Jones,* 175 N. C., 709 and cases there cited. *Hampton v. R. R.,* 120 N. C., 534. See, also, 22 C. J., 913; 10 R. C. L., 1153 *et seq.*

Whether or not there is sufficient evidence of the correctness of a photograph to render it competent to be used by a witness for the purpose of illustrating or explaining his testimony is a preliminary question of fact for the judge. In *Davis v. R. R.,* 136 N. C., 116, *Chief Justice Clark,* who wrote the dissenting opinion in *Hampton v. R. R., supra,* says: "Photographs frequently convey information to the jury and to the court with an accuracy not permissible to spoken words, if their

admission is properly guarded by inquiry as to the time and manner when taken. The admission of this species of evidence was, it is true, somewhat questioned (by a divided Court) when presented to this Court for the first time. But they have since become a well-recognized means of evidence." In *Martin v. Knight,* 147 N. C., 564, it is said in the opinion of the Court, written by *Connor, J.,* "In *Hampton v. R. R.,* 120 N. C., 534, 35 L. R. A., 808, a photograph was rejected, but in *Davis v. R. R.,* 136 N. C., 116, we followed the dissenting opinion of the present *Chief Justice (Clark),* sustained by the overwhelming weight of authority." See *Pickett v. R. R.,* 153 N. C., 148; *Lupton v. Express Co.,* 169 N. C., 671.

In *S. v. Lutterloh,* 188 N. C., 412, we held that it was not error for the trial judge to permit photographs, designed to show the width and general topography of the road, where the collision occurred, to be used by witnesses in explaining their testimony. The question presented by this record is whether a photograph made a few days after the homicide, which shows not only the topography of the scene, but which also shows, upon the scene of the homicide, as photographed, persons placed in positions when the photograph was taken which the State contends are the identical positions occupied by deceased, by defendant, and by witnesses, at the very moment of the homicide, may be used by witnesses to illustrate or explain their testimony and may also be received as evidence. The evidence tends to show that the photograph represents the scene of the homicide as reconstructed under the direction of a witness, who was present when the defendant shot the deceased, and that he placed the different persons in the positions as shown in the photograph. It was competent for this person to testify as a witness at the trial as to everything shown in the photograph, the location of the roads, the embankment on or near which deceased was at work when he first saw defendant, the positions occupied by deceased, by defendant, and by the witnesses at any moment from the time defendant appeared on the scene until the fatal shot was fired. His testimony was evidence of these facts; we see no valid ground for objection to the use by the witness of the photograph which he testified was correct, to give to the jury more accurate information of the facts, as this witness testified them to be, than he could give by the spoken word. The witness was subject to cross-examination and could be contradicted by evidence offered by defendant not only as to what he said as a witness, but also as to what the photograph, used by him to illustrate or explain his testimony, showed.

The photographs, taken under the circumstances under which the evidence shows these were taken, were not competent however as evidence, and upon objection by defendant should have been excluded. They were *ex parte,* and did not purport to represent the scene at the time the

homicide was committed. They were inadmissible as evidence to show the relative positions of deceased, of defendant or of witnesses at the time of, or immediately before, the homicide. A photograph which shows the scene of a homicide as reproduced or reconstructed, after the occurrence, is not admissible and should be rejected as evidence. 22 C. J., 920, note 83, citing *Grant v. Chicago, etc., R. Co.*, 176 Ill., A. 292; *Welch v. Louisville, etc., R. Co.*, 163 Ky., 100; *Rodick v. Maine Central R. Co.*, 109 Me., 580; *Fore v. State*, 75 Miss., 727. There must be a New trial.

STATE v. P. W. WHALEY.

(Filed 17 March, 1926.)

1. Automobiles—Statutes—Negligence—Instructions—Proximate Cause—Appeal and Error.

In order to convict the defendant of manslaughter for the unintentional death of one riding in an automobile with him, caused by his negligently colliding with a motor truck on the street of a town, where the evidence on the question of his negligent driving is conflicting as to whether he was exceeding the speed limit and disregarding the precaution regulated and prescribed by statute, C. S., 2618, as amended by chapter 272, Public Laws of 1925, an instruction that made the defendant's guilt to depend upon whether he was driving in disregard of the statutory requirements, without reference to whether this caused or was the proximate cause of the injury, is reversible error.

2. Automobiles—Negligence—Statutes—Safety Regulations.

The speed limit prescribed by statute at which an automobile driver may go at various places, does not alone excuse those who drive within that specified by the statute, and it is likewise required that they use proper care where other conditions require it within the limitations given.

3. Automobiles — Statutes — Safety Regulations — Involuntary Manslaughter.

Where one drives his automobile in violation of the statutory requirements, and thus directly, or without an independent intervening sole proximate cause, the death of another results, he is guilty of manslaughter, though the death was unintentionally caused by his act.

4. Instructions—Contentions—Appeal and Error.

The contentions of the parties to the action under the evidence is not a necessary part of the instructions of the trial judge to the jury upon the law of the case, and error committed therein, when not excepted to at the time, is ordinarily not reversible on appeal. C. S., 564.

5. Evidence—Defendant as Witness—Character.

Evidence of the good character of a defendant in a criminal action, who has taken the witness stand in his own behalf, may be considered by the jury as not only affecting the credibility of his testimony, but also as substantive evidence.

APPEAL by defendant from *Barnhill, J.*, at October Term, 1925, of LENOIR.

Criminal prosecution tried upon an indictment charging the defendant with manslaughter.

There is evidence on behalf of the State tending to show that on 25 July, 1925, about 7:30 p. m., the defendant and two other persons, Fred White and a man by the name of Green, were riding in a Ford automobile, going eastwardly along Bright Street in the residential section of the city of Kinston, at a rate of speed of approximately 35 or 40 miles an hour, when the defendant ran his automobile into a parked truck, causing the Ford car to turn over two or three times, pinning Fred White beneath it and killing him. According to the State's evidence, the truck was parked on the right-hand side of Bright Street not far from where it intersects at right angles with East Street. The defendant crossed the intersection of these two streets just before colliding with the truck as aforesaid, and there seemed to be no lessening of his speed as he crossed the intersection or as he crashed into the truck. There is further evidence tending to show that a storm was gathering at this time, dust was flying in the streets and rain was beginning to fall.

The defendant, on the other hand, testifies that he was driving carefully along Bright Street and across East Street at a rate of speed, not in excess of 12 or 15 miles an hour; and that he approached the truck, standing at an angle on the street and came within a distance of about 8 feet of it, when the driver, Burrell Sutton, suddenly and without warning backed the heavy truck, owned by Oettinger Brothers, into the defendant's car, striking the right-hand rear fender and door of his Ford automobile, causing it to turn over and pin the deceased beneath it.

The defendant's car was stopped within 20 feet from where the collision occurred, and the truck continued to back until it almost reached the middle of the intersection of Bright and East streets.

Upon the conflicting evidence of the State and the defendant, the case was submitted to the jury and resulted in a verdict of conviction. From the judgment pronounced thereon, the defendant appeals, assigning errors.

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

Shaw, Jones & Jones and T. D. Warren for defendant.

STACY, C. J., after stating the case: The case on appeal was settled by agreement and not by the judge; it contains several exceptions which seem to necessitate a new trial.

There is ample evidence on behalf of the State to warrant a conviction, but the defendant has a different view of the matter, and he contends that the judge's instructions fail to give him the full benefit of his testimony. The following portion of the charge forms the basis of one of the defendant's exceptive assignments of error:

"The court further charges you that the defendant would be guilty, if you find from the evidence that the truck of Oettinger Brothers was backed out in front of his car, causing the car of the defendant to turn over, and if you find that the defendant was violating the speed limit or any other phase of the traffic laws and find that fact from the evidence according to the definition of reasonable doubt just given to you, it would be your duty to render a verdict of guilty."

Under this instruction, it will be observed, the guilt of the defendant is made to depend on whether "the defendant was violating the speed limit or any other phase of the traffic laws" at the time of the collision, regardless of any other cause and without a finding that White's death ensued as a result of such violation or was occasioned thereby. It does not follow, as a necessary corollary, that the deceased met his death at the hands of the defendant, simply because he was driving in violation of some phase of the traffic laws, when it further appears if the defendant's version of the matter be accepted, that the proximate cause of the injury was the backing of the truck into the defendant's car. In the civil case of *Lineberry v. R. R.*, 187 N. C., 786, a boy was injured by a train running at the time in violation of an ordinance of the town of Mebane, which was negligence *per se*, but there the railroad was exonerated from liability because it further appeared that the sole proximate cause of the injury was the act of a playmate in pushing the plaintiff beneath the moving train.

It is conceded by the Attorney-General that the above instruction can hardly be sustained unless it is rendered harmless by other portions of the charge; and we do not find that it is.

Speaking to the subject of criminal negligence in *S. v. Rountree*, 181 N. C., 535, the Court said:

"The degree of negligence necessary to be shown on an indictment for manslaughter, where an unintentional killing is established, is such recklessness or carelessness as is incompatible with a proper regard for

human life. *S. v. Gash,* 177 N. C., 595; *S. v. McIver,* 175 N. C., 761; *S. v. Tankersley,* 172 N. C., 955. The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to carry the case to the jury in a criminal prosecution where it reasonably appears that death or great bodily harm was likely to occur. *S. v. Gray,* 180 N. C., 697. A want of due care or a failure to observe the rule of the prudent man, which proximately produces an injury, will render one liable for damages in a civil action, while culpable negligence, under the criminal law, is such recklessness or carelessness, resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *S. v. Goetz,* 83 Conn., 437; 30 L. R. A. (N. S.), 458."

It is generally held that where one is engaged in an unlawful and dangerous act, which is itself in violation of a statute intended and designed to prevent injury to the person, and death ensues as a consequence thereof, the actor is guilty of manslaughter at least, and under some circumstances, of murder. *S. v. McIver,* 175 N. C., 761; *S. v. Sudderth,* 184 N. C., 753; *S. v. Jessup,* 183 N. C., 771.

So far as pertinent to the present appeal, C. S., 2618, as amended by chapter 272, Public Laws of 1925, provides: "No person shall operate a motor vehicle upon the public highways of this State recklessly, or at a rate of speed greater than is reasonable and proper, having regard to the width, traffic, and use of the highway, or so as to endanger the property or the life or limbs of any person: *Provided:* that no person shall operate a motor vehicle on any public highway, road or street of this State at a rate of speed in excess of:

"(A) Twenty miles per hour in the built-up residential section of any village, town or city. (Built-up residential section defined.)

"(D) Fifteen miles per hour in traversing an intersection of highways when the driver's view is obstructed." (Obstruction of driver's view defined.)

But in fixing the maximum rates allowed by law in cities and towns or upon the public highways, the statute does not purport to establish rates of speed which would be lawful under all circumstances. No rate must be greater than is "reasonable and proper," considering the time and place, and "having regard to the width, traffic, and use of the highways," nor should it be such "as to endanger property or the life or limb of any person." Proper speed under certain conditions, may be excessive speed under others; and proper speed in the daytime might be grossly excessive at night. *S. v. O'Brien,* 32 N. J. L., 169.

It is the unanimous holding of all the recent decisions that, when one drives his automobile in such a manner as to violate the law pertaining to its safe operation, and in so doing causes the death of another,

he is guilty of manslaughter. Note 27 A. L. R., 1182. "Involuntary manslaughter," says Wharton, Am. Crim. Law (11 ed.), sec. 426, p. 622, "is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part not amounting to a felony."

It follows, therefore, if the jury should find that the present defendant was driving his machine in violation of any of the statutory regulations pertaining to its safe operation, and thus occasioned the death of the deceased, he would be guilty of manslaughter; but the culpable negligence of the defendant, and not an independent, intervening, sole proximate cause, must have produced the death. *S. v. McIver, supra.*

Again, the defendant complains at what was said to the jury in regard to his evidence of good character. After stating the defendant's contention that his good character should be taken into consideration in passing upon the credibility of his testimony and also in determining the question of his guilt or innocence, the court gave the following as a contention of the State:

"The State, in reply to that, contends that good character does not have any weight in a case of this kind, and that you should not take the good character into consideration when passing upon the guilt or innocence of the defendant because good men violate the State traffic laws every day."

In view of our decisions touching the general subject of contentions (*S. v. Sinodis,* 189 N. C., 565), and as no definite determination of this exception is required by the present record, we omit any ruling as to the merits of the assignment of error based thereon, but it may be doubted as to whether an erroneous proposition of law, though given as a contention of one of the parties, can be sustained. *S. v. Love,* 187 N. C., 32. The contentions of the parties arise out of a different understanding of the facts, while, in theory at least, there can be no divergence of understanding as to the law. The judge declares the law arising on the evidence, and what he says is the law of the case so long as it stands. "That the contentions be given is neither required by the statute, C. S., 564, nor by law"—*Varser, J.,* in *Wilson v. Wilson,* 190 N. C., 819.

Evidence of the defendant's good character, when his character is put in issue and when he also testifies in his own behalf, is competent (1) as bearing upon the credibility of his testimony and (2) as touching the question of his guilt or innocence. *S. v. Cloninger,* 149 N. C., 567.

Speaking to the subject in *S. v. Moore,* 185 N. C., 637, *Hoke, J.,* said: "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 testimony and as substantive evidence on the issue," citing authorities for the position.

A new trial must be ordered so that the defendant's evidence, as well as that of the State, may be submitted to the jury under correct legal instructions.

New trial.

J. Q. ADAMS AND WIFE, ZEBBIE ADAMS, v. FRED WILSON, CRAWFORD BURROWS AND WIFE, SUDIE BURROWS, JACK WALL AND WIFE, SOPHRONIA WALL AND BESSIE WILSON AND J. K. WITHERINGTON, GUARDIAN OF FRED WILSON, SUDIE BURROWS, SOPHRONIA WALL, AND BESSIE WILSON.

(Filed 17 March, 1926.)

1. Wills—Posthumous Child—Descent and Distribution.

Where the father has died leaving a will not providing for a posthumous child, the child inherits as if the parent had died intestate, and takes his portion of the property as "heir at law."

2. Judgments — Wills — Caveat — Equity — Estoppel — Statutes — Descent and Distribution.

Where the father dies leaving a will not providing for a posthumous child, and the child thereafter files a caveat to the will and the issue of *devisavit vel non* has been decided adversely to the child, the position taken by the child that she is entitled to inherit from the father under the canons of descent applicable is not in conflict with the position taken as caveator of the will, and the judgment in this proceeding does not operate as an estoppel.

APPEAL by plaintiffs from *Dunn, J.*, January Civil Term, 1926, of PITT. Error.

"The court finds the following facts from the pleadings and from the admissions of the parties:

"1. That on 27 June, 1893, Z. V. Witherington died domiciled in Pitt County.

"2. That on 13 July, 1893, a paper-writing purporting to be the last will and testament of the said Z. V. Witherington was admitted to probate.

"3. That Zebbie Adams, the caveator of that will, was the only child of the said Z. V. Witherington, she having been born 2 July, 1893, six days after the death of her father, having intermarried with her co-caveator, J. Q. Adams, on 14 January, 1914.

"4. That the said Zebbie Adams, on 19 January, 1920, filed a caveat to said last will and testament.

"5. That the said matter was heard before his Honor, Judge Grady, at the May Term, 1923, of Pitt Superior Court, who, being of the opinion that the caveators were barred by the statute of limitation, dismissed the caveat.

"6. From said judgment the caveators appealed to the Supreme Court, and the judgment of his Honor, Judge Grady, was affirmed by the Supreme Court, as appears in its opinion appearing in 186 N. C., at page 152.

"7. That on 7 April, 1923, and while the caveat above referred to was pending, the plaintiffs in this action, Zebbie Adams and J. Q. Adams, who are the same as the caveators in the caveat, instituted this action against the defendants to recover the land in controversy, which is the same land which was devised by the testator, Z. V. Witherington, to Susan Witherington, his mother, as appears in said last will and testament.

"8. That at the time of his death the said Z. V. Witherington was seized in fee of the land devised to his mother, subject to his mother's life estate.

"9. That after the death of Z. V. Witherington, the mother of the said Z. V. Witherington conveyed the said land to the mother of the defendants, reserving a life estate, and the defendants claim said land as heirs at law of their said mother; the deed from the mother of the said Z. V. Witherington to the mother of the defendants bears date of 1 April, 1906.

"10. That Susan Witherington, mother of Z. V. Witherington, died in the fall of 1919.

"Upon the foregoing facts it is agreed by and between the parties thereto, that if the court should be of the opinion that the caveat filed by the present plaintiffs in this action to the last will and testament of the said Z. V. Witherington, and which was disposed of in the judgment of his Honor, Judge Grady, is an estoppel to the maintenance of the present action by the plaintiffs, that the court shall adjudge the defendants to be the owners in fee and entitled to the possession of the land in controversy; but it is further agreed that if the court upon the foregoing facts shall be of the opinion that said judgment of Judge Grady did not operate as an estoppel to the maintenance of this action by the plaintiffs, then it shall be adjudged that the plaintiffs are the owners in fee and entitled to the immediate possession of said land, it being understood that either party may appeal from such judgment as may be rendered by the court upon the foregoing facts."

The court being of the opinion upon the foregoing facts, that the caveat filed by the plaintiffs to the last will and testament of Z. V.

Witherington estops them from now maintaining this action, and that they are barred and precluded from the maintenance of this action:

"It is now, therefore, considered, ordered and adjudged that the defendants be and they are declared to be the owners and entitled to the continued possession of the land in controversy, freed and discharged of any and all claims of the plaintiffs.

"And it is further ordered and adjudged that the defendants recover their costs to be taxed by the clerk.

"That the matter of rents and betterments be reserved, without prejudice, to await the opinion of the Supreme Court."

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

F. G. James & Son and Julius Brown for plaintiffs.
Skinner & Whedbee and F. C. Harding for defendants.

CLARKSON, J. Z. V. Witherington died on 27 June, 1893, leaving a last will and testament, which was duly admitted to probate. He left one child, the plaintiff, Zebbie Witherington, who married J. Q. Adams, and they are the plaintiffs in this action. She was born 6 days after the death of her father. In the will of Z. V. Witherington, he made no provision for his unborn child, Zebbie Witherington. She was his only child. Under C. S., 4169, she was entitled to the fee-simple title to the property. The question of dower does not arise, as Z. V. Witherington's mother owned a life estate in the land at the time of his death.

In *Nicholson v. Nicholson,* 190 N. C., p. 123, it was said: "B. B. Nicholson having died leaving a widow and after-born son for whom he made no provision in his will; the statute says that this son shall be entitled to such share and proportion of the parent's estate as if he had died intestate. . . . In the case of *Flanner v. Flanner,* 160 N. C., 126, Lizzie H. Flanner made a will as follows: 'I give, grant and devise to my beloved husband, William H. Flanner, all my property of every kind, real, personal and mixed.' The will was made 16 May, 1891. On 7 February, 1892, William B. Flanner, Jr., was born of the marriage and thereafter Lizzie H. Flanner died. The Court in the case held that no provision was made for the child. See *Rawls v. Ins. Co.,* 189 N. C., 268."

The serious question presented: Zebbie Adams and her husband on 19 January, 1920, filed a caveat to the will of her father, Z. V. Witherington. The plea of the statute of limitation was set up and the court decided that the caveator, Zebbie Adams, was barred. 186 N. C., 152. The present suit was instituted by Zebbie Adams while the caveat filed by her was pending.

The defendants contend: "The simple legal question involved is whether or not under the record both in the caveat case and the instant case, the plaintiffs are estopped, they having had an opportunity to present all matters involved here in the caveat case."

The caveat filed by Zebbie Adams was, in part, as follows:

"That Zebbie Adams, caveator above named, is the only child of the said Z. V. Witherington; that she was born on 2 July, 1893, six days after the death of her father, and that she intermarried with the plaintiff, J. Q. Adams, on 14 January, 1914.

"That the paper-writing aforesaid, purporting to be the last will and testament of Z. V. Witherington is not his will, for that as caveators are informed and believe, the signature to the same was obtained by undue influence and duress," etc.

We said in *Cook v. Sink,* 190 N. C., 625: "They cannot 'blow hot and cold in the same breath.' Any other view would be inequitable and unconscionable. Plaintiff or the other devisees cannot take inconsistent positions. 'Upon the principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming under it, to attack any of its provisions. . . . So, also, one who accepts the terms of a deed or other contract must accept the same as a whole; one cannot accept part and reject the rest.' Bigelow on Estoppel, 6 ed., p. 744. *Fort v. Allen,* 110 N. C., 191; *Chard v. Warren,* 122 N. C., 86; *Freeman v. Ramsey,* 189 N. C., 790. 'Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct to the prejudice of another.' 16 Cyc., p. 785; *Holloman v. R. R.,* 172 N. C., 376."

In the present case—Zebbie Adams did not take inconsistent positions to the prejudice of anyone. If the will of Z. V. Witherington was set aside for undue influence, etc., she was the only child of her father and would inherit his property. If the will was not set aside, he having made no provision for her, under C. S., 4169, she would still be entitled to his property.

Hoke, J., speaking to the question in *Pritchard v. Williams,* 175 N. C., p. 322, says: "It is only when *two rights are inconsistent* that the party is put to his election, and that the exercise of one or the failure to do so bars the other." *Tyler v. Capehart,* 125 N. C., 64; *Fleming v. Congleton,* 177 N. C., 188; *Randolph v. Edwards, ante,* 334; *Gilbert v. McCreary,* 12 A. L. R., p. 1172 (W. Va., 104 S. E., 273).

In *McGehee v. McGehee,* 189 N. C., 560, *Stacy, C. J.,* says: " '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."

On the record we cannot hold that plaintiff is estopped. She does not come within the old legal sayings: "Not having spoken when she should have been heard, she should not be heard when she should be silent." *Engineering Co. v. Boyd, ante,* 143, and *Pass v. Lea,* 32 N. C., p. 410, cited by defendants are not inconsistent with the position here taken.

The law is said to be "favorable to the utility of the doctrine of estoppel, hostile to *its technicality.*" *Lord Bramwell* said: "Estoppels are odious, and the doctrine should never be applied without a necessity for it." Shirley's Leading Cases in the Common Law, 3rd English Ed., p. 410.

For the reasons given, there is

Error.

LESLIE AVERY v. ADA T. BRANTLEY, ADMINISTRATRIX OF EDNA EARLE AVERY, ADA T. BRANTLEY, INDIVIDUALLY AND THE NATIONAL SURETY COMPANY, A CORPORATION.

(Filed 17 March, 1926.)

1. Negligence—Wrongful Death—Damages—Trusts—Descent and Distribution—Statutes—Executors and Administrators.

The administratrix recovering damages for the wrongful death of her intestate, C. S., 160, holds the money so received in trust for the benefit of those who may be entitled thereto under the canons of descent.

2. Descent and Distribution—Statutes—Husband and Wife—Parent and Child—Abandonment—Divorce.

Where the husband has abondoned his wife and infant child, and the wife has obtained a divorce, and while still an infant a recovery is had for its wrongful death by her mother, who has again married, and has qualified as administratrix of her infant child, under the provisions of C. S., 137, subsec. 6, casting the inheritance upon the father and mother

under stated conditions when both are living, the father is entitled to half the money recovered by the mother for the wrongful death of their infant child, though under a separate statute he has lost the right to its care and custody by a former adjudication of the court in the wife's action for divorce.

3. Statutes—In Pari Materia—Parent and Child—Inheritance—Abandonment.

C. S., 137, as to the inheritance of the father and mother, etc., dying without leaving husband, wife or child, and C. S., 189, depriving the parent of the care, custody and services of the child in case of abandonment, are not *in pari materia.*

APPEAL by plaintiff from *Bond, J.,* and a jury, at November Term, 1925, of CRAVEN. Reversed.

This was a civil action in which the plaintiff by a petition before the clerk sought to obtain one-half of the money recovered by the defendant administratrix in a civil action theretofore tried in the Superior Court of Craven County. The plaintiff's petition was denied. An issue of fact was raised and the cause was transferred to the civil issue docket and tried at the November Term of the Superior Court. From the pleadings the following facts were admitted:

"First. That on 13 August, 1923, Edna Earle Avery, of the age of four years, came to her death through wrongful and negligent acts of the Benevolent Protective Order of Elks Lodge No. 764, New Bern, N. C., etc.

"Second. That Ada T. Avery, now Ada T. Brantley, qualified as administratrix of the estate of the said Edna Earle Avery on 27 August, 1923, and brought suit for negligence against said Elks Lodge, as more fully appears by the judgment roll in said action in the office of the clerk, and the said administratrix gave the National Surety Company, a corporation, as her surety.

"Third. That at the May Term, 1925, of the Superior Court of Craven County, the said administratrix recovered judgment against the said Elks Lodge for $2,000 on account of the wrongful and negligent death of the said Edna Earle Avery, as above recited and the sum of $2,000 was duly paid to the said administratrix after she gave bond, and is now in her custody.

"Fourth. That at the time of her death the said Edna Earle Avery was four years of age and unmarried, and died without leaving any husband or child or issue of a child, but leaving a father, Leslie Avery, the petitioner, and a mother, Ada T. Avery, now Ada T. Brantley."

Plaintiff then moved for judgment. Motion was denied and the court submitted the following issue to the jury: 'Did the plaintiff Leslie Avery, he being the father, wilfully abandon the care, custody, nurture

and maintenance of Edna Earle Avery to its mother, and thereby forfeit all rights to the care, custody and services of said Edna Earle Avery.' The jury answered the issue 'Yes,' and the judge signed the judgment set out in the record which adjudges that the plaintiff is not entitled to recover any part of the funds in controversy."

The plaintiff made numerous exceptions, assigned error and appealed to the Supreme Court.

The material assignments of error are:

"1. The court erred in refusing to grant the plaintiff's motion for judgment on the admitted facts.

"2. The court erred in refusing to sign the judgment tendered by plaintiff on admitted facts.

"3. The court erred in submitting the issue as above set forth."

D. L. Ward and W. B. Rouse for plaintiff.

Guion & Guion and H. P. Whitehurst, for defendant.

CLARKSON, J. The plaintiff, Leslie Avery and his wife, Ada T. Avery, (now Ada T. Brantley) had one child, Edna Earle Avery, who, when about four years old, on 13 August, 1923, was wrongfully and negligently killed by the Benevolent Protective Order of Elks Lodge No. 764, New Bern, N. C. Her mother, Ada T. Avery (now Brantley) qualified as administratrix and brought suit against the Elks Lodge and recovered $2,000. The plaintiff claims, as the father of the child, one-half of the recovery. The only question for our determination—is he entitled to it? We are of the opinion that he is, and the exceptions and assignments of error by plaintiff are well taken.

C. S., 160 is as follows: "When the death of a person is caused by a 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 his or their executors, administrators, collectors or successors, shall be liable to an action for damages, to be brought within one year after such death, by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy. In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence."

The distribution of personal property in case of intestacy referred to, is as follows: "C. S., 137, subsec. 6: If, in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate shall be equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent shall be entitled to the whole of the estate. The terms 'father' and 'mother' shall not apply to a step-parent, but shall apply to a parent by adoption."

In *Broadnax v. Broadnax,* 160 N. C., p. 435, it is said: "In the *Baker case* (*Baker v. R. R.*, 91 N. C., 310), the Court says: 'The administrator thus occupies the place of trustee, for a special purpose, of such fund as he may obtain by the suit, holding it when recovered solely for the use of those who are entitled under the statute of distributions, free from the claims of creditors and legatees, and subject only to such charges and expenses, inclusive of counsel fees and his own commissions, as may have been reasonably incurred in prosecuting and securing the claim. Diminished by these deductions, the remaining duty is to pay over to the distributees'; and in the *Hartness case* (*Hartness v. Pharr,* 133 N. C., 566): 'It must be borne in mind that, whatever the varying forms of the statutes may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person, or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; and this is so although the personal representative may be designated as the person to bring the action. The latter does not derive any right, title, or authority from his intestate, but sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration. *Vance v. R. R.,* 138 N. C., 463; *Dowell v. Raleigh,* 173 N. C., 197.

Under the statute of distribution plaintiff is clearly entitled, under the admitted facts, to one-half of the recovery had by the administratrix. This right is given in certain language "estate shall be equally divided between the *father* and *mother.*"

It is contended by defendant, mother of the child, and administratrix, that plaintiff abandoned the child and forfeited all rights to the fund, and relies on C. S., 189, which is as follows: "In all cases where the parent or parents of any child has wilfully abandoned the care, custody, nurture and maintenance of the child to kindred, relatives or other persons, such parent or parents shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child."

We must trace this section. In the Revisal of 1905, chap. 2. "Adoption of minor children," sec. 180, is as follows: "Right to custody forfeited by abandonment. In all cases where the surviving parent of any orphan child shall have wilfully abandoned the care, custody, nurture and maintenance of any orphan child to kindred, relatives or other persons, such parent shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of such child."

This was taken from Public Laws, 1885, chap. 120, sec. 1, entitled "An act in the interest of certain orphan children of the State." This was amended by Public Laws, 1909, chap. 917, and with the amendment we have C. S., 189, *supra.* This entire legislation is in reference to the adoption of minor children and has nothing to do with the death by wrongful act. C. S., 160. It cannot be construed *in pari materia,* as it relates to an entirely different subject.

If there was an abandonment under sec. 189, and so found by the jury, the effect of the statute was only to forfeit all rights to the *care, custody and services of the child.* This in no way had any bearing on a recovery for the wrongful death of the child, C. S., 160, and the distribution of the fund under C. S., 137, subsection 6. We cannot stretch the language of the statute, C. S., 189, to meet the facts in the present case. To do so we would make and not construe the law.

From the record, the lives of the litigants present a pathetic tragedy. It seems from the record that it took "two to make a quarrel." The record discloses that the contest is between the father and mother over money recovered for the wrongful killing of their child. The mother of the child has obtained a divorce from the plaintiff, her former husband, and has married again. For plaintiff's misconduct he was convicted of an assault on his wife and compelled to leave the State. He was afterwards pardoned and on the argument it was said that he has mended his ways.

The defendant, Mrs. Ada T. Brantley, says: "I am now married again and living in Winston-Salem. My husband is in the real estate business. I do not work. I have a comfortable home and get along very well with my husband. I was 18 years old when I married Avery, and he was nearly twenty."

While the mother was away, in Wilmington, the child fell through the elevator shaft and was killed. Suit was brought and a settlement was made for the wrongful death. Under the law as written, the father and mother are entitled each to one-half of the recovery.

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

Reversed.

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

(Filed 17 March, 1926.)

1. Appeal and Error—Opinions—Estoppel.

In this action to recover from a defaulting clerk of the Superior Court moneys alleged by the plaintiff to belong to him, the opinion of a former appeal by various claimants remanding the cause, permitting other claimants to come in and plead, was not an estoppel upon the plaintiff in the instant case on appeal.

2. Evidence—Pleadings—Admissions.

Evidence offered on the trial of an action as to matters admitted in the pleadings, is irrelevant to the issues raised by the pleadings in respect thereto.

3. Evidence—Counterclaim—Pleadings.

Evidence offered to prove an unpleaded counterclaim is properly stricken out by the trial judge on motion.

4. Trials—Questions for Jury—Evidence—Issues.

Conflicting evidence upon issues raised by the pleadings is for the jury to determine.

5. Instructions—Appeal and Error.

The charge of the judge to the jury upon the issues arising from the pleadings in the case, is to be construed from its related parts taken as a whole.

CIVIL ACTION before *Bond, J.*, Fall Term, 1925, of PAMLICO.

This case was heard in the Supreme Court at the Fall Term, 1923, and is reported in 186 N. C., p. 127. Upon petition, it was reheard, and the decision of the court is reported in 188 N. C., p. 119. It was again appealed to the Supreme Court and the opinion of the Court is reported in 189 N. C., at p. 247. The facts relating to the history and course of the controversy are found in the printed reports referred to and for this reason will not be repeated.

There are two appeals. The first appeal is on behalf of the plaintiff, Lee, and others, growing out of a claim of $1,172.14. The other is an appeal by the defendant, Casualty Company, on a judgment upon the verdict for claim of $1,040.95.

Z. V. Rawls for plaintiffs.

F. C. Brinson, Ward & Ward for defendants.

BROGDEN, J. In the appeal reported in 189 N. C., p. 247, *Stacy, J.*, said: "Our original opinion (186 N. C., 127) 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, realtor's 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."

It was further held that the plaintiffs should have the right and opportunity to present their claims and permission was given to amend the pleadings, if necessary, to properly present the disputed questions.

The above opinion was rendered in March, 1925. Thereafter in April, 1925, plaintiffs filed an amended complaint, paragraph 3 being as follows: "That by virtue of the color of his office as clerk Superior Court of Pamlico County, the defendant, E. E. Martin, on 20 June, 1917, received as a fund paid into court for plaintiff, by L. J. Upton & Company of $1,172.14. The defendants, answering said paragraph 3, say: "That allegation 3 is not denied."

The fifth allegation of said amended complaint filed by the plaintiff is as follows: "That on 20 October, 1919, plaintiff demanded of the defendant, E. E. Martin, clerk Superior Court, the payment of $1,172.14, the said sum having been received by the defendant, Martin, by virtue and color of his office as a fund paid into court for plaintiff, and payment thereof was refused." The defendant, answering paragraph 5 of the complaint, says: "That as to allegation five, it is admitted that plaintiff demanded the payment of $1,172.14 on 20 October, 1919, and the remainder of allegation five is denied, and it is averred that up to the time of said demand on 20 October, 1919, the plaintiff had declined and refused to accept the money."

Thereafter on 10 November, 1925, and during the term at which this action was tried, the plaintiff, without any order of court, so far as this record discloses, presented a reply, paragraph three of which was as follows: "It is admitted that the said fund of $1,172.14 was paid into court, 20 June, 1917, by Upton & Company, as a tender to plaintiff, and that the case of *Lee v. Upton* is reported in 178 N. C., p. 198, *but it is averred that the said fund was misappropriated and embezzled by the defendant, Martin, on* 20 *June,* 1917, *the date of the receipt of said fund, by the defaulting clerk.*"

The defendants thereupon made a motion to strike out from said reply the allegation as to misappropriation on 20 June, 1917, and the judge

allowed the motion, striking out from said reply the foregoing words shown in italics. The plaintiff excepted and assigned the action of the judge as error.

The plaintiff further attempted to show by the vice-president of the bank that the Upton check of $1,172.14, payable to E. E. Martin, was deposited in the bank in June, 1917, by E. E. Martin to his personal account, and that said E. E. Martin at said time did not have an official account in this particular bank. The defendant objected to this testimony and the objection was sustained by the trial judge.

It should be observed in the outset that the check for $1,172.14 does not appear to have been made to E. E. Martin as clerk but merely to E. E. Martin; and further, the fact that E. E. Martin as clerk had no official account in a particular bank would be no proof of the fact as to whether he carried an official account at all. The defendants, however, objected to the testimony upon the further ground that it was alleged in the amended complaint and admitted in the answer that the defalcation occurred on or after 20 October, 1919; and further, that there is no allegation in any of the pleadings, except the reply referred to, as to any defalcation, except the allegations already designated.

It is an elementary rule that issues arise upon the pleadings, and, if a fact is alleged by one party and admitted by the other, no issue arises therefrom, but both parties are bound by the allegation so made, and evidence offered in relation thereto is irrelevant. *Geer v. Brown,* 126 N. C., 240; *Tucker v. Wilkins,* 105 N. C., 272. In *Grant v. Gooch,* 105 N. C., 278, the rule is stated thus: "The complaint alleges that there was no money paid, and the deed was the voluntary act of the grantor, and this allegation is not denied in the answer. The fact is, therefore, admitted, and the effect of the admission is as available to the plaintiff as if found by the jury."

The exception relating to the action of the trial judge in striking out a portion of the reply is untenable. No counterclaim was pleaded in the answer, and, in addition, the new matter in the reply was inconsistent with the complaint. C. S., 525. The plaintiffs did not request permission to amend as provided by C. S., 547, and, even if this had been done, the power to permit an amendment or to permit the filing of reply was lodged in the discretion of the trial judge. *Brewer v. Ring and Valk,* 177 N. C., 476; *Fay v. Crowell,* 184 N. C., 415; *Warrington v. Hardison,* 185 N. C., 76; *Currie v. Malloy,* 185 N. C., 206.

The plaintiffs move in the Supreme Court for a writ of certiorari directing the clerk of Pamlico County to send up the order of said clerk made on 2 November, 1925, extending time for plaintiffs to file reply to 10 November, 1925. For the reasons stated the motion is denied.

We find no error in plaintiffs' appeal.

STATE *v.* MARTIN.

APPEAL OF DEFENDANT, CASUALTY COMPANY.

In the defendant's appeal the issues and answers of the jury thereto were as follows: (1) What amount, if any, of the fund of $1,040.95 of the E. E. Martin defalcation occurred prior to the first Monday in December, 1918? A. All of it. (2) If there was a defalcation on any part of said amount prior to the first Monday in December, 1918, when did such defalcation or defalcations occur? A. Prior to 31 May, 1918. (3) What amount of the said fund of $1,040.95 was defaulted on after the 1st Monday in December, 1918, and prior to 7 February, 1921? A.....

There were exceptions as to the ruling of the trial judge upon motion of nonsuit, and to the refusal to give certain instructions requested by the defendant, and there were further exceptions to portions of the charge of the court to the jury. The record discloses that there was competent evidence upon the issues submitted. The evidence was conflicting, it is true, but its weight and credibility was for the jury. Construing the charge in its entirety, there is no reversible error disclosed. The issues involved simple questions of fact and the judgment upon the verdict must be sustained.

No error.

STATE EX REL. W. J. SWANN, ADMINISTRATOR OF NATHAN CAHOON, DECEASED, V. E. E. MARTIN AND NEW AMSTERDAM CASUALTY COMPANY.

(Filed 17 March, 1926.)

1. Conspiracy—Evidence—Fraud—Proximate Cause.

In order to raise an issue of conspiracy between an administrator and a clerk of the court, under allegation that the former had loaned to the latter moneys belonging to the estate without requiring a sufficient bond, the evidence may be circumstantial, but it must raise more than a conjecture of the conspiracy alleged, and show an unlawful act on the part of the alleged conspirators which proximately caused the loss complained of.

2. Instructions—Limitation of Actions—Evidence—Directing Verdict—Appeal and Error—Harmless Error.

An instruction upon the running of the statute of limitations directing an answer to the issue, in an action alleging conspiracy, is immaterial when the evidence is not sufficient to sustain the allegation.

CIVIL ACTION tried before *Bond, J.*, at Fall Term, 1925, of PAMLICO.

Summons was issued 19 September, 1925. Summons was served on the defendant, Martin, 26 September, 1925, and on the New Amsterdam Casualty Company 22 September, 1925.

There were two causes of action set out in the complaint. It was alleged as a first cause of action that the defendant Martin was clerk of the Superior Court of Pamlico County; that the first term of said clerk began on 8 December, 1914, and he was reëlected for a second term and inducted into office for the second term on the first Monday in December, 1918, and that New Amsterdam Casualty Company was surety on his official bond.

It was further alleged that Paul D. Cahoon, administrator of the estate of Nathan Cahoon, deceased, entered into a wrongful and unlawful conspiracy and collusion with said clerk in pursuance of which the said administrator loaned to said clerk, without security, the sum of $2,040 belonging to the estate of the decedent, Nathan Cahoon, with intent to cheat and defraud the estate of said deceased, and that the said clerk required said administrator to give an insufficient bond.

It was further alleged that the defendant, New Amsterdam Casualty Company, was also bondsman for the administrator, Paul D. Cahoon, said bond being in the penal sum of $1,000.

The evidence offered at the trial tended to show that the administrator had loaned the clerk about $2,000, and that subsequently the administrator Cahoon had brought suit against said clerk and secured a judgment.

Upon the second cause of action alleged, it appears from the record that the full penalty of the bond of the administrator, Paul D. Cahoon, was paid by said Casualty Company, bondsman, to one B. F. Griffin, guardian, as a result of an action entitled State ex rel. B. F. Griffin, Guardian, v. Paul D. Cahoon and New Amsterdam Casualty Company, to which said action all of the creditors of the estate of Nathan Cahoon, deceased, were parties.

The facts relating to the various aspects of this litigation appear in 186 N. C., 127; 188 N. C., 119; 189 N. C., 247; and 189 N. C., 254, and for that reason it is unnecessary to repeat them.

The issues submitted to the jury and the answers to said issues were as follows: (1) Did the defendant, Martin, and Paul D. Cahoon, administrator of the estate of Nathan Cahoon, enter into a conspiracy to cheat and defraud the estate of Nathan Cahoon, as alleged in the complaint? A. No. (2) Did the defendant, Martin, neglect to require the said administrator to give a good and sufficient bond, as alleged in the complaint? A. Yes. (3) Did the defendant, Martin, embezzle funds belonging to the estate of the said Nathan Cahoon, as alleged in the complaint? A. No. (4) What amount, if anything, is plaintiff entitled to recover on the penal sum of the bond of Paul D. Cahoon, in his second cause of action? A. Nothing. (5) Did defendant, New Amsterdam Casualty Company, pay the $1,000 penalty of the administration bond signed by it with P. D. Cahoon, administrator of Nathan Cahoon,

and set out in the second cause of action, on judgment rendered against it as set out in the answer? A. Yes. (6) If so, were C. S. Weskett & Company and H. J. Kennedy as C. H. Fowler & Company, the only unpaid creditors of the Nathan Cahoon estate and W. J. Swann, administrator *de bonis non,* parties to the litigation in which the matter was adjudicated, as alleged in the answer? A. Yes. (7) Is the plaintiff's cause of action set out as the first cause of action in the complaint barred by the statutes of limitation as against the defendant, New Amsterdam Casualty Company? A. Yes. (8) Are plaintiff's causes of action as set out in the first cause of action barred by the statutes of limitation as against E. E. Martin? A. Yes.

From judgment on the verdict the plaintiff appealed.

Z. V. Rawls for plaintiff.
F. C. Brinson, Ward & Ward for defendants.

BROGDEN, J. The first cause of action is based upon an alleged conspiracy between the defaulting clerk of Pamlico County and Paul D. Cahoon, administrator of the estate of Nathan Cahoon, deceased. An issue involving the question of conspiracy was submitted to the jury under instructions by the court to answer it in the negative.

On this aspect of the case, therefore, the only question to be determined is whether or not there was any evidence of conspiracy.

It appeared that the administrator had collected about $2,000 belonging to the estate of the decedent, and that this sum had been loaned by the administrator to the clerk without security. It further appeared that the administrator had not made all the reports as required by statute.

A conspiracy has been defined to be "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." *S. v. Dalton,* 168 N. C., 204.

A conspiracy has been further defined as a "combination among two or more persons to accomplish, by concerted action, an unlawful purpose, or a purpose, not in itself unlawful, by unlawful means. But whether it is a wrongful or illegal conspiracy depends not upon the name given by the pleader, but upon the quality of the acts charged to have been committed. If these acts are not wrongful or illegal, no agreement to commit them can properly be called an illegal and wrongful conspiracy." *Ballentine v. Cummings,* 70 Atl., 548.

A conspiracy may be proved by circumstantial evidence because in questions involving conduct of men the certainty of mathematical precision cannot be obtained nor is such required. *S. v. Knotts,* 168 N. C., 188.

In *Shields v. Bank,* 138 N. C., 185, the question of conspiracy in civil actions was under consideration by *Justice Hoke.* In disposing of the question at issue in that case this language was used: "It must be proved as well as alleged that the plaintiff entered into a conspiracy to cheat and was a participant in a fraudulent purpose, either in the scheme or its execution, which worked injury to the defendant as a proximate consequence."

However, the proof must be sufficient to create more than a suspicion. Testimony that raises no more than a suspicion is not sufficient to be submitted to a jury as evidence of guilt. *Perry v. Ins. Co.,* 137 N. C., 404. The principle is thus stated in *Brown v. Kinsey,* 81 N. C., 245: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the court will not leave the issue to be passed on by the jury." *Sutton v. Madre,* 47 N. C., 320; *Liquor Co. v. Johnson,* 161 N. C., 77; *Seagrove v. Winston,* 167 N. C., 207; *S. v. Bridgers,* 172 N. C., 882; *S. v. Prince,* 182 N. C., 790. A fair interpretation of plaintiff's first cause of action, as alleged, compels the conclusion, that conspiracy is the sole foundation of the remedy sought.

Applying the law to the facts disclosed in the record, we hold that there was no evidence of a "wrongful and unlawful conspiracy and collusion between the defendant and the said administrator to cheat and defraud the estate of Nathan Cahoon," sufficient in probative value to create more than a conjecture or suspicion.

Upon the second cause of action upon the $1,000 bond of Paul D. Cahoon, administrator of Nathan Cahoon, it appears that the entire penalty of said bond has been paid by New Amsterdam Casualty Company to B. F. Griffin, guardian. This second cause of action is disposed of in the opinion of *Justice Connor* rendered in this cause and reported in 189 N. C., 254.

Exception to the charge of the trial judge upon the issue relating to the statute of limitations in the first cause of action becomes immaterial by reason of the fact that this cause of action was based upon conspiracy, and the jury found no conspiracy existed. Exception to the charge of the trial judge upon the issue relating to the statute of limitations upon the second cause of action is likewise immaterial because the decision of the Court in 189 N. C., p. 254, precluded the assertion of the second cause of action at all. The judgment must therefore be

Affirmed.

ALBERT FULCHER v. PINE LUMBER COMPANY.

(Filed 17 March, 1926.)

1. Jurors—Qualification—Principal and Surety—Corporations—Interest.

An agent or employee of an indemnity corporation, surety on the plaintiff's prosecution bond, is incompetent to sit on the jury in the trial of an action to recover damages for a negligent personal injury against its principal.

2. Jurors — Examination as to Interest — Corporations — Principal and Surety—New Trial—Appeal and Error—Parties.

A party to the action may in good faith question a juror being passed upon by him as to whether the juror was employed by the corporation, surety on the prosecution bond, though the surety is not a proper party to the action, and such is insufficient to grant a new trial on appeal.

3. Instructions—Appeal and Error—Harmless Error—Negligence—Contributory Negligence—Evidence.

While contributory negligence of a plaintiff, employee of defendant lumber company, will bar him of recovery for an injury negligently inflicted on him, when the proximate cause, an instruction to that effect will not be held for reversible error when there is not introduced upon the trial any evidence which tends to show contributory negligence on the plaintiff's part.

STACY, C. J., concurring in result.

APPEAL by defendant from *Bond, J.*, at November Term, 1925, of CRAVEN. No error.

Action to recover damages for personal injuries, sustained by plaintiff while at work as an employee of defendant. The issues, with answers thereto, were as follows:

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

2. Did the defendant by his own negligent conduct contribute to and cause his said injury? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover? Answer: $5,000.

From judgment on this verdict, defendant appealed to the Supreme Court.

D. L. Ward for plaintiff.
Moore & Dunn for defendant.

CONNOR, J. Defendant's first assignment of error is based upon an incident, occurring during the trial, and stated in the case on appeal as follows:

"The plaintiff, in examining the jury, asked the question, 'Is there any member of the jury in the employ of the Thomas Masten Indemnity Insurance Company or Association?'"

When the question was asked, the judge called the attorneys for plaintiff and defendant to the bench, and in an undertone, not heard by the jury, asked why plaintiff's attorneys desired to ask the question. Plaintiff's attorneys, in an undertone, not heard by the jury, said to the judge that Mr. Asa, agent of the Thomas Masten Indemnity Association, a mutual concern composed of lumber manufacturers, and then present, had tried to settle the case with them, and had stated to them that his association had insured defendant against loss in cases of this kind, and that Mr. Aberly (manager of defendant company) had also said that defendant was a member of the Masten Association, and that plaintiff's attorneys desired to ascertain if any member or agent of the association was on the jury. His Honor decided that the question was asked in good faith.

The defendant objected; objection overruled, and defendant excepted. It does not appear whether any of the jurors answered the question or not; therefore, the question as to whether or not an affirmative answer to the question by a member of the jury would have been ground for a challenge for cause is not presented. His Honor held only that the question, asked in good faith, was not subject to objection. There was no motion by defendant for any instruction to the jury, relative to the matter, then or thereafter during the trial, or for a continuance on the ground that the question was an intimation, at least, to the jury, by plaintiff's attorneys, that defendant was protected by indemnity insurance against any damages which it might have to pay to plaintiff, by reason of the verdict in this case. Having been informed by both the manager of defendant company, and the agent of the indemnity association, that the association and not the company, by reason of the contract of insurance, would pay such damages as plaintiff might recover, attorneys for plaintiff not only had the right, but it was also their duty to ascertain by questions addressed to jurors tendered to plaintiff, what relationship, if any, existed between members of the jury and the association, which was interested in the verdict. The fact that a juror was an agent or member of the association which would ultimately pay the damages assessed by the jury, if any, would affect the competency of the juror to serve in this case; it would have weight with the attorneys for plaintiff, at least, in determining whether they should challenge the juror, peremptorily.

In *Blevins v. Cotton Mills,* 150 N. C., 493, it is held that an employee is not a competent juror for the trial of a cause involving the rights or interests of his employer. In *Norris v. Mills,* 154 N. C., 474, it is

held that it is proper for the attorney for plaintiff, in good faith, to ask jurors as to their relationship, if any, to a casualty company, where it is admitted that the defendant is insured by the casualty company, with respect to the damages which plaintiff is seeking to recover in the action. See, also, *Walters v. Lumber Co.*, 165 N. C., 389, and *Oliphant v. R. R.*, 171 N. C., 304. In *Lytton v. Mfg. Co.*, 157 N. C., 332, it is said that "evidence that the defendant in an action for damages arising from an injury is insured in a casualty company is entirely foreign to the issues raised by the pleadings and is incompetent. By some courts it is held to be so dangerous as to justify another trial, even when the trial judge strikes it from the record." It is said, however, in *Bryant v. Furniture Co.*, 186 N. C., 441, that where the fact, that defendant charged with negligent injury of plaintiff held a policy of indemnity insurance against damages which might be recovered for such injury, is brought out on the trial merely as an incident on cross-examination or otherwise, it will not always or necessarily constitute reversible error. See *Gilland v. Stone Co.*, 189 N. C., 783; *Allen v. Garibaldi*, 187 N. C., 798; *Davis v. Shipbuilding Co.*, 180 N. C., 74. Also, *Deligny v. Furniture Co.*, 170 N. C., 189; *Starr v. Oil Co.*, 165 N. C., 587; *Featherstone v. Cotton Mills*, 159 N. C., 429.

We cannot hold, where an attorney for a party to an action, in the performance of his duty, and in the exercise of his right, as such attorney, inquires of jurors tendered to plaintiff, if any of them sustains such relation to an association or corporation, not a party to the action, which he knows or in good faith believes has an interest in the verdict which may be rendered, by reason of a contract, indemnifying the adverse party from loss by reason of such verdict, as would render the juror incompetent if such association or corporation was a party to the action, that the inquiry is in itself so prejudicial to defendant that defendant is entitled to have an adverse verdict set aside and the judgment reversed for this reason alone. The association or indemnity company is not ordinarily a proper party to the action, *Clark v. Bonsal*, 157 N. C., 270; it has, however, such an interest in the result of the action that no agent or employee can be held a competent juror to pass upon the issues between the plaintiff and the defendant of record. Plaintiff is entitled to know before the jury is empaneled, whether any juror is an agent of such a corporation, or a member of such an association. The contract between defendant and such association or corporation cannot be shown on the trial, for it is foreign to the issues, either of liability or damages determinative of the controversy between plaintiff and defendant; it does not follow, however, that it is reversible error for the judge to permit the inquiry upon examination of the jurors, prior to the empaneling of the jury. As to whether the question is asked in good

faith, or as to whether the adverse party has been prejudiced by the inquiry addressed to the jurors, before the jury is empaneled, must be left to the trial judge to determine in his discretion. An exception must ordinarily be addressed to a ruling by the judge. Upon this record, defendant made no motion and asked no instruction to the jury with respect to the inquiry made of the jurors by plaintiff's attorney. The assignment of error is not sustained.

We have examined the assignments of error based upon exceptions to the evidence offered by plaintiff, and to the refusal of defendant's motion for judgment as of nonsuit, at the close of all the evidence; we do not deem it necessary to discuss these assignments *seriatim:* they cannot be sustained.

Defendant complains chiefly of the following instruction to the jury, upon the second issue:

"The defendant sets up contributory negligence. Contributory negligence is such conduct on the part of the plaintiff as shows that he failed to do what under the exact conditions a reasonably prudent man would have done, or that he did an act which under those conditions a reasonably prudent man would not have done. Like an action based upon negligence, it must have been the proximate cause of the injury." Defendant excepted to this instruction and assigns same as error. Defendant contends that, if the jury, having found that plaintiff was injured by the negligence of defendant as alleged in the complaint, and having therefore answered the first issue "Yes," should further find that the negligence of plaintiff contributed to his injury as one of the causes thereof, they should in accordance with a proper instruction, have answered the second issue, "Yes"; that it was error to instruct the jury, in effect, that they must find that the negligence of plaintiff was the proximate cause of the injury in order to find that it was contributory negligence as alleged in the answer. This contention of defendant is supported by *Construction Co. v. R. R.,* 184 N. C., 179, and *Lea v. Utilities Co.,* 176 N. C., 511, cited in defendant's brief. Contributory negligence on the part of plaintiff, except where otherwise provided by statute, is held to bar recovery of damages resulting from the negligence of defendant if such contributory negligence concurs with the negligence of defendant, as a proximate cause of the injury. It implies *ex vi termini* that the negligence of defendant is a cause of the injury. It must be conceded that the instruction as set out in the case on appeal is not accurate; we cannot hold, however, that there is reversible error, upon the facts of this case.

All the evidence is to the effect that plaintiff, a man 60 years of age, was at work under the immediate direction and supervision of the manager of defendant company; that two wheels of a truck loaded with

lumber had got off the track; plaintiff was directed by the manager to aid in getting the truck back on the track; one wheel was pried up; while plaintiff was helping to raise the other, the lumber which was piled 12 to 14 feet on the truck, slid off and mashed him to the ground. Plaintiff sustained serious and permanent injuries. The jury has found that it was negligence for defendant to require plaintiff to work at the lower end of the truck, on which was piled lumber 12 to 14 feet high; that a prudent man, with reasonable foresight, would have foreseen that the lumber would probably slide off and mash the men who, under the direction of defendant's manager, were at work, endeavoring to raise the truck; that this negligence was the proximate cause of the injury.

A careful reading of the testimony of all the witnesses, as set out in the case on appeal, fails to disclose any evidence of contributory negligence on the part of plaintiff. We find no reversible error. The judgment should be affirmed. There is

No error.

STACY, C. J., concurring in result.

DURHAM CARNEGIE v. JOE PERKINS.

(Filed 17 March, 1926.)

1. Landlord and Tenant—Title—Possession—Vendor and Purchaser—Contract of Rent—Statutes.

A tenant may not continue in possession of the leased premises and deny his landlord's title by setting up a superior or outstanding title in himself, nor where he continues in possession under a former owner and contracts with a purchaser to pay him rent, can he assert ownership of title in himself. C. S., 1473, 1476, 1477, 1478.

2. Evidence—Nonsuit—Landlord and Tenant—Possession—Title—Trials.

On a trial on appeal to the Superior Court in a summary action of ejectment, where the question involved is whether a tenant holding over the possession from a former owner had agreed to pay rent to the purchaser, and the evidence is conflicting, the question of jurisdiction is determined by the answer of the jury to the issue, and a motion as of nonsuit is properly denied. C. S., 567.

APPEAL by defendant from *Stack, J.*, and a jury, at November Special Term, 1925, of PITT. No error.

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

"1. Did the defendant rent the room in the house in question of the plaintiff and agree to pay one dollar per week therefor, as claimed by the plaintiffs? Answer: Yes.

"2. Does the defendant wrongfully hold over, and has his term expired, as claimed by the plaintiffs? Answer: Yes."

The judgment of the court below was as follows:

"This cause coming on to be heard before his Honor, A. M. Stack, and a jury, upon an appeal from B. F. Tyson, justice of the peace, and being an action by the plaintiff against the defendant on a rental contract for the payment of rent at $1 per week, alleging that the contract was breached by the defendant on 1 May, 1924, and demanding that payment of rent be had and for the possession of the premises and the issues of record having been submitted to the jury wherein the jury say that there was a contract between the plaintiff and the defendant, wherein the defendant agreed to pay $1.00 per week rent for room in the house of the plaintiff and that the defendant wrongfully holds over and that his term has expired and that the plaintiff is entitled to the possession of the property as established by the issues of record and the answers thereto, by the jury. It is now, thereupon, on motion of S. J. Everett, attorney for the plaintiff, ordered, adjudged and decreed that the plaintiff recover of the defendant rent at $1.00 per week from 1 May, 1924, and interest thereon until paid and that by reason of the breach of contract of the defendant the plaintiff is entitled to the possession of the premises unlawfully held by the defendant, Joe Perkins, and it is adjudged that the plaintiff is entitled by reason thereof to the possession of the same and that the cost of this action be taxed against the defendant."

The defendant made numerous exceptions and assignments of error, the main ones will be considered in the opinion.

S. J. Everett for plaintiff.
Julius Brown for defendant.

CLARKSON, J. The only material assignments of error by defendant necessary to be considered, are as follows:

"(1) At the close of the plaintiff's evidence, the defendant moved the court to nonsuit the plaintiff and to dismiss the action.

"(2) At the conclusion of all of the evidence, the defendant renewed his motion to nonsuit the plaintiff and dismiss the action."

Was the court below correct in overruling defendant's motions for judgment as in case of nonsuit? C. S., 567. We think so.

Defendant contended that the following provision was in a deed and agreement made 16 December, 1915, by Puss Harrington to and with

Sam Short, both signing same: "And he further covenants that after the death of the said Puss Harrington her husband's nephew, Joe Perkins, shall have possession and use the one room in said house during his natural life without any charge whatever." That an action of ejectment was brought before a justice of the peace contrary to the provisions in the Constitution of North Carolina, Art. IV, sec. 27—that a justice of the peace has no jurisdiction where the "title to real estate" is in controversy. C. S., 1473.

"C. S., 1476. In every action brought in a court of a justice of the peace, where the title to real estate comes in controversy, the defendant may, either with or without other matter of defense, set forth, in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice."

"C. S., 1477. If it appears on the trial that the title to real estate is in controversy, the justice shall dismiss the action and render judgment against the plaintiff for costs."

C. S., 1478, provides when action dismissed before a justice of the peace another may be brought in Superior Court.

Defendant contends that the action should be dismissed and the motions for judgment as in case of nonsuit should be allowed.

Plaintiff contends that the "title to real estate" is not in controversy. That on 17 October, 1923, he bought a fee-simple title to the land from Col. Harry Skinner and wife, with full covenants of warranty.

Durham Carnegie, testified, in part: "We moved there and found Joe Perkins there. I stayed there a time and got everything straight like I wanted it, and told Joe that he would have to pay me rent, that I had bought the place and showed him where the deed was. I showed him the deed for it. I had bought it and paid for it, from Col. Harry Skinner, and he asked me then how much rent. I told him I would charge him $1 per week for the room. 'Well,' he said, 'I will pay you $1 a week, but I will have to wait a while until I get kinder straight.' . . . When I asked Joe about paying rent he didn't say anything about his owning the property, not to me. He never did make any such statement."

Julia Carnegie, testified, in part: "I know Joe Perkins. I had a conversation with him, or contract with him, in reference to renting a room in my house. When we moved there, I took the deed and read it to him and told him I had a deed and I wanted rent for the room and he said, 'How much?' and I said, 'One dollar a week,' and he said 'All right.' Durham was present when that contract took place. He did not say anything about owning the land or having any interest in it. He did not pay me."

The defendant denied the agreement alleged by plaintiff to pay rent, and testified, in part: "I told them I had a life estate there. My Aunt Puss gave it to me. She raised me and she gave me a life estate. I went there and have been staying there ever since. I told them I had the room and they knew I had it. That was my room, they knew it was my room, they knew it was my room when they moved there, Aunt Puss gave me my room to be mine, and Julia moved Aunt Puss' things in my room, put them in my room. In the case of Grimes v. Sam Short, no papers or summons were served on me. I didn't know anything about the suit."

The court below charged the jury, in part, as follows: "It is not a question of who owns this house, or who owns that room. It does not make any difference as far as this case is concerned, who owns it, but the question is simply whether or not the defendant agreed to pay rent for it, agreed to rent it from the plaintiff. Now, there is this principle of law that when one rents from another that is an admission that he has got some kind of title. The law will not permit a man to dispute one from whom he rents over title. A tenant may sublet and become a landlord himself without any title to the property and yet he can throw out his sub-lessee if the term expires. If there was no renting in this case the plaintiff has no right to go in a court of a justice of the peace and bring this action. He would have to come in to the Superior Court here and allege that he was the owner of the land and the defendant wrongfully detained him and the defendant would deny that such was his claim of title and we would try the title of the room. In this particular case, the title to the land cannot come in, it is only a question of whether or not there was a rental. If the plaintiff didn't rent to the defendant that ends the matter. If he did, then if he didn't comply with his contract, he would have to get out."

The jury answered the issues in favor of plaintiff. The charge of the court is well settled law.

In *Lawrence v. Eller,* 169 N. C., p. 213, *Hoke, J.,* speaking to the subject, and citing numerous authorities, says: "It is recognized as the general rule that a tenant is not allowed to controvert the title of his landlord or set up rights adverse to such title without having first surrendered the possession acquired under and by virtue of the agreement between them." *Alexander v. Gibbon,* 118, N. C., p. 800; *Hobby v. Freeman,* 183 N. C., 241; *Shelton v. Clinard,* 187 N. C., 665.

In *Perry v. Perry,* 190 N. C., p. 126, *Varser, J.,* speaking to the question, says: "Of course, as stated in *Davis v. Davis,* 83 N. C., 71, if the defendant did enter as tenant of the plaintiffs or became such after entry, then he is estopped to deny the plaintiffs' title (16 R. C. L., 469), or to assert title to himself (16 R. C. L., 657), until he has re-

stored the possession to the plaintiff, but he may contest the issue of tenancy by any competent evidence."

There are modifications to this rule, as in the case of *Hargrove v. Cox,* 180 N. C., p. 360, and cases there cited; but, in the present case, the evidence of plaintiff tended to show a direct promise of rental by defendant to plaintiff. The jury found for the plaintiff. The deed to the property was made to Durham Carnegie and wife, Julia Carnegie. The action was properly brought by plaintiff. *Davis v. Bass,* 188 N. C., 200. In the present action, from the jury's finding, defendant is debarred of asserting any equitable right or title he may have in the property.

From the entire record we can find

No error.

E. B. WARREN AND R. L. WARREN v. ARMOUR FERTILIZER WORKS.

(Filed 17 March, 1926.)

1. Contracts—Bills and Notes—Collateral Security—Damages—Instructions—Directing Verdict—Appeal and Error.

Where there is evidence that cotton warehouse receipts were pledged as collateral security to a note under an agreement that the cotton was to be held and sold when the price was satisfactory to the pledgee, and the pledgor breached this agreement to the damage of the pledgee, and there was evidence tending to show that the pledgee was present and assisting at the sale: *Held,* an instruction directing a verdict in the pledgee's favor if they found that pledgor breached his contract, without reference to pledgee's acquiescence, is reversible.

2. Instructions—Corrections—Appeal and Error—Reversible Error.

An incorrect instruction is not cured by another and correct instruction, upon the same phase of the case, and which was not stated by the judge to be a correction of the error, and the jury has been left to choose between the two.

APPEAL by defendant from *Devin, J.,* at November Term, 1925, of HARNETT. New trial.

Action to recover damages for breach of contract and for conversion. The issues submitted to the jury, with answers thereto, are as follows:

1. Did the defendant agree, in consideration of plaintiff's storing 45 bales of cotton as collateral security for its debt, that it would hold said cotton until sale directed by plaintiffs, or until the market reached a price satisfactory to plaintiffs, as alleged in the complaint? Answer: Yes.

2. Did the defendant fail to comply with said agreement? Answer: Yes.

3. What damage, if any, are plaintiffs entitled to recover therefor? Answer: $2,263.58, with interest.

From judgment on this verdict, defendant appealed to the Supreme Court.

Godwin & Williams, Young & Young and Clifford & Townsend for plaintiffs.

Cook & Cook and M. T. Spears for defendant.

CONNOR, J. There was evidence sufficient to support the answer to the first issue. Plaintiffs purchased of defendant, for use in their farming operations for the year 1920, a large quantity of fertilizers, paying therefor $5,000 in cash, and giving their notes for about $8,000, for the balance due on the purchase price. These notes became due in the fall of 1920; plaintiffs were unable to pay the notes, and on account of the falling price of cotton, did not wish to sell their crop. At the request of defendant, they stored in a warehouse at Dunn, N. C., in December, 1920, 45 bales of cotton, taking warehouse receipts therefor, which they assigned and delivered to defendant, as security for their notes, which were then past due. Defendant's agent testified that he told plaintiffs that defendant would hold the cotton for a reasonable length of time. Plaintiff, E. B. Warren, testified that the agreement with defendant was that the cotton should be held until it could be sold for a satisfactory price. On 13 May, 1921, at the request of defendant, plaintiffs executed their note for $1,700, payable to the order of defendant, on or before 1 July, 1921. This note contained the following words: "This note being secured by 45 bales of cotton stored in the warehouse of the General Utilities Co." The amount of the note was the estimated value of the cotton at its date; when paid it was to be credited on the indebtedness of plaintiffs to defendant as evidenced by the notes executed in the spring of 1920, and maturing in the fall thereafter. Plaintiff, E. B. Warren, testified that the agent of defendant agreed at the time of the execution of the note, that if the price of cotton, at the maturity of the note, was not satisfactory to plaintiffs, defendant would not sell the cotton, but would hold it until the price was satisfactory to them. This was denied by the agent of defendant. The jury, however, has found with plaintiffs, and have accordingly answered the first issue, Yes.

The cotton was sold by defendant on 6 July, 1921, at nine and five-eighths cents per pound. Plaintiffs offered evidence that this was not a satisfactory price to them, and that they objected to the sale at this

price. Evidence was offered by defendant tending to show that one of the plaintiffs was present when the cotton was sold, and made the sale in person; that neither of plaintiffs objected to the sale. Defendant denied that there was an agreement as alleged in the complaint, but alleged that plaintiffs consented to and acquiesced in the sale on 6 July, 1921, at nine and five-eighths cents. There was evidence that the market price of cotton in September, 1920, was 20 cents per pound, and that this was a satisfactory price to plaintiffs.

There is no exception to the charge of the court upon the first issue. Upon the second issue, the court instructed the jury as follows:

"If you find by the greater weight of the evidence that defendant made the agreement alleged by the plaintiffs, referred to in the first issue, then your answer to the second issue would also be 'Yes', because it is not denied by defendant; they deny they made any such agreement, but if you find that they did make the agreement, if you find the facts as testified to, you would answer it (the second issue), 'Yes.' " Defendant excepted to this instruction and assigns same as error.

In giving this instruction the learned judge was manifestly inadvertent to the testimony of John H. Cook, who testified that "he was in Dunn on the day the cotton was sold, and saw plaintiff, Dr. R. L. Warren, on the street; that Dr. Warren told him that the bank (which held the note for $1,700, with warehouse receipts for the cotton as collateral, for collection) had received instructions from defendant to sell the cotton; that he was going to handle and sell the cotton himself; that later Dr. Warren told him that he had handled the cotton himself to see that it brought the market price." George M. Floyd testified that he saw Dr. Warren in the bank on 6 July, 1921, and heard him say that he had been selling the cotton he had stored for Armour; that he was hot as the result of his work in selling the cotton. This assignment of error must be sustained.

Later in his charge, his Honor instructed the jury as follows: "On the second issue, the contention on the part of the defendant is that even if there was such an agreement between the parties, it was waived by the acquiescence of the plaintiffs in the sale of the cotton; and if you find that they did acquiesce in the sale and defendant sold it, plaintiffs could not hold defendant for breach of the agreement. If you find those to be the facts, you would answer the second issue 'No'; you could not answer it 'Yes' unless you find by the greater weight of the evidence that defendant failed to comply with the agreement and said failure was not waived or acquiesced in by plaintiffs." Defendant excepted to this instruction and assigns same as error.

Counsel for plaintiffs, in their brief, say that if the former instruction should be held as error, the latter instruction corrects and cures the

error. We cannot so hold. Defendant was not relying upon a waiver by plaintiffs of the agreement, or upon their acquiescence in the sale. It contends that the cotton was sold by plaintiffs, on 6 July, 1921, at a price which was satisfactory to them. There was evidence to support this contention. The jury should have been instructed to answer the second issue "No," if they found from the evidence that one of the plaintiffs, Dr. Warren, personally sold the cotton on 6 July, 1921, at nine and five-eighths cents per pound. There was evidence to the contrary; the conflicting evidence should have been submitted to the jury, under an appropriate instruction.

Assuming, however, that the latter instruction was sufficient, and that is was intended by his Honor as a correction of the error in the former instruction, upon his attention being directed thereto by plaintiffs' counsel, it does not clearly appear that the jury was so instructed or so understood it. The case was therefore submitted to the jury upon contradictory instructions. This entitles defendant, who was prejudiced thereby, to a new trial. *Young v. Comrs.*, 190 N. C., 845, and cases there cited in the opinion by *Justice Adams*.

New trial.

STATE v. L. W. BROWN.

(Filed 17 March, 1926.)

1. Private Nuisance—Abatement—Suit.

At common law a party injured by a nuisance could bring an action on the case for damages or abate the nuisance in proper cases without suit.

2. Entry Upon Land of Another.

Entry upon the land of another and abatement of a private nuisance thereon by the injured party without suit may usually be regarded as a remedy which necessity alone indulges in cases of great emergency, in which the ordinary remedy would not be effectual.

3. Nuisance on Wrongdoer's Land.

As a general rule if the nuisance is on the wrongdoer's own land, he should first be warned and requested to abate it himself, but to this rule there may be exceptions, as when the nuisance is immediately dangerous to life and health.

4. Public Peace.

The public peace should not be jeopardized by permitting individuals to redress their own wrongs when they might obtain adequate security by resorting to courts of justice.

STATE *v.* BROWN.

The defendant was convicted of malicious injury to real property in breach of C. S., 4301, before *Barnhill, J.,* at October Term, 1925, of DUPLIN, and upon errors assigned he appealed to the Supreme Court.

On 1 August, 1921, W. R. Pate, for value, leased the Bass mill pond on Folly Branch to H. B. Gaylor and his associates for a period of ten years. The lessees were given the exclusive right to go there at will and to take others with them for the purpose of hunting and fishing. Gaylor and his associates went into possession under the name of the Long Leaf Fishing Club, repaired the dam, put in gates, ponded the water, and stocked it with fish obtained from the Government in 1921. In January, 1925, the gate was raised and the water and the fish went down the stream. The gate was opened on four different occasions.

The defendant lived in Magnolia and owned a farm adjoining the land of W. R. Pate, on which he kept his hogs and cattle. In the fall of 1902 he cut a road from his farm to the Magnolia-Kenansville highway. As a part of the road he built a bridge across Folly Branch above the pond, the road never having been repaired except under his direction. He claims it as his road. He testified that in January, 1925, he tried to cross the bridge and was prevented by high water which had been backed on the bridge from the pond. He said his road thus became impassable and that he pulled up the gate and let the water run out of the pond so that he could repair the bridge. He had to go thirty or forty feet off his land to get to the gate. The defendant testified that he had complained to members of the club and had told them of his predicament. One of the defendant's witnesses testified: "The water was not across the bridge. The bridge was so you couldn't cross before the fish pond was established."

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

Stevens, Beasley & Stevens for defendant.

ADAMS, J. At common law the party injured by a nuisance had a choice of two remedies. (1) He could bring an action on the case for damages, and, if a tenant of the freehold, he could resort to the assize of nuisance or to the writ of *quod permittat prosternere,* which not only gave the plaintiff satisfaction for his injury, but removed the cause by abating the nuisance. These writs, long out of use, have been superseded for practical purposes, in the absence of special statutory provision, by an action for damages and abatement and by a suit in equity to restrain the continuance of the wrong. (2) The other remedy at common law was an abatement of the nuisance without suit by the act and authority of the party aggrieved. 3 Bl. Com., 5, 220; 2 Pol. & Mait., 53; 7 Hold. His. Eng. Law. 330.

The defendant in the present action contends that he has a right of way extending from his farm through Pate's land to the Magnolia-Kenansville highway; that several years ago, as an essential part of his easement, he built a bridge across Folly Branch; and that the lessees tortiously obstructed the stream and flooded his bridge, thereby creating a private nuisance which he had a right to abate without suit. It is understood, of course, that we are not dealing with a public nuisance, and in the principle applicable to an abatement in such cases we are not now interested. *S. v. Dibble,* 49 N. C., 108; *S. v. Parrott,* 71 N. C., 311. The defense is based on the defendant's alleged right to enter upon the premises of the lessees and release the ponded water. All the exceptions relate to this proposition, and if the proposition is not sound or is not sustained by the evidence the defense must fail.

The theory upon which the common law gave a remedy by abatement of a private nuisance had its foundation in the right to redress a private wrong,—particularly the obstruction or annoyance of such things as required an immediate remedy and could not await the "slow progress of the ordinary forms of justice." 3 Bl., 6. It is no doubt upon this theory that some of the authorities say that if the acts of the occupant are in themselves unlawful and the nuisance is immediately dangerous to life or health, the person injured may enter on the land of such occupant and abate the wrong; but *Jaggard and Pollock* suggest that it is a "hazardous course at best, for a man to take the law into his own hands, and in modern times it can seldom, if ever, be advisable." 2 Jaggard on Torts, 901; Pollock on Torts (12 ed.), 426. Entry upon the land of another and abatement of a private nuisance thereon by the injured party without suit may usually be regarded as a remedy which necessity alone indulges in cases of great emergency, in which the ordinary remedy would not be effectual. *Gates v. Blincoe,* 26 Am. Dec., 440. Accordingly, this Court has said, "We do not undertake to lay down any general rule as to how far the individual may go in the abatement of the nuisance which is an injury to him." *Wolfe v. Pearson,* 114 N. C., 622, 635. Also, it may be said as a general rule that if the nuisance is on the wrongdoer's own land he should be first warned and required to abate it himself,—a rule to which there may be exceptions, as for example when the nuisance is immediately dangerous to life or health or when some special emergency demands immediate action. 2 Jaggard, 800. But the defendant has not shown the necessary emergency. True, he testified that the water was over the bridge and that he opened the gate and let the water run out of the pond in order to repair the bridge; but he introduced other testimony which was in direct conflict with his own. Nor has he shown the necessary notice. He complained to the members of the club and told them his predica-

ment; but there is no evidence that he notified them that he would abate the nuisance if they did not. Indeed, the evidence is not entirely free from an intimation of secrecy on his part. Under the circumstances he should have sought relief in the courts. "The public peace should not be jeopardized by permitting individuals to redress their own wrongs when they might obtain adequate security and indemnity by resort to any of the ordinary remedies in courts of justice." *Gates v. Blincoe, supra.*

What we have said disposes of all the assignments of error. As to the first we have assumed that the defendant had acquired the right of way; in the second there is no reference to the necessity of a warning and notice of entry; and in the instructions excepted to we find no error. The defendant was tried upon an indictment, but the fine imposed did not exceed the punishment prescribed by the statute in case of the complainant's failure to state in his affidavit that the damage inflicted was more than ten dollars. C. S., 4301.

No error.

F. S. ROYSTER GUANO COMPANY v. J. R. MANNING.

(Filed 17 March, 1926.)

1. Pleadings—Issues—Judgment—Appeal and Error.

Where the defendant in an action upon a note admits its execution, but alleges that at the time, without reading the instrument, he understood it was payable to another whom he owed for fertilizer in a transaction with such other person: *Held*, the issues as to whether the third person, not a party to the action, was acting as agent for the plaintiff, is not presented in the absence of allegation in the answer to that effect, and a judgment in defendant's favor thereon, is reversible error.

2. Appeal and Error—New Trials—Pleadings—Amendments—Issues.

After a motion to amend pleadings made for the first time in the Supreme Court on appeal has been refused, a motion to this effect, addressed to the discretion of the trial judge is allowable so as to present issues relevant thereto.

APPEAL by plaintiff from *Bond, J.*, at December Term, 1925, of CRAVEN. New trial.

Action upon note for $504.81, dated 12 February, 1921, due on 1 November, after date, payable to the order of plaintiff and executed by defendant. In defense of said action, defendant alleges:

"4. That during the early spring of 1920, this defendant and his tenants purchased from M. O. Blount various shipments of fertilizers, merchandise, and farming implements to the amount of $4,700.

"5. That during the latter part of the year 1920, and the early part of the year 1921, this defendant alleges that he paid said M. O. Blount in cash about $4,200 and gave a note for $504.81 for the balance, which he thought was given to Blount, and did not know until the said note was presented to him that it had been made to F. S. Royster Guano Company.

"6. That he did not purchase any goods or fertilizers from the F. S. Royster Guano Company, and had no dealings of any kind with them and does not owe them anything.

"7. That the said F. S. Royster Guano Company is not the proper party to maintain the action; not the real party in interest.

"8. For a further defense and by way of counterclaim, and set off, this defendant alleges: That during the early part of 1921, he let the said M. O. Blount store eight bales of cotton for him in Norfolk, out of which the said note was to be paid, and instructed him to sell the said cotton when the price reached twenty cents per pound.

"9. That the said Blount, in violation of said instructions, sold said cotton, as this defendant is informed, for nine and five-eighths cents per pound.

"10. That during the month of September, 1921, cotton advanced to 20.5 cents per pound, and at the time said cotton was stored it was selling for 18 cents per pound.

"11. The cotton was sold without the knowledge and consent of the defendant and no credit was placed on the note for the amount the said cotton was sold for.

"Wherefore, defendant prays the court that M. O. Blount be made a party to this action; that said note be delivered up and canceled, and that he recover judgment against the said M. O. Blount for the sum of $415, the difference between what the cotton should have sold for at twenty cents per pound, and the note set out in the complaint."

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

1. Did defendant, Manning, execute and deliver to plaintiff, Royster Guano Company, the note sued on in the complaint? Answer: Yes.

2. Was it agreed between defendant, Manning, and M. O. Blount that the proceeds from the sale of cotton should be applied on the said note due Royster Guano Company? Answer: Yes.

3. What sum was received from sale of cotton? Answer, $387.17.

4. Was it agreed between M. O. Blount and defendant, Manning, that no sale should be made of the cotton for less than twenty cents per pound? Answer: Yes.

5. Was M. O. Blount, in receiving said cotton, acting as agent of plaintiff, Royster Guano Company? Answer: Yes.

From judgment on foregoing verdict, that plaintiff take nothing, and that defendant go without day, plaintiff appealed to the Supreme Court.

Moore & Dunn for plaintiff.
W. B. Rouse and D. L. Ward for defendant.

CONNOR, J. M. O. Blount has not been made a party to this action, in accordance with the prayer of defendant, J. R. Manning. After the jury was empaneled, plaintiff moved to strike out from the answer and further defense all allegations contained therein as to transaction between defendant and said M. O. Blount. This motion was denied, and plaintiff excepted. Plaintiff also excepted to the issues as submitted to the jury for that same do not arise upon the pleadings. Its 17th assignment of error is based upon this exception.

Defendant does not allege in his answer that M. O. Blount was agent of plaintiff, or that he delivered the eight bales of cotton to Blount as such agent. He admits in his answer that he executed the note set out in the complaint and offered in evidence by plaintiff; he alleges that at the time he signed the note, he did not know that it was payable to F. S. Royster Guano Company; that he was not indebted to Royster Guano Company, but was indebted to M. O. Blount for the amount of the note, as balance due him. He testified as a witness that he delivered the cotton to Blount, about 1 January, 1921, prior to the execution of the note payable to plaintiff, and had the agreement with Blount as alleged at the time of the delivery of the cotton; that Blount thereafter, on the date of the execution of the note told him that he had to get a note for the plaintiff; that defendant then signed the note. Defendant does not allege that he has paid anything on the note to the plaintiff, or to any one for plaintiff. The note is negotiable in form, and plaintiff is the holder thereof; there is no allegation that plaintiff had any notice of the storage of cotton with Blount, or of any agreement with Blount as to the application of the proceeds of the sale of the cotton to the payment of the note.

The matters set up in the answer do not constitute a defense to the action by plaintiff, certainly, without allegation that Blount was agent of plaintiff, with authority to make the agreement, as alleged. Plaintiff's exception to the issues as submitted should have been sustained.

There was error in the submission of issues, determinative of the rights of the parties, which do not arise upon the pleadings. Other assignments of error need not be discussed, for they are based chiefly upon exceptions to evidence or instructions applicable to the fifth issue, involving the question of agency.

When this appeal was called for argument, defendant moved in this Court for leave to amend his answer by striking out paragraphs 6 and 7 thereof, and substituting in lieu thereof the following:

"That when he purchased the fertilizer he thought he was purchasing it from M. O. Blount, but has since learned that M. O. Blount was the agent of F. S. Royster Guano Company and sold said fertilizer to said defendant as such agent; that defendant did not know at the time that the note was payable to F. S. Royster Guano Company, as he did not read it, but has since learned that it was so payable and he now admits the signature to said note in the light of these facts."

This motion is denied. The controversy between the parties to this action should be submitted to a jury upon evidence relevant to issues raised by the pleadings. The motion to amend the pleadings may, of course, be made in the Superior Court before trial of the action without prejudice from the denial of the motion in this Court. It will then be heard and disposed of, as the court may deem just to both parties. There must be a

New trial.

MUNGER & BENNETT, INCORPORATED, v. EAST CAROLINA LUMBER CO.

(Filed 17 March, 1926.)

Deeds and Conveyances—Timber Deeds—Contracts—Unilateral and Bilateral Contracts—Options—Consideration—Purchasers.

The extension period contained in a deed to timber growing upon lands are options or unilateral contracts, and requires the payment of the consideration within the period stated in the deed to make them executed bilateral contracts, and is payable to the purchaser of the lands under a deed with covenants and warranty of title registered prior to the time the vendee has exercised his option of purchase. *Timber Co. v. Bryan*, 171 N. C., 265; *Timber Co. v. Wells*, 171 N. C., 264, cited and applied.

APPEAL by defendant from *Bond, J.*, at November Term, 1925, of CRAVEN.

Civil action to recover of defendant compensation for use of right of way and log landing as per stipulation in extension provision of deed. The case was heard on facts agreed, and from a judgment in favor of plaintiff, the defendant appeals.

Thos. D. Warren for plaintiff.
R. E. Whitehurst for defendant.

STACY, C. J. There being no controversy between the parties as to the essential facts, a jury trial was waived and the cause submitted to the court for determination on the following facts agreed:

1. On 18 November, 1912, E. R. Phillips and wife, in consideration of $1,000, gave to the defendant properly executed deed for a right of way and log landing on their lands in Pamlico County, for a term of ten years which said deed was duly registered on 25 November, 1912, and contains the following extension clause:

"And it is expressly understood and agreed between the parties hereto that the party of the second part shall have the right to extend the time herein granted for the use and occupation of the right of way and land herein described for the further additional term of ten years after the expiration of the first period of ten years herein conveyed, at any time it may desire to do so during the continuance of lease agreement by giving notice to the parties of the first part of such purpose to so extend said period for the additional period of ten years from and after the expiration of the ten years herein conveyed, by the payment to the parties of the first part by the party of the second part of the same amount of money as is herein specified as the consideration of the first period of time."

2. On 9 September, 1915, the said E. R. Phillips and wife conveyed to the plaintiff, Munger & Bennett, Inc., by proper warranty deed, for a valuable consideration, the same lands described in deed from E. R. Phillips and wife to defendant, East Carolina Lumber Company, which said deed to plaintiff was duly registered 9 November, 1915, and contains the following covenants and warranties:

"The said Phillips and wife covenant that they are seized of said premises in fee and have a right to convey in fee simple, that the same are free and clear from all encumbrances; and that they will warrant and defend the said title to the same against the lawful claims of all persons whomsoever."

3. On 8 November, 1922, the East Carolina Lumber Company paid to E. R. Phillips the sum of $1,000 for the extension of ten years above mentioned, and the defendant is now using said right of way and log landing under a claim of right by reason of the terms of said extension provision.

4. This action was instituted 15 October, 1924, after a refusal on the part of the defendant to pay the plaintiff the said extension money.

On these, the facts chiefly pertinent, judgment was rendered in favor of the plaintiff, which must be upheld on authority of *Timber Co. v. Bryan,* 171 N. C., 265, and *Timber Co. v. Wells, ibid.,* 264.

The decisions on the subject are to the effect that these extension provisions, of the kind here presented, are in the nature of options, or unilateral executory contracts subject to be converted into bilateral executed contracts only upon compliance with the terms stated therein, and that the estates or interests resulting therefrom arise at the time the conditions are complied with and the options exercised. Hence, nothing else appearing, the prices to be paid for said extension rights belong to those who own the property at the time the options are exercised, and from whose estates the interests then arising necessarily pass. *Dill v. Reynolds,* 186 N. C., 293.

Affirmed.

JENNIE MAYO ET AL. v. JOHN G. BRAGAW, SR., ET AL.

(Filed 17 March, 1926.)

Cemeteries—Burial—Church—Removal of Dead Bodies—Statutes.

The building of a new vestry room of a church to be used with the one as presently located in relation to the use of the choir, etc., comes within the purview of the statute permitting the removal of the bodies buried in the churchyard by the proper authorities of the church, when necessary or expedient to do so, in carrying out the arrangement. C. S., 5030.

APPEAL by plaintiffs from *Grady, J.,* at February Term, 1926, of BEAUFORT.

The proceeding is to determine the right of the defendants, vestry of St. Peter's Parish, Washington, N. C., to remove certain graves from the churchyard of said parish.

From a judgment in favor of defendants, the plaintiffs appeal.

H. C. Carter for plaintiffs.
Ward & Grimes for defendants.

STACY, C. J. The parties to the present proceeding, having a question in difference which might properly become the subject of a civil action, have submitted the same for determination without action, upon an agreed statement of facts, as authorized by C. S., 626.

The question to be determined is the right of the defendants, vestry of St. Peter's Parish, Washington, N. C., to remove certain graves in the churchyard of said parish, including the body or grave of Martin

Maddox Mayo, so as to permit an enlargement of the church building, as proposed by the defendants.

Martin Maddox Mayo died in infancy, sometime prior to 1890, and was buried in St. Peter's churchyard within the bounds of the proposed enlargement of the church building, and it is necessary to remove said body or grave in order to carry out the present plans of the defendants. The plaintiffs, mother and brother of the deceased, object to a removal of the body or grave in question and contend that the contemplated purposes of the defendants do not constitute an enlargement of the church building within the meaning of C. S., 5030.

As bearing on this point, it is stipulated in the second paragraph of the agreed statement of facts that "the defendants desire to enlarge said church building, and said enlargement will consist primarily of the following: The present vestry room of the church will be transformed into a lobby and there will be a door leading from said lobby through a cloister to a new vestry room, and thence to the Sunday school rooms, and on the far side of the Sunday school rooms will be a chapel for holding divine services on special occasions and where a small congregation is expected to be present, and it is contemplated that the choir will assemble in the choir room and proceed from the choir room through the new vestry room and cloister into the lobby and into the church proper; but the auditorium of the present church building will not be enlarged, nor will the seating capacity of said church building be increased."

We think the proposed action of the defendants comes within the purview of C. S., 5030, which is as follows:

"In those cases where any church authorities desire to enlarge a church building and where it becomes necessary or expedient to remove certain graves in order to secure the necessary room for such enlargement, it shall be lawful for such church authorities after thirty days notice to the relatives of deceased, if any are known, and if none are known, then after notice posted at the church door for a like time, to remove such graves to a suitable plat in the church cemetery or in another cemetery, due care being taken to protect tombstones and replace them properly, so as to leave the graves in as good condition as before removal."

It is conceded that all the provisions of the law have been complied with, the only question in difference between the parties being as to whether the contemplated improvements constitute an enlargement of said church building, within the meaning of the statute, and we think they do. This was the holding of the trial court.

Affirmed.

PLATO COLLINS ET AL. v. CHARLES F. DUNN ET AL.

(Filed 17 March, 1926.)

Taxation—Deeds and Conveyances—Sales—Mortgages—Notice.

The claimant of land under a deed for nonpayment of taxes must show the prior notice of the sale as required by statute, with sufficient description to identify the lands, as against a purchaser at a foreclosure sale under the power contained in a mortgage registered at the time.

APPEAL by defendant, Charles F. Dunn, from *Barnhill, J.*, at November Term, 1925, of LENOIR. No error.

Action to remove cloud upon title to land, situate in the city of Kinston, N. C. Frank Murrill, as owner of the land described in the complaint, listed the same for taxation for the year 1921. At the time the land was so listed, it was subject to a deed of trust, executed by Frank Murrill, conveying the same to John G. Dawson, trustee, to secure notes executed by Frank Murrill, payable to Plato Collins. These notes were endorsed and assigned by Plato Collins to the First National Bank of Kinston as collateral security for his note to said bank. Neither Collins' note to the bank, nor the collateral notes have been paid. The deed of trust was duly recorded.

The land was sold on 6 June, 1922, by the city tax collector of the city of Kinston for the collection of taxes assessed thereon as due the said city. Defendant, Charles F. Dunn, now claims title to said land under deed dated ..... day of June, 1923, executed by said city tax collector, purporting to convey same to him. This deed has been duly recorded in the office of the register of deeds of Lenoir County, in Book 76, at page 330.

Plaintiffs seek by this action to have said deed declared void and canceled as a cloud upon their title, under the deed of trust from Frank Murrill to John G. Dawson, trustee. Issues submitted to the jury, without objection, were answered in accordance with contentions of plaintiffs. From judgment upon the verdict, defendant, Charles F. Dunn, appealed.

F. E. Wallace for plaintiffs.
Charles F. Dunn in propria persona.

PER CURIAM. The evidence offered by plaintiffs was sufficient to sustain the allegations of their complaint. There was no error in the refusal of the court to allow the motion of defendant for judgment of nonsuit, at the close of the evidence. The legal title to the land was in John G. Dawson, trustee, for the holder of the notes secured therein; there was no evidence that the notes had been paid or discharged. The demurrer *ore*

tenus for misjoinder of parties and because the complaint did not state a cause of action cannot be sustained.

Evidence offered by defendant, Dunn, to sustain his contentions that he is the owner of the land by virtue of a deed executed by the city tax collector of the city of Kinston was not of sufficient probative force to show compliance by him, as purchaser at the tax sale, with the provisions of the statute, relative to notice. C. S., 8028. There was no evidence of notice to John G. Dawson, trustee, who held the legal title to the land, or to Plato Collins, the payee named in the notes secured in the deed of trust. There is no contention that notice was served on the trustee; he testified that no notice was given to him by Dunn or by any one else that the land had been sold for taxes. The receipt for a registered package, signed in the name of Mr. Collins, by his wife, conceding that it is evidence that Mr. Collins received the package, proves nothing more; defendant offered no evidence as to the contents of the package. Mr. Collins testified that he had no notice of the sale of the land for taxes. The receipted bill for the publication of a notice in the *Kinston Free Press,* at most, is evidence only that some notice published in said paper, was paid for by Dunn; there was no evidence as to what the notice was. The affidavit offered by defendant, was to the effect that he had purchased "the land of Frank Murrill at a sale" made by the city tax collector on 6 June, 1923; this was not a sufficient description of the land, nor is the description of the land in the certificate of the city tax collector, to wit: '1 lot of land listed by Frank Murrill,'" sufficient. Defendant offered no evidence in aid of the description in the certificate or in the affidavit.

There is no error in the charge of the court; assignments of error based upon exceptions to portions of the charge as indicated are not sustained. The judgment must be

Affirmed.

LALAH M. TRUELOVE ET AL. v. LIZZIE PARKER ET AL.

(Filed 24 March, 1926.)

1. Adoption—Parent and Child—Parties—Consent—Descent and Distribution.

The procedure for the adoption of minors is prescribed by statute, which requires that a petition must be filed, that there must be parties of record, and the consent required by the statute. The parent or guardian, etc., must be a party to the proceeding. If both parties are living they must be made parties. Their consent or the consent of the survivor is essential and they must have an opportunity to be heard in order to express their consent. To be heard in a judicial sense and to be bound by the order, they must be parties to the proceeding.

2. Adoption—Petition—Record.

In this case the petition, the order of adoption and the letters of adoption constituted the entire proceeding before the clerk. It does not appear from the record that the father and mother of the child were parties as the statute requires and in this respect it is held that the proceeding was defective.

3. Summons—Voluntary Appearance.

The record does not show that a summons or other final notice was issued and served or that the father and mother made a voluntary appearance, and it is held that as a general rule the notice required by the statute must be given, and in its absence the proceeding may be held defective.

4. No Service of Process.

Where a defendant has never been served with process or appeared in person or by attorney, a judgment rendered against him is not simply voidable but void, and may be so treated whenever and wherever offered without any direct proceeding to vacate it.

5. Abandonment.

To constitute abandonment by a parent of its child, so as to deprive him of the right to prevent the adoption of the child, there must be some conduct on the part of the parent which evinces a purpose to forego parental duties.

6. Parties—Adoption.

Upon the record in this case it is held that neither the father nor the mother of the child was a party to the proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of their person, and having no jurisdiction of their person, he had no jurisdiction of the subject-matter.

7. Same—Equity—Estoppel.

Where an order by the clerk in proceedings to adopt an infant is void *ab initio*, it is not binding upon the parties, and where the foster parent is dead and the question is one of the descent of his property to the heirs of the deceased adopted child, or the collateral heirs of the foster parent, there is no mutuality upon which an estoppel could operate either under the judgment or the subsequent acquiescence of the original parties.

CONNOR, J., concurring.
CLARKSON, J., concurring in result.
STACY, C. J., dissenting.

APPEAL by the plaintiffs and certain of the defendants from *Devin, J.*, at November Term, 1925, of HARNETT.

Controversy without action (C. S., 626), to determine the title to land and to remove a cloud from title, submitted upon the following statement of facts agreed:

1. On or about 20 July, 1912, John A. Weathers filed with the clerk of Superior Court of Harnett County a writing purporting to be a petition for the adoption of Irma Johnson, for life, a copy of which is

hereto attached and marked Exhibit "A." And on 26 July, 1912, the clerk of Superior Court entered an order purporting to be an order of adoption and issued letters of adoption, of which order and letters, a copy is attached hereto and marked Exhibit "B." The exhibits constitute all the proceedings in said case. After the adoption proceedings, Irma Johnson, lived in the home with John A. Weathers and his wife and was thereafter known as Irma Johnson Weathers, until the death of the said John A. Weathers and his wife.

2. Thereafter, on or about 6 April, 1922, the said John A. Weathers died intestate and at the time of his death was seized and possessed in fee of the lands described in paragraph 6 of the complaint of Lalah M. Truelove and others therein.

3. At the time of his death, the said John A. Weathers left surviving him Irma Johnson Weathers, the adopted daughter; he also left surviving him the plaintiffs, Lalah M. Truelove, Corrina Blalock, Vallie Weathers, Hepsie A. Holt, Frances Rosser, the heirs of Bettie Lawrence, and the heirs of Nannie Gunter, of whom Lalah M. Truelove, Corrina Blalock, Vallie Weathers and Nannie Gunter were full sisters of the said John A. Weathers and the said Hepsie A. Holt, Bettie Lawrence and Frances Rosser were half-sisters of the said John A. Weathers; and left surviving him no child or issue of any child save and except that he was survived by the said Irma Johnson Weathers.

4. Shortly thereafter Irma Johnson Weathers died intestate, leaving surviving her, Minnie Parker and Lucian Johnson, her natural mother and father, Haze Johnson, her whole brother, Lizzie Parker and Frances Parker, her half-sisters, and Ernest Parker, a half-brother. All parties to this action.

5. After the birth of Haze Johnson and Irma Johnson Weathers, Lucian Johnson and his wife, Minnie Rollins Johnson separated themselves from each other and never lived together again, and never obtained a divorce. And after the said separation Minnie Rollins Johnson associated herself with Frank Parker without a legal marriage, and to that association were born the half-sisters, Lizzie Parker and Frances Parker and the half-brother, Ernest Parker, who are the children of Minnie Parker and Frank Parker; neither of whom are of the blood of John A. Weathers or in any way related to him by blood.

6. The defendant, Haze Johnson, since this suit has been instituted, by regular warranty deed of conveyance, conveyed all of the land described herein to the defendant, Victor R. Johnson, and the defendant, Victor R. Johnson, has by regular deed of conveyance conveyed two-thirds undivided interest in the said land to the defendant, C. W. Sandrock; all parties of this suit.

Claims of the parties:

1. The defendant, Victor R. Johnson, claims title to one-third undivided interest in the land described herein, and the defendant, C. W. Sandrock, claims title to two-thirds undivided interest in the said land under the deed from Haze Johnson, the nearest collateral relative to the intestate, Irma Johnson Weathers.

2. The defendants, Lizzie Parker, Frances Parker and Ernest Parker, claim title to three-fourths of the land, as collateral heirs to Irma Johnson Weathers.

3. The parties hereto, Lucian Johnson and Minnie Parker, claim title to the land as tenants in common, as the sole successors to the title of Irma Johnson Weathers.

4. Lalah M. Truelove and the other brothers and sisters and their legal representatives, who are parties hereto, claim title to the land by reason of their collateral inheritance from John A. Weathers.

Exhibit "A" is as follows:

NORTH CAROLINA—HARNETT COUNTY.

In the Superior Court.

J. A. Weathers
v. } Petition for Adoption.
L. J. Johnson and Martha Johnson.

To F. H. Taylor, clerk Superior Court of Harnett County:

The petition of J. A. Weathers of said county and State, respectively showeth:

1. That Irma Johnson is a female child of the age of five years, and is at present residing with the said J. A. Weathers of said county.

2. That L. J. Johnson and Martha Johnson, father and mother of the child are living.

3. That Martha Johnson, mother of the child, has been living away from her husband and child for the past two years, and takes no interest whatever in said child.

4. That L. J. Johnson, father of the child is not capable of properly providing for said child and gives his consent to the adoption of said child by said J. A. Weathers.

5. That the said child has no estate of any kind, either real, personal or mixed, and is entirely dependent on said J. A. Weathers, with whom the said child now resides.

6. The petitioner desires to adopt the said child for life, to which adoption L. J. Johnson, father of the child consents.

Wherefore, the petitioner prays that he may be allowed to adopt the said child for the life of said child, and that letters of adoption may be granted him by the court. J. A. WEATHERS, *Petitioner.*

This 26 July, 1912.

Exhibit "B" is as follows:

J. A. Weathers
v.
L. J. Johnson and Martha Johnson. } Order of Adoption.

This cause coming on to be heard upon the allegations of the petitioner, and being heard, and it appearing to the court that Irma Johnson is a child without any estate, and that Martha Johnson, mother of the child is living away from her husband and child and takes no interest whatever in said child, and that L. J. Johnson, father of the child is not capable of properly providing for said child and consents to the adoption of said child by said J. A. Weathers, who is a proper and suitable person to have the custody of said child, and who desires to adopt said child for life:

It is therefore, ordered and adjudged by the court that letters of adoption be, and the same are hereby granted to the said J. A. Weathers, to the end that the relations of parent and child be established for life between the said J. A. Weathers and the said Irma Johnson, with all the duties, powers and rights belonging to the relationship of parent and child. F. H. TAYLOR, *Clerk Superior Court.*

This 26 July, 1912.

NORTH CAROLINA—Harnett County Superior Court.

LETTERS OF ADOPTION.

STATE OF NORTH CAROLINA, to all to whom these shall come—Greeting:

J. A. Weathers, having applied by petition to the undersigned clerk of the Superior Court of Harnett County, for the adoption of Irma Johnson, a female child for life; and the said J. A. Weathers having satisfied the undersigned that he is a suitable person to have charge of said child; and an order of court having been made granting the petition of said J. A. Weathers:

These are therefore to authorize and empower the said..... to take charge of the said orphan for life to the end that the relationship of parent and child may be fully established between said J. A. Weathers and said Irma Johnson, a female child, agreeably to an order made by the court.

Witness my hand and official seal, this 26 July, 1912.

F. H. TAYLOR, *Clerk Superior Court.*

His Honor was of opinion that upon the death of John A. Weathers the land in controversy descended to Irma Johnson Weathers and upon her death to her brother Haze Johnson as her only heir at law; and thereupon it was adjudged that by the conveyance of Haze Johnson to Victor R. Johnson and by the latter's conveyance of a two-thirds interest to Sandrock, the title passed to Victor R. Johnson and Sandrock in the proportion of one-third and two-thirds respectively, as set out in the statement of facts, and that they are the owners and entitled to the possession of the land. The plaintiffs and all the defendants except Haze Johnson, Victor R. Johnson and C. W. Sandrock excepted and appealed.

Seawell & McPherson and Teague & Teague for Lalah Truelove and others, plaintiffs.

W. P. Byrd and W. P. Aycock for Minnie Parker.

J. Elmer Long and Young & Young for Lucian J. Johnson.

W. S. Lockhart for Victor R. Johnson.

Rose & Lyon for C. W. Sandrock.

ADAMS, J. On 26 July, 1912, the clerk of the Superior Court of Harnett County issued letters of adoption purporting to establish the relation of parent and child between John A. Weathers and Irma Johnson, who at that time was five years of age. Thereafter Irma lived in the home of Weathers and his wife and was known as Irma Johnson Weathers. John A. Weathers died intestate on 6 April, 1922, seized of about eight hundred acres of land. He left no issue; but Irma's death occurred a few hours after his. He was survived also by the plaintiffs, who are his brothers and sisters. Irma was survived by her father and mother, one illegitimate half-brother, two illegitimate half-sisters, and one whole brother, Haze Johnson, whose interest in the land, if any, has passed by conveyances to Victor R. Johnson and C. W. Sandrock. All these are parties to the action and represent the several conflicting claims of title. The father and mother of Irma contend that under the provisions of C. S., 185, the order of adoption enabled her to inherit, and that she did inherit, the real estate of John A. Weathers in like manner and to the same extent as if she had been his actual child; also, that upon her death the title she had thus acquired vested in them as tenants in common by virtue of the proviso in the sixth canon of descents. C. S., 1654(6). Haze Johnson and his successors in interest say that Irma's estate was not derived or transmitted to her from an ancestor, but acquired by force of the order of adoption, and that her title therefore descended under the fifth rule to Haze Johnson as her next collateral relation. On the other hand, the plaintiffs insist

that the adoption proceeding is fatally defective and utterly void; that Irma acquired no title to the land; and that as the heirs at law of John A. Weathers they are entitled to his real estate. At the threshold of these contentions we are confronted with the grave question whether the proceeding is void and therefore subject to collateral attack.

The procedure for the adoption of minors is prescribed by statute: a petition must be filed; there must be parties of record; and with the requisite consent an order may be made granting letters of adoption. C. S., ch. 2. Section 183 provides that the parent or guardian, etc., must be a party to the proceeding. We think the words "the parent," should not be interpreted, if both parents are living, to include the father and exclude the mother, for these several statutes construed as a whole seem to import that ordinarily both the parents if living shall be parties. The petition must set forth their names; and if both are living their consent is as a rule prerequisite to an order granting the letters; or, if one is dead, the consent of the survivor. If their consent is essential they must have an opportunity to be heard; and to be heard in a judicial sense and to be bound by the order they must be parties to the proceeding.

At common law parental rights were vested in the father, and the mother had no legal interest in the custody or earnings of her children; but modern decisions have relaxed the common-law doctrine and have indicated a manifest tendency to equalize the rights of custody and control. True, under our own decisions the father is considered in law as the head of the household and as such entitled in the first instance to the custody of his child,—a right necessarily springing from his duty to provide for the child's protection, maintenance, and education. But this right is not absolute; circumstances often occur in which it may be questioned; and beyond doubt the mother's natural interest in the welfare of her children is not less profound than that of the father. *Newsome v. Bunch,* 144 N. C., 15; *In re Fain,* 172 N. C., 790. A father may by deed dispose of the custody and tuition of his unmarried child for such time as it may remain under the age of twenty-one years; but only with the written consent and privy examination of the mother, if she be living. He may make such disposition by his last will and testament in writing; but only if the mother be dead. If the father die without exercising the right of appointment, or if he wilfully abandon his wife, the mother may in like manner dispose of the custody and tuition of her unmarried infant child. 3 C. S., 2151. In all these statutes, and in others, the Legislature has recognized the human as well as the legal relation between parent and child, the paramount and the subordinate, the present and the inchoate, rights of the father and the mother, and has wisely provided that both the parents shall have ade-

quate opportunity to be heard and, except in rare cases, shall give their consent before the legal relation is severed or the domestic circle is broken. We cannot yield our assent to the proposition that because Irma resided with Weathers when his petition was filed it was not necessary to make her parents parties to the proceeding. The statute contemplates an adjudication concerning adverse interests. And the failure to observe the statutory requirements as to notice and consent is not a mere irregularity which is immune from collateral attack, for they are jurisdictional and without them, as a general rule, a valid order of adoption cannot be made.

The plaintiffs contend that these requisites are wanting; the defendants contend that we should proceed upon the presumption that the court had jurisdiction of the parties and that the proceeding is regular. The proceedings, whether it be deemed judicial or a proceeding *in rem* or *quasi in rem*, calls for the exercise only of such judicial functions as are conferred by chapter 2 of the Consolidated Statutes and to this extent the jurisdiction of the clerk is limited and special. "The jurisdiction in such cases both as to the subject-matter of the judgment and as to the persons to be affected by it must appear by the record; and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. The power to enter a decree of adoption conferred upon a court of general jurisdiction is a special and summary power of this class, and the facts essential to the exercise of the special jurisdiction must appear upon the record. To give a decree of adoption any force or effect, jurisdiction must have been acquired by the court, first, over the person seeking to adopt the child; second, over the child; and third, over the parents of the child; and there can be no presumption that jurisdiction was obtained over the parent of the child if the record of adoption is silent on the subject." 1 R. C. L., 603, sec. 11.

In the light of this principle let us see whether it appears upon the record that the court had jurisdiction over Irma's father and mother. When the clerk made the order of adoption the only paper before him was the petition. The petition, the order of adoption, and the letters of adoption constitute the entire proceeding. Statement of facts, par. 1. It does not affirmatively appear that the father and mother of the child were "parties of record in this proceeding," as the statute requires. Sec. 183. Indeed, it does not affirmatively appear that either of them was a party. No summons or other similar notice was issued and served; there was no voluntary appearance; and of course the caption of the petition did not supply this defect. It is to be noted that the order of adoption contains no recital of the service of process or the appearance of the child's parents. In the order there is a recital of the father's consent to the adoption, and from this, it is said, his appearance may be

inferred; but as the order purports to repeat and approve each allegation of the petition, including that of the father's consent, in the absence of any other suggestion of the father's presence or appearance in the proceeding, we may reasonably infer that the clerk assumed the petition to be true and upon this assumption adjudged the adoption without further inquiry or investigation. In any event, it does not affirmatively appear that the father was present or represented in the proceeding. In *Doyle v. Brown,* 72 N. C., 393, it is said: "Where a defendant has never been served with process, nor appeared in person or by attorney, a judgment against him is not simply voidable, but void; and it may be so treated whenever and wherever offered, without any direct proceedings to vacate it. And the reason is, that the want of service of process and the want of appearance is shown by the record itself, whenever it is offered. It would be otherwise if the record showed service of process or appearance when in fact there had been none. In such case the judgment would be apparently regular and would be conclusive until by a direct proceeding for the purpose it would be vacated." *Carter v. Rountree,* 109 N. C., 29; *Moore v. Packer,* 174 N. C., 665.

It is not pretended that Martha Johnson (or Minnie Parker), the mother, was a party of record; but the defendants seek to relieve the necessity of her consent and the service of process on her by alleging that she had abandoned her child and had forfeited her rights and privileges with respect to its care, custody, and services. In 1 C. J., 1387(76) it is said: "To constitute such an abandonment by a parent as will deprive him of the right to prevent the adoption of his child, and dispense with the necessity of his consent, there must be some conduct on his part which evinces a settled purpose to forego all parental duties. But merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment." By the terms of the statute it is necessary that such abandonment be wilful,—that is, accomplished purposely and deliberately in violation of law. *S. v. Whitener,* 93 N. C., 590. The clerk's finding (which is the recital of another allegation in the petition), as set forth in the order of adoption, is in these words: "Martha Johnson, mother of the child, is living away from her husband and child and takes no interest whatever in said child." It does not appear upon the face of the record whether her absence was compulsory, negligent, or wilful; and in a proceeding of this kind inferences cannot supply the want of an affirmative adjudication. "When a petition alleges abandonment of a child it must make a case strictly within the provisions of the statute relating to such abandonment." 1 C. J., 1385 (61).

The mother had no actual or constructive notice of the proceeding and no opportunity to be heard on the question of abandonment. It is held in a number of cases decided elsewhere that the existence of abandon-

ment as ground for an adoption without parental consent must be judicially determined and that notice to the parent of the adoption proceeding is essential to cut off his rights. 1 R. C. L., 628 (39); *Schiltz v. Roenitz,* 21 L. R. A. (Wis.), 483; *Beatty v. Davenport,* 122 A. S. R. (Wash.), 937; *ibid.,* 13 Anno. Cas., 585 and note; *In re Cozza,* 31 Anno. Cas. (Cal.), 214 and note, page 222. Such notice may not be necessary in every case; but when the parent, as in the case at bar, is within the jurisdiction of the court and subject to its process, an order of adoption based upon his alleged abondonment should not ordinarily be held conclusive against him unless he has had notice of the proceeding and an opportunity to be heard in defense.

Upon the record as it has come to us we are of opinion that neither the father nor the mother of Irma Johnson was a party to the adoption proceeding within the contemplation of the statute, and that the clerk had no jurisdiction of their person. Having no jurisdiction of their person he had no jurisdiction of the subject-matter: consent is essential to the order of adoption (sec. 184), and when the statute requires it to be given jurisdiction of the subject-matter cannot be acquired without it. 1 C. J., 1384 (57); *In re Cozza, supra,* note, page 221.

But it is contended on behalf of the defendants that John A. Weathers voluntarily entered into the contract of adoption, and during his lifetime recognized the relation thus created, and that after his death his heirs at law should not be permitted to avail themselves of a departure from the directions of the statute to defeat the rights of the child, and 10 R. C. L., 764 (81) is cited in support of the position. The principle no doubt applies in case of a mere technical disregard of the statute; but as the clerk had acquired no jurisdiction his order and letters of adoption are not simply irregular; as we have said they are void. In consequence they were binding neither on the father and mother nor on the adopting parent, because estoppels must be mutual; and if not conclusive against the parties, the order is not conclusive against their privies. *Ferguson v. Jones,* 11 A. S. R., 808, and cases cited in note, page 821; 1 C. J., 1393; *Doyle v. Brown, supra; Kissam v. Gaylord,* 46 N. C., 294, 298; *Peebles v. Pate,* 90 N. C., 348; *Dudley v. Jeffress,* 178 N. C., 111.

We do not concur in the argument that because the father and mother did not formally object to the letters of adoption during the lifetime of John A. Weathers they impliedly assented thereto and may now express their approval and thereby impart vitality to the clerk's order. This order is void *ab initio;* and the title to the land vested at the instant John A. Weathers died. It follows that the subsequent consent of the father and mother could neither divest the title nor confer jurisdiction upon the court.

We must not be understood as disparaging in any respect the legislative policy of providing for the adoption of minor children. That its wisdom is apparent is clearly expressed in these words: "Under them (adoption laws) innocent, parentless and abandoned children are withdrawn from the charity of public institutions and provided with comfortable homes and affectionate foster parents. Unfortunate children, whose parents, through overwhelming adversity, or the infirmities of their nature, are unable to care and provide for them, are placed in cheerful homes under the care and control of adoptive parents willing and able to provide for their protection and comfort." *Estate of McKeag,* 99 A. S. R., 80, 84. The approval of this policy is commendable. No less commendable is observance of an elemental principle which is designed to protect minor children from influences and associations that are vicious or immoral; and the principle cannot be affected in this instance by the alleged lapse of the mother.

In our opinion the order of adoption is void and subject to collateral attack; and as the plaintiffs have succeeded to the title of John A. Weathers they should be adjudged the owners of the land in controversy.

Error.

CONNOR, J. I concur fully with the opinion of the Court upon which the decision in this case is founded. It doubtless becomes a precedent. It affords assurance to all mothers that they cannot, under the laws of this State be deprived of the custody of their children by adoption proceedings to which they have not consented or to which they have not been made parties to the end that they may be heard before any order is made depriving them of their rights. The decision recognizes that the mother as well as the father has rights to the custody of the child; she cannot be held to have forfeited such rights without a hearing. The court is without jurisdiction to make an order for the adpotion of a child by a stranger until both parents, if living, have consented to the adoption or until the court has found after a hearing, of which due notice has been given to both, that the parents have forfeited their rights to the custody of the child. The mother cannot be held to have forfeited such rights until she has had notice of the proceedings, merely because the father has consented to the adoption; upon this record, it does not appear that either the father or mother of the child was a party of record to the proceeding.

After the court has acquired jurisdiction by a proceeding to which both parents, if living, are parties, with full opportunity to be heard, then the order of adoption will not thereafter be set aside for mere irregularities, especially when the relationship arising from the adop-

tion has been acquiesced in by all interested parties and rights growing out of the relationship have accrued. No apprehension need be felt that this decision will hereafter be cited as an authority to give this Court or the mothers of the State trouble.

CLARKSON, J., concurring in the result: I concur in the conclusion reached in the opinion of the Court.

STACY, C. J., dissenting: To my mind, the judgment of the majority is at variance with the legislative intent touching the subject of adoption, and hence I am constrained to state the reasons for my dissent.

On 26 July, 1912, John A. Weathers filed in the Superior Court of Harnett County a petition for the adoption of Irma Johnson, a minor residing at that time with the petitioner in said county. The petition recites that Irma Johnson is a female child, five years of age, the daughter of L. J. and Martha Johnson; "that Martha Johnson, mother of the child, has been living away from her husband and child for the past two years, and takes no interest whatever in said child"; that the natural father of the child is not capable of properly providing for said minor, and gives his consent to her adoption by the petitioner; that the child has no estate of any kind, and is entirely dependent upon the petitioner, with whom she has resided for two years; and that the petitioner desires to adopt said child for life, to which adoption L. J. Johnson consents.

Thereupon, the court made and caused to be entered an order of adoption, based upon the finding "that Irma Johnson is a child without any estate; that Martha Johnson, mother of the child, is living away from her husband and child, and takes no interest whatever in said child; and that L. J. Johnson, father of the child, is not capable of properly providing for said child, and consents to the adoption of the child by J. A. Weathers, who is a proper and suitable person to have the custody of said child, and who desires to adopt her for life." Following the adoption, Irma Johnson lived in the home of John A. Weathers and his wife and assumed the name of Irma Johnson Weathers.

It appears as a fact that Martha Johnson abandoned her legal husband and children and thereafter associated herself in unlawful relation with one Frank Parker.

Irma Johnson Weathers lived with her foster parents, John A. Weathers and his wife, who had no other children, for nearly ten years, when they were all killed in an automobile accident, 6 April, 1922, Irma Johnson Weathers surviving both John A. Weathers and his wife.

This suit is a contest over the estate of John A. Weathers. The plaintiffs are his collateral heirs, while the defendants are the heirs of Irma Johnson Weathers, or they claim through her.

It is conceded that, if the adoption in 1912 be valid, Irma Johnson Weathers succeeded to or inherited the estate; otherwise it is to go to the plaintiffs.

Let it be observed in the outset that this attack upon the order of adoption is not made by the natural parents of Irma Johnson, or any one claiming under her, but by the collateral heirs of John A. Weathers, deceased. This observation is made *in limine* because it has been held that attacks of this kind should not be entertained when made by the heirs or representatives of the adoptive parent, who was a party to the proceeding, except for jurisdictional defects appearing on the record. *Coleman v. Coleman,* 81 Ark., 7; *Wilson v. Otis,* 71 N. H., 483; *Morris v. Dooley,* 59 Ark., 483; *Watts v. Dull,* 184 Ill., 86; *Foley v. Foley,* 61 Ill. App., 577; *Crocker v. Balch,* 104 Tenn., 6. And in the absence of evidence to show a want of jurisdiction, the presumption in favor of such jurisdiction should prevail. *Josey v. Brown,* 119 Ga., 758; *In re Camp,* 131 Cal., 469.

It has also been held that where the court has jurisdiction of the subject-matter and of the parties, an irregularity which might render the decree voidable at the election of the infant is no ground for a collateral attack by those claiming under the adoptive parent. *Sewall v. Roberts,* 115 Mass., 262. The fact that the natural parents were not served with notice of the proceeding to adopt their child has been held not to render an order of adoption entered in such proceeding invalid as to the parties thereto and their privies, although the proceeding might have been successfully attacked by the parents for that reason. *Coleman v. Coleman,* 81 Ark., 7; *Woodard's Appeal,* 81 Conn., 152; *Sullivan v. People,* 224 Ill., 468; *Ross v. Ross,* 129 Mass., 243; *Beatty v. Davenport,* 45 Wash., 555; 30 L. R. A. (N. S.), 147 note; 1 R. C. L., 608.

In *Woodard's Appeal, supra,* the Court reasoned that even though the parents of the adopted child had the right to contest the validity of the adoption in so far as it deprived them of their legal parental rights, because no notice of the proceeding had been given to them, it did not follow that a decree giving to the infant statutory capacity of inheritance from a stranger, rendered in pursuance of jurisdiction conferred by statute and in the manner prescribed thereby, should be held invalid for that reason.

In the case of *In re Evans,* 106 Cal., 565, the same view is expressed in the following language: "Various irregularities in the proceedings are urged, but, after these papers were executed before the judge, and this man and this child lived together as father and daughter for ten years and down to the day of his death, it requires more than mere irregularities to brush aside and annul a relationship entered into with

all honesty of purpose, lived up to for many years, and only severed by the hand of death." To like effect are the decisions in *Estate of McKeag,* 141 Cal., 403; *In re Johnson,* 98 Cal., 545; *Parsons v. Parsons,* 101 Wis., 83; *Van Matre v. Sankey,* 148 Ill., 536; *Sewall v. Roberts,* 115 Mass., 276.

And in *Nugent v. Powell,* 4 Wyo., 201, it is said: "Notwithstanding these proceedings in adoption, the father might at any time since they took place have brought an action for the possession or custody of the child, and no one will contend, or perhaps can successfully contend, that in such case these adoption proceedings would constitute a bar to the father's action, or that they were conclusive upon him. But it does not follow that because the adoption proceedings were not conclusive upon the father, they were not conclusive upon the parties to the proceedings and their privies; on the contrary, we think they are, and so hold."

Again, it is the holding of a number of courts that though the adoption may be voidable at the instance of the child or its natural parents because of a failure to comply with some requirement of the statute, yet if all the conditions have been performed or complied with on the part of the child, or of those who agreed and consented to the adoption, so that the adoptive parent has received full consideration or recompense therefor, the child will ordinarily be entitled to enforce its property rights arising under such adoption. *Chehak v. Battles,* 133 La., 107; *Starkey v. McDermott,* 91 Mo., 647; *Nowack v. Berger,* 133 Mo., 24; *Burns v. Smith,* 21 Mont., 251; *Kofka v. Rosicky,* 41 Neb., 328; *Van Tine v. Van Tine* (N. J.), 15 Atl., 249; 1 R. C. L., 617.

In Wolf's Appeal (Pa.), 13 Atl., 764, this position is clearly stated as follows: "Nearly nine years after the decree was entered, and more than one year after the death of her adopted father, his administrator and collateral heirs come into court and ask that this decree of adoption be vacated. They are not here in the interest nor on behalf of the innocent subject of adoption, but decidedly against the same. They are either strangers to the adoption proceedings, and therefore have no standing in court, or they are privies in blood or in law, and stand in the shoes of Samuel Sankey, through and under whom they claim. Surely Samuel Sankey, if living, would not be heard in this Court questioning its decree made at his solicitation. He invoked the jurisdiction of the court; he asked that the decree of adoption should be made; he got what he desired; and he would not now be allowed to question the means he set in motion. If any wrong was done, Samuel Sankey did it, and neither he nor those who claim under him can be permitted to take advantage of his wrong to the prejudice of an innocent party. On the argument many cases were cited where decrees of adoption have

been set aside at the instance or in the interests of the adopted child, but none were cited nor will any likely ever be found where such decrees were revoked at the instance of the party who invoked the power of the court, and sought and obtained its decree, when such revocation would be to the prejudice of the innocent child."

The above cases are cited only to show how the matter has been dealt with in other jurisdictions. The present record, of course, must be considered in the light of our own legislation on the subject. It is conceded that the act of adopting a child is not a matter of common-law origin, but was taken from the civil law and introduced here by statute. *Furgeson v. Jones,* 17 Ore., 204. The pertinent sections on the subject as found in chapter 2 of the Consolidated Statutes provide as follows:

First, that any person desiring to adopt a minor child may file a petition in the Superior Court of the county wherein such child resides, setting forth the name and age of the child and the names of its parents, whether the parents or either of them are living, and if there be no living parent, the name of the guardian, if any, and if there be no guardian, the name of the person having charge of the child or with whom such child resides, the amount and nature of the child's estate, if any, and especially whether the adoption is for the minority or for the life of the child. C. S., 182.

Second, that the parent or guardian, or the person having charge of such child, or with whom it may reside, must be a party of record in the proceeding. C. S., 183.

Third, that in all cases where the parent or parents of any child has wilfully abandoned the care, custody, nurture and maintenance of the child to kindred, relatives or other persons, such parent or parents shall be deemed to have forfeited all rights and privileges with respect to the care, custody and services of the child. C. S., 189.

It is not required that the proceeding be adverse; it may be *ex parte,* and not infrequently is; it is commenced by petition; no summons is necessary. *Rector v. Logging Co.*, 179 N. C., 59; *Caldwell v. Wilson,* 121 N. C., p. 453. The parents of the child, if living, must appear as parties of record. Here they do appear as parties of record. The father consents to the adoption. The mother does not, but it is found as a fact "that Martha Johnson, mother of the child, is living away from her husband and child and takes no interest whatever in said child." While this finding, standing alone, may not be sufficient to show a wilful abandonment on the part of Martha Johnson, such as is required by C. S., 189, to forfeit all her rights and privileges with respect to the care, custody and services of such child, yet it does appear by evidence in the present proceeding, that, as a matter of fact, the said Martha

Johnson did separate herself from her husband and children and thereafter live in adultery with one Frank Parker. What more is necessary to show a wilful abandonment of her infant daughter, less than three years of age? If this evidence be competent, and I think it is, the failure to notify her at the time, ought not to be held as a fatal defect to the adoption proceeding. She had forfeited all her rights and privileges with respect to the care, custody and services of such child; and having thus forfeited her rights, no notice to her was required in order to give the court jurisdiction. *Nugent v. Powell,* 4 Wyo., 173; *Wilson v. Otis,* 71 N. H., 483. If notice to the natural parent has been rendered unnecessary by a previous abandonment, such parent is bound by the decree, was the holding in *Richards v. Matheson,* 8 S. D., 77. Likewise, in *James v. James,* 35 Wash., 653, it was held that where a child is in the custody of its father and the mother is living separate and apart, her consent is not essential to a proceeding for its adoption. The pertinent decisions are to the effect that even jurisdictional facts, or those necessary to show that a court or board of special or limited powers has acted within its jurisdiction, may be established by extrinsic evidence, in the absence of a statute requiring such facts to appear of record. *In re Williams,* 102 Cal., 70; *Van Dusen v. Sweet,* 51 N. Y., 378; *Williams v. Cammack,* 27 Miss., 209.

Here, the reason and excuse for proceeding without the consent of Martha Johnson, since she had forfeited her rights of custody, etc., under C. S., 189, may be shown by extrinsic evidence in aid of upholding the validity of the proceeding, for a decree of adoption is not necessarily invalid because it does not recite, nor the petition allege, the assent of the parents or facts excusing their assent. *Wilson v. Otis,* 71 N. H., 483. See, also, *Crawford v. Wilson,* 139 Ga., 465.

I do not agree to the proposition stated in 1 R. C. L., 603, and approved by the majority opinion, for I do not think it is supported by the weight of authority or the better-considered decisions, that jurisdiction in adoption cases, both as to the subject-matter of the judgment and as to the persons to be affected by it, "must appear on the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it." In the first place, when a court has attained the dignity of a court of record, there is a presumption in favor of its jurisdiction and the rightfulness of its decrees, when it assumes to act, and, until it has attained such dignity, it has no record by which it may speak at all. In the second place, even if its jurisdiction be special in such cases, unless the statute require some written evidence of its jurisdiction to be made and preserved, the general rule respecting judicial officers and courts of limited authority is that the jurisdictional facts, upon which their decrees rest, may be

shown by extrinsic evidence, oral or written, in the absence of a statute requiring such facts to appear in the minutes or other record of its proceedings. *Jolly v. Foltz,* 34 Cal., 321; *Williams v. Cammack,* 27 Miss., 209; *Barnard v. Barnard,* 119 Ill., 98; *Estate of Williams,* 102 Cal., 70.

Certainly in a case like the present, a strict construction of these statutes ought not to be applied for the purpose of thwarting the will of the adoptive parent, and disinheriting an adopted child in favor of the kindred by blood, whom the adoptive parent had sought to exclude from participating in his estate by the adoption of the child of another. Rather in such case, it seems to me, a liberal operation and intendment should be given the statutes to support a proceeding taken in good faith thereunder. *Cofer v. Scroggins,* 98 Ala., 342; *Fosburg v. Rogers,* 114 Mo., 134.

Speaking to the question in *Nugent v. Powell,* 4 Wyo., p. 186, *Clark, J.,* said: "It must be admitted in the beginning that a proceeding in adoption was wholly unknown to the common law, and in our system of jurisprudence it is purely a statutory matter. Hence it follows that, in order to give any validity to such proceedings, they must have been conducted in substantial conformity with the provisions of the statute, and its requirements observed; but, notwithstanding this, it ought not to be overlooked, in the examination of cases growing out of the exercise of this statutory right, that the right is a beneficial one, both to the public and those immediately concerned in its exercise. . . . In cases of this kind it is not the duty of the court to bring the judicial microscope to bear upon the case, in order that every slight defect might be enlarged and magnified, so that a reason might be found for declaring invalid an act consummated years before, but rather approach the case with the inclination to uphold such acts, if it is found that there was a substantial compliance with the statute."

I recognize the force of the argument that the rights of parents over their children should not be lightly dealt with, or easily swept away, and with this I readily concur; but jealous as the law may be of the rights of natural parents over their children, with all due deference, it seems to me that in the case at bar this solicitude has reached the stage of "a vaulting ambition which o'erleaps itself and falls on t'other side." There are other adoption proceedings in North Carolina which may be affected by the present decision. I think we are setting a precedent which will rise up to trouble us in the future.

For the reasons given, I must dissent from the judgment to be rendered in this case.

RUFUS SANDERS v. JOHN H. GRIFFIN AND WIFE, SARAH E. GRIFFIN, B. J. BOYLES AND WIFE, LUCY E. BOYLES, AND THE FIRST NATIONAL BANK OF WILSON, NORTH CAROLINA.

(Filed 24 March, 1926.)

1. Evidence—Telephone—Conversations—Hearsay—Circumstantial Evidence.

Where a telephone conversation is otherwise competent, it is not objectionable for a witness who has heard it only from one end of the line to testify to what he had heard, when the speaker at the other end has been sufficiently identified by circumstantial evidence, and the part testified to and other circumstances in evidence clearly indicate the subject-matter of the conversation as bearing upon certain material facts, though other parts of the conversation cannot be given by the witness testifying.

2. Contracts—Parties—Beneficiaries—Actions—Bills and Notes—Collateral Security.

Where a bank has loaned money on the note of the borrower, with a note secured by mortgage as collateral under an agreement that the collateral note should not be nor was it marked paid: *Held*, the bank, relying on this agreement and lending the money on the faith that it should not be canceled gets a good title to the collateral note.

3. Appeal and Error—Evidence—Reference—Findings.

The approval of the trial judge of the findings of the referee in the case referred, are not reviewable on appeal when they are supported by sufficient legal evidence.

APPEAL from *Cranmer, J.*, at November Term, 1925, of WILSON. No error.

At May Term, 1925, by consent, the action was referred under the following order: "In the above entitled case, by consent, it is ordered that this action be referred to David Isear, referee, who will take the testimony of such witnesses as may be offered by the parties hereto and report his findings of fact and conclusions of law thereon to this court. It is further ordered that if no exceptions are filed to the findings of fact and conclusions of law, then this action is remanded to the clerk of the Superior Court of Wilson County for final judgment and disposition."

On 3 August, 1925, the referee filed his report, together with the evidence taken. The findings of fact are as follows:

"A. That on or about the 5th day of November, 1920, Rufus Sanders sold to John H. Griffin a tract of land in Wilson County, for $9,000.00, the purchase price being evidenced by six notes of $1,500.00 each, one due ninety days from date, and the other five due 5 November, 1921, 1922, 1923, 1924, and 1925, respectively, the notes being secured by mortgage given by Griffin to Sanders upon the land, recorded in Book 126, page 125.

"B. That the deed from Rufus Sanders to John H. Griffin is in ordinary form and after describing the real estate conveyed by metes and bounds the description closes with these words: 'containing 66 acres, more or less, and being the very lot of land conveyed unto Zack F. Gill, as upon reference to his deed duly recorded in the register's office of Wilson County in Book 116, page 354.'

"C. That thereafter, on the same day, Griffin sold the land to the defendant, B. J. Boyles, and executed unto him a deed which contained the following language: 'The assumption of the party of the second part (B. J. Boyles) of a certain mortgage indebtedness outstanding against real estate hereinafter described in the sum of $9,000.00, in favor of Rufus Sanders.' The consideration passing from Boyles to Griffin being $3,000.00, and the assumption of the mortgage.

"D. That almost immediately thereafter, Sanders was notified by Boyles or Griffin of the sale of the property by Griffin to Boyles.

"E. That the note due in ninety days was duly paid and is not in controversy in this action.

"F. That when the second note for $1,500.00 fell due, 5 November, 1921, Sanders called upon Boyles for payment and Boyles did not pay it when due.

"G. That between 5 November, 1921, and 11 February, 1922, Sanders left the note with his attorney, with instructions from Sanders to collect it and that if it was not paid, to sell under mortgage.

"H. That Sanders was subsequently informed by both Boyles and his attorney that the money to take up the note could not be raised by Boyles, except by placing the note with the bank as collateral.

"I. Boyles, not having the money, arranged with Col. John F. Bruton, president of the First National Bank, to borrow $1,500.00, agreeing to put up this note as collateral.

"J. That thereupon, Boyles went to see Sanders' attorney and obtained from him the note in question duly endorsed, 'Rufus Sanders, by his attorney.'

"K. That his attorney knew the purpose for which the note was transferred and acted after consulting Rufus Sanders.

"L. That Mr. Boyles, after receiving the note from Sanders' attorney, carried it to the bank and placed it as collateral to a loan, the proceeds of which he paid to Sanders' attorney for Rufus Sanders.

"M. That Rufus Sanders accepted the proceeds derived from the transfer of said note under circumstances which should have put him upon notice as to the method of its procurement.

"O. That Rufus Sanders has been in possession of said real estate since 18 August, 1923, which real estate is reasonably worth a yearly rental of $360.00.

From the foregoing conclusions of fact, your referee finds the following conclusions of law:

"1. The defendant, John H. Griffin, is entitled to no reduction in the original indebtedness by reason of any discrepancy between the description in the deed of the plaintiff and the acreage actually conveyed.

"2. That The First National Bank of Wilson is entitled to participate in the proceeds of the sale of said real estate.

"3. The plaintiff is chargeable with a yearly rental of $360.00 from 18 August, 1923.

"4. A resale of said real estate must be had."

At November Term, 1925, the court below found: "The findings of fact of the referee as set out in the report of the referee, and a part of the record of this cause, are hereby in all respects affirmed and approved and by the court adopted as the true facts in this cause." Judgment was rendered in accordance with the findings of the referee, etc. The plaintiff duly excepted to the judgment and assigned error. The material assignments of error will be considered in the opinion.

Connor & Hill for plaintiff.

O. G. Rand and W. A. Lucas for defendants.

CLARKSON, J.—B. J. Boles testified as follows: "I recognize this note. It never came into my possession at all. It came into Col. Bruton's possession at the bank. I assumed the payment of this note. When the note came due money was tight and I told Mr. Sanders I could not pay it. Sanders' attorney called on me several times for the money. I told him that I could not pay it, but would see if I could get Col. Bruton to take it up. I told Sanders' attorney this in Sanders' presence. I was in Sanders' attorney's office right before the transfer. Sanders' attorney called Mr. Sanders' phone number and addressed some person over the phone whom he called Mr. Sanders. (To that portion of the evidence 'Sanders' attorney called Mr. Sanders' phone number and addressed some person over the phone whom he called Mr. Sanders,' the plaintiff excepted and assigned as error.) I don't remember what Sanders' attorney said over the phone, but he told me to get the money from the bank the next day and the note would be transferred. He said that it would be all right. Sanders' attorney and I went to Col. Bruton's office with the note. Col. Bruton gave Sanders' attorney a check for the money. I never gave Sanders' attorney the check. I never had my hands on it."

Plaintiff contends: "The purpose of this evidence was to fix Sanders with notice of the transfer of this note. It will be observed that Mr. Sanders denies any such conversation. 'I never had any conversation

with my attorney over the phone or otherwise, authorizing him to transfer this note to the bank.' It will be observed that Sanders' attorney does not testify to this telephone conversation. We therefore have a pure hearsay proposition from Mr. Boyles and it is submitted that it is incompetent as fixing Sanders with any conversation with his attorney at all."

Col. John F. Bruton testified, in part: "Mr. Boyles called to see me about negotiating a loan, stating that there was an obligation outstanding on his farm. He stated that the note was worrying him. I told him that we could lend him the $1,500.00 with the Griffin note as collateral. He left the office and in about five minutes returned with the note, which he pledged as collateral. Our records show that he gave plaintiff's attorney a check for the deposit. I told Mr. Boyles that he would have to take the note up and not pay it off if it was to be placed as collateral."

It will be noted that Boyles testified: That he told Sanders he could not pay the note, and in his attorney's presence told him that he would see if he could get Col. Bruton to take it up. He further testified that Sanders' attorney "called Sanders' phone number." This testimony indicated that Boyles knew Sanders' phone number. The attorney addressed some person over the phone whom he called "Mr. Sanders." The note was in possession of Sanders' attorney when he called Sanders' phone number and was subsequently turned over to Col. Bruton as collateral security. The note was never marked "Paid" and the testimony of Col. Bruton was to the effect that the note could not be paid off if he took it as collateral. The money was paid to Sanders' attorney, who did not mark the note "paid." We think, under all the facts and circumstances of this case, the phone incident was some evidence, a circumstance to be considered with the other evidence to fix Sanders with notice that the note was not to be paid off.

Courts of justice recognize the useful intercommunication in modern life of the telephone. They are now installed in almost every home and place of business. They have become a necessity, as a medium to the conduct of business.

A bystander, as was said in *Lumber Co. v. Askew,* 185 N. C., 87, could not go so far as to testify that he heard a conversation "between my father and Mr. Cobb"; because he did not know whether Mr. Cobb was at the other end of the line. This was hearsay. This part of the testimony was incompetent. In that case the principle was well recognized that it is not hearsay for a bystander to testify, under certain circumstances, to what he heard the party who was conversing over the phone say.

In *Atlantic Coast Realty Co. v. Robertson, Exrs.,* 135 Va., 247, 116 S. E., 480, the following was held admissible: "Q. 'What did you see your husband do and hear him say on the Sunday night you have referred to? A. He went to the phone and asked for the Stratford Hotel. He said, in a few moments, "Is that Mr. Burke?" and, in a few moments he said, "I have been trying to get you for several days. I wanted to tell you that I have decided not to accept your proposition," and in a few moments he said "Yes, but I have decided not to accept your proposition." Q. And he repeated that twice over the phone on Sunday night? A. Yes, sir. Q. Are you absolutely positive of that? A. I am.' There have been many cases involving the admissibility of the testimony of a bystander who relates one side of a telephone conversation. No attempt will be made to review these cases. So far as the rule has been formulated, it is that they are governed by the same general rules of evidence which govern the admission of oral statements made in original conversations, except, of course, that the party against whom the conversation is sought to be used must be identified; but the identity of the other party to the conversation may be established either by direct or circumstantial evidence. 12 Ency. Evidence, 477; *Williamson, Etc., v. King,* 58 Okl., 120, 158 Pac., 1142."

In *Johnston v. Fitzhugh,* 91 Oreg. Rep., p. 252, it is said: "If it is established prima facie either directly or by circumstantial evidence that the conversation took place between individuals who could be bound by the same if carried on face to face, it is competent for a bystander to narrate that part of the conversation which he hears, provided always that the statements which he heard are competent evidence. The reason given by the court to the effect that a witness could not give part of the conversation unless he could give all of it, is fallacious. It often happens that a witness can remember some part of the transaction and not others, but this does not exclude what he knows or remembers. It is true that 'when part of an act, declaration, conversation or writing is given in evidence by one party, the whole, on the same subject, may be inquired into by the other.' . . . This, however, does not require that the account of the act, declaration or conversation must come entirely from the mouth of any single witness. It is rare in any case that any one witness may be able to testify to all the facts and circumstances involved in the contention. Generally, evidence is made up of 'line upon line, here a little and there a little': Isa. xxviii: 10."

In *St. Paul Fire & Marine Ins. Co. v. McQuaid,* 114 Miss., 430 (75 South, 255), it was said: "As to the law touching conversations over telephones: We think the law is well settled that such conversations are admissible in evidence. The fact that the voice at the telephone is not identified does not render the conversation inadmissible.

The weight to be given such evidence is largely left to the jury, or to the chancellor, when the case is tried without a jury."

In *McCarthy v. Peach,* 186 Mass., 67, 70 N. E., 1029, 1 Ann. Cas., 801, it is said: "The only question is whether a witness for the plaintiff properly was allowed to testify to what he heard the plaintiff say as a part of an alleged conversation with the defendant over the telephone, the plaintiff being in Boston and the defendant in Chelsea, and the witness being in the presence and hearing of the plaintiff. The witness had no personal knowledge with whom the plaintiff was talking, and did not hear anything that was alleged to have been said by the defendant, and did not know that the defendant heard anything that the plaintiff said. . . . We think that the evidence was properly admitted. . . . The evidence that was admitted cannot be regarded as hearsay evidence or declarations made by the plaintiff in his own interest, simply because the witness did not know of his own knowledge that the other party to the alleged conversation was the defendant, or that there was any other party, or that the defendant heard what was said."

The present case is not like *Saleeby v. Brown,* 190 N. C., p. 146, cited by plaintiff. In the *Saleeby case,* it was said: "The mortgage was not canceled of record, but it was surrendered to the mortgagor and marked 'paid and satisfied', and the note also surrendered to mortgagor and 'canceled and destroyed.'" It could not be subsequently resuscitated and reissued as security for a new loan.

It is true in the present case, that Boyles assumed the payment of the Griffin notes and became liable to pay the plaintiff. In *Parlier v. Miller,* 186 N. C., 504, it is said: "Professor Minor, in his great treatise on Real Property, says: 'If the assignee (of the land) does thus assume payment of the mortgage debt, he thereby becomes the principal debtor, and the original mortgagor is only liable subsidiarily as a surety. And while the mortgagee may continue to hold the mortgagor personally liable upon his contract to pay the debt, notwithstanding the assumption of the mortgage by the purchaser of the land, he may also, it seems, hold the purchaser directly responsible, though he is not a party to the agreement between the mortgagor and the purchaser—a right based sometimes upon the principle that one may sue upon a contract to which he is not a party, if it be made for his benefit, and sometimes upon the theory of the subrogation of the mortgagee to the rights of the mortgagor (the surety) against the purchaser (the principal debtor).' 1 Minor on Real Property, sec. 647; *Baber v. Hanie,* 133 N. C., 588."

Boyles assumed the Griffin notes, secured by mortgage, and became obligated to pay them. The note in controversy, secured by mortgage,

was one of a series that he assumed. It is found as a fact that, to the knowledge of the owner of the note, the money on the note could not be raised by Boyles unless this note be placed as collateral with the bank which was to loan the money. The note was used as a basis of credit for Boyles, with the owner's knowledge and not marked 'paid.' The money was loaned by the bank on the faith of it being one of a series of notes secured by mortgage. The money obtained from the bank was paid to the plaintiff, owner. Under the findings of fact, the intent of the parties was that the note should be used as collateral and not paid, and this, in many respects, is corroborated by the conduct of the parties to the transaction. The right and justice of the matter, under such circumstances, is that the bank should not be the loser. The agreement should stand as made by the parties. *Furniture Co. v. Potter,* 188 N. C., p. 146.

The evidence of record is sufficient to sustain the findings of fact.

It is said in *Battle v. Mercer,* 187 N. C., p. 448: The discretion of a trial judge as to findings of fact is well stated by *Stacy, J.,* in *S. v. Jackson,* 183 N. C., 698: 'The findings of fact of a referee, approved by the trial judge, are not subject to review on appeal, if they are supported by any competent evidence. *Dorsey v. Mining Co.,* 177 N. C., 60; *Hudson v. Morton,* 162 N. C., 6; *Hunter v. Kelly,* 92 N. C., 285.' "

We do not think it necessary, from the view we take, to consider the other assignments of error *seriatim.* From the record we can find

No error.

WILLIAMS ET ALS. v. SASSER ET ALS.

(Filed 24 March, 1926.)

1. Estates—Remaindermen—Vested Interest—Heirs of the Body—Children—Rule in Shelley's Case.

A conveyance of land to the grantor's daughter for life, with remainder over to "the lawful begotten heirs of her body," to be held in trust free from the debts of her husband and "for the special benefit of herself and children": *Held,* the rule in *Shelley's case* does not apply, and the limitation over is to her children, who take at once a vested interest not determinable upon the contingency of their surviving their mother.

2. Estates—Deeds and Conveyances — Remainders—Vested Interests—Wills—Devises.

One who takes a vested remainder may dispose of the lands by will that takes effect during the continuance of the preceding life estate, but its enjoyment will be postponed.

3. Estates—Contingent Remainders—Vested Interest—Words of Survivorship.

Ordinarily where the vesting of an interest in the remainderman is postponed to the death of the first taker, some expression indicating it, or importing survivorship, are used in the creation of the estate.

4. Same—Trusts—Postponement of the Possession.

Where from a proper interpretation of the instrument creating it a remainder in lands is vested, a trust imposed that the estate is to be held for determinative periods, for the benefit of those taking after the falling in of the precedent estate only postpones the absolute ownership of the remaindermen accordingly.

CIVIL ACTION before *Barnhill, J.*, at December Term, 1925, of DUPLIN.

This was a civil action for partition instituted before the clerk of the Superior Court. One of the plaintiffs, Bessie L. Sasser, claimed a one-eighth undivided interest in the land as devisee of Mollie L. Williams, and also an interest in said land as heir at law of Indiana S. Sasser. The defendants admitted that Bessie L. Sasser was entitled to an interest in the property as heir at law of Indiana S. Sasser, but denied that she was entitled to any interest in said land under the will of Mollie L. Williams.

In March, 1858, Daniel Harper executed and delivered to Martha L. Williams a deed for the land in controversy, as follows, to-wit: "North Carolina, Duplin County. Know all men by these presents, that I, Daniel Harper, of the State of North Carolina, and county of Duplin, do for the natural love and affection that I have for my daughter, Martha L. Williams, wife of Barachas W. Williams, do give unto her my plantation that I now live on, lying on the east side of the Wilmington and Weldon Railroad, and on the north side of Bear Swamp, adjoining the lands of D. B. Newton, David Wright and others, supposed to be 160 acres, which by reference to deed will more fully show together with my dwelling-house and out-houses on the premises during her natural life and at her death to be equally divided between the lawful begotten heirs of her body.

I further give unto my beloved daughter the following negroes, Old Oty, aged about thirty-eight years, Jackson, aged about 16 years, Squire John about 13 years, Cassey about 9, Winnie about 7, Sally about 4, and young Oty about 9 months old and their increase during her natural life but I reserve my lifetime in the land and negroes and after her death to be divided and disposed of as the above land and not to be liable nor subject to any debts heretofore made by her husband nor any that he may contract hereafter nor any future husband not to be disposed of by him in any way whatever, only to be used by her husband for the

special benefit of herself, and children during her natural life and at her death to go in the hands of Daniel B. Newton as special trustee for the lawful begotten heirs of her body and for him as they become 21 years old to divide and hand over to them as the law directs in all such cases all the above named property I do warrant and defend the title to my daughter against the lawful claims of any and all persons whatsoever. But by the mutual consent of my daughter I have the use of the above property or any portion of it that I may want during my life.

In testimony whereof, I hereunto set my hand and seal this the 11th day of March, 1858. DANIEL (his X mark) HARPER, (Seal).

Signed, sealed and delivered in the presence of
DAVID WRIGHT, D. BOWDEN.

Before signed, I do reserve one quarter of an acre including my graveyard where my wife Alisa Harper and my grandchild is buried free from all encumbrances forever.
DANIEL (his X mark) HARPER, (Seal).

Signed, sealed and delivered in the presence of
DAVID WRIGHT, D. BOWDEN.

The due execution of the foregoing deed is proved in open court by the oath of D. Bowden, subscribing witness and ordered to be registered.
Test: JOHN J. WHITEHEAD, *Clerk*.

Witnessed and ordered to be registered. THOS. I. KOONCE, *Register*.
Registered Book 22, page 368."

After the pleadings were filed the question came before Judge Barnhill for determination, and he rendered judgment, the pertinent portion of which is as follows: "It is adjudged that said will of Mollie L. Williams was ineffectual to convey any interest in said land and that the petitioner, Bessie L. Sasser, together with the other heirs at law of Indiana S. Sasser are seized of a 1-7 undivided interest in said land, *i. e.*, Bessie L. Sasser is seized of a 1-21 interest. This cause is remanded to the clerk to the end that he may proceed herein in accordance with this judgment."

The defendants contend that the judgment as rendered is correct for the reason that Mollie Williams predeceased her mother, Martha L. Williams, and hence had no interest in said land to devise to her

niece. The plaintiff, Bessie L. Sasser, contends that the judgment should be reversed for the reason that the said will of Mollie L. Williams conveyed to her a one-eighth undivided interest.

R. D. Johnson for plaintiff.
Gavin & Boney for defendants.
Downing & Downing for defendant, Rosa A. Sasser.

BROGDEN, J. It is conceded in the briefs of the parties that the rule in *Shelley's case* is not involved for the reason that the superadded words "equally divided between the lawful begotten heirs of her body" bar its application. *Ward v. Jones,* 40 N. C., 400; *Mills v. Thorne,* 95 N. C., 362; *Jones v. Whichard,* 163 N. C., 244; *Haar v. Schloss,* 169 N. C., 228; *Blackledge v. Simmons,* 180 N. C., 535.

Therefore, Martha L. Williams, the grantee in the deed, took thereunder a life estate only with remainder to be "equally divided between the lawful begotten heirs of her body," it being further provided that "at her death to go into the hands of Daniel B. Newton as special trustee for the lawful begotten heirs of her body, and for him, as they become 21 years old, to divide and hand over to them as the law directs in all such cases, all the above named property." It is manifest that the words "lawful begotten heirs of her body" are not employed to designate an entire class to take in succession from generation to generation or used in a technical sense, but rather as a mere *descriptio personarum.* Hence, the words "lawful begotten heirs of her body" should be construed as children. This interpretation is further reinforced and established by the language of the deed itself, and particularly the following clause thereof, "only to be used by her husband for the special benefit of herself and *children* during her natural life, etc." *Puckett v. Morgan,* 158 N. C., 344; *Bizzell v. Loan Association,* 172 N. C., 159; *Albright v. Albright,* 172 N. C., 351; *Kornegay v. Cunningham,* 174 N. C., 209; *Pugh v. Allen,* 179 N. C., 307; *Blackledge v. Simmons,* 180 N. C., 535.

Under this construction Martha L. Williams, the grantee in the deed, would take a life estate with remainder to her children to be equally divided as they become 21 years old.

The vital question immediately arises: "Is the remainder vested or contingent?" If contingent, the will of Mollie Williams who predeceased the life tenant, Martha L. Williams, is ineffectual, and the plaintiff, Bessie L. Sasser, takes nothing thereunder. If the remainder is vested, Bessie L. Sasser took under said will the one-eighth interest of Mollie L. Williams in said land.

The contention of the defendants that the remainder is contingent rests upon the theory that only the children of the life tenant who

survive her will take an interest in the property. They rely upon the decisions of *Richardson v. Richardson,* 152 N. C., 705; *Bowen v. Hackney,* 136 N. C., 187; *Starnes v. Hill,* 112 N. C., 1; *James v. Hooker,* 172 N. C., 780; *Mercer v. Downs, ante,* 203. In all of these cases there were words of survivorship or words importing survivorship in the instrument creating the estate, and these words of survivorship were construed as referring to the death of the life tenant as the time for ascertaining or designating the parties entitled to the property. There is no such language in the deed of Daniel L. Harper.

In *Power Co. v. Haywood,* 186 N. C., 313, the question as to whether the remainder was vested or contingent was fully discussed by *Adams, J.* It was the sole question for decision. The distinction between vested and contingent remainders was thus expressed: "The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." In that case the devise was "to William, during his natural life, and at his death to his eldest son; but if he should die leaving no son surviving him, then I give said plantation to my children, to be equally divided between them." Thereafter William James Boylan was born to the life tenant, William Boylan, and died during his father's lifetime, and therefore before the life estate terminated. Continuing the discussion, *Justice Adams* says further: "Guided by the foregoing authorities and others which are not cited, we are unable to concur in the argument that the vesting of the remainder was dependent on the decease of the life tenant during the life of the remainderman."

In *Witty v. Witty,* 184 N. C., 375, it appeared that Levi Witty died in January, 1872, devising his land to his wife, Louisa Witty, for life, and at her death, or if she married again, the land was to be sold at public auction and the proceeds to be divided equally among "my lawful heirs." At the time of his death the testator was survived by five children, all of whom died before the death of the life tenant. E. M. Witty, one of the children of the testator, died before his mother, the life tenant, devising his interest in the land to his wife, Mrs. E. M. Witty, for life, with remainder to his adopted son, Mark Witty, Jr. *Stacy, J.,* says: "It is provided that the remainder after the life estate is to be divided equally among 'my lawful heirs,' *simpliciter,* and this imports a division among those who were the heirs of the testator at the time of his death, and who took in right at that time, though they were not to come into actual possession and enjoyment until the previous benefit, intended for their mother, should terminate by her death."

And further, "the fact that the direction is to sell the realty at the expiration of the preceding particular estate and to divide the proceeds derived therefrom ordinarily would not affect the general rule as to when the remainder is to vest."

The various shades of definition and distinguishing marks of vested and contingent remainders are fully discussed and classified in the *Haywood case* and the *Witty case.* These cases summarize and gather up in clear expression the principles reaffirmed in a long line of decisions from *Brinson v. Wharton,* 43 N. C., p. 80, to the present time. Under the authority of the reasoning in these cases we hold that Mollie L. Williams took a vested remainder in the land, and that therefore her will conveying her interest to Bessie L. Sasser was effectual to transfer her interest to the said Bessie L. Sasser.

While it is true that the deed provided that at the death of the life tenant the land was to be held by a trustee until the remainderman should arrive at 21 years of age, this fact does not affect the principle regulating the time of vesting of the estate in the remainderman. It simply postponed the time of enjoyment. 23 R. C. L., 529; *Starnes v. Hill,* 112 N. C., 1; *Bank v. Ballard,* 83 Ky., 481; *Taylor v. Mosher,* 29 Md., 443; *Schofield v. Alcott,* 11 N. E., 357; L. R. A., 1918-E., 1127.

Holding, therefore, as we do, that Mollie L. Williams took a vested remainder, the judgment must be

Reversed.

H. F. WALTER AND THE FIRST NATIONAL BANK OF KINSTON, N. C., v. J. L. KILPATRICK AND G. G. MOORE, TRUSTEE.

(Filed 24 March, 1926.)

1. Bills and Notes—Negotiable Instruments — Statutes — Mortgages—Trusts—Deeds and Conveyances—Acceleration of Maturity—Nonpayment of Interest.

The negotiability of notes in series each containing an unconditional promise to pay a certain sum of money at a fixed future time to the order of a specified person, C. S., 2982, 2985, is not affected by provisions stated therein that they are secured by deed in trust on or mortgages of certain lands, C. S., 2986, or the expressed condition contained in the mortgage accelerating the maturity of each and all of the notes upon nonpayment of interest on any of them, when it is due and payable.

2. Bills and Notes—Maturity Accelerated—Determinable Issue.

An instrument payable on or before a fixed date is negotiable under the provisions of C. S., 2985, and is not affected by C. S., 2982(3), requiring that it be payable at a determinable future time.

3. Same—Qualified Endorsement—Warranty.

The endorsement of a note "without recourse" does not impair the negotiability of the instrument, but qualifies the endorsement (C. S., 3019), by which the endorser warrants only the genuineness of the instrument; that he had a good title; that he and prior endorsers had capacity to contract; that he had no knowledge of any fact which could impair its validity or render it valueless. C. S., 3046.

4. Same—Presentment—Dishonor.

Where one has acquired a negotiable instrument by an endorsement by a holder without recourse, there is no implied warranty on the part of such endorser that the instrument would be paid by the maker on presentment according to its tenor, or that if the necessary proceedings upon dishonor should be taken he would be liable thereon.

5. Same—Mortgages—Trusts—Priorities—Registration—Notice.

A prior registered mortgage on lands given for the security of notes in series, is notice to the holders of the notes of conditions agreed upon between the original parties as to priority of payment of some of the notes in the series over other notes therein, and such priorities of payment are enforceable against the others in realizing upon the securities in a sale of the mortgage premiums, without affecting the negotiable qualities of the notes thus secured.

6. Same—Priority of Payment—Breach of Warranty.

The endorser without recourse of one or more of negotiable instruments in series, does not breach his warranty as such endorser by a provision in a prior registered mortgage securing their series of the notes, giving other of the notes in the series a preference in payment out of the proceeds in the sale of the mortgaged lands.

7. Same—Waiver—Option—Estoppel.

Where some of a series of negotiable notes are given priority of payment in a registered mortgage, and others without such priority are endorsed without recourse by the original payee, the latter is not estopped from insisting upon his right of priority of the other notes so secured, and such is a matter of his option.

APPEAL by plaintiffs from *Barnhill, J.*, at November Term, 1925, of LENOIR. No error.

Action to enjoin and restrain sale of land, under power of sale contained in deed of trust, to reform said deed by striking therefrom a provision relative to priority in payment of the first three notes secured therein from proceeds of sale of land conveyed thereby, and for judgment that all the notes secured by said deed of trust shall be paid equally and ratably from proceeds of sale by trustee or by commissioner under decree of foreclosure.

On 1 November, 1919, H. C. White conveyed to G. G. Moore, trustee, a tract of land, situate in Lenoir County, to secure the payment of six notes, executed by him, and payable to the order of J. L. Kilpatrick, the consideration for said notes being the balance due on the purchase

price of said land, sold and conveyed by Kilpatrick to White, by deed of same date. Five of said notes, each for the sum of $5,539.88, became due, according to their tenor, successively, on 1 January, 1921 to 1925, inclusive; the remaining note for $391.20 becomes due on 1 January, 1926. Immediately upon the execution of said notes by H. C. White, defendant, J. L. Kilpatrick, payee named therein, endorsed the three notes, due 1 January, 1924, 1925 and 1926, respectively, without recourse, and transferred same for value, and before maturity to plaintiff, H. F. Walter; thereafter, the said H. F. Walter, for value, and before maturity, transferred the notes due on 1 January, 1924, and on 1 January, 1926, to his coplaintiff, the First National Bank of Kinston, N. C. At the date of the commencement of this action, to wit, 3 February, 1922, J. L. Kilpatrick was the holder, as payee, of the three notes, first maturing, and plaintiffs were the holders, as endorsers of the three remaining notes, as herein stated. Each of said notes contains on its face the following words: "This is one of a series of notes secured by deed of trust or mortgage and it is agreed that the failure to pay any note or interest when due shall cause all to become due and payable immediately." Interest on all of said notes to 1 January, 1921, has been paid; no other or further payment has been made on any one of said notes.

The deed of trust, executed by H. C. White to G. G. Moore, trustee, and duly recorded, contains a provision in the following words: "In case of sale under the power, the first three notes shall have priority to the funds."

Plaintiffs, in their complaint, alleged that these words were inserted, after the execution of the deed of trust, by interlineation, without the knowledge or consent of plaintiffs; this allegation is denied by defendants. Plaintiffs further allege that the effect of said interlineation is to exclude plaintiffs from any participation in the proceeds of the sale of the land conveyed by the deed of trust, for the reason that said land, if sold now, would not bring a price more than sufficient to pay the three notes, first maturing; that if the first three notes, now held by J. L. Kilpatrick, shall first be paid in full out of the proceeds of the sale of the land, no sum will be left in the hands of the trustee to be applied on the payment of the remaining notes now held by plaintiffs.

Plaintiffs pray judgment that said provision be declared void, and that the holders of all said notes, secured in said deed of trust be declared entitled to payment from the proceeds of the sale of said land, equally and ratably.

The issue submitted to the jury was as follows:

"Was the deed of trust from White to Moore, trustee, recorded in Book 64, page 362, Lenoir registry, altered and changed after the

execution and delivery of said deed of trust and the notes thereby secured by inserting therein the clause, 'In case of sale under the power, the first three notes shall have priority to the funds,' as alleged in the complaint? Answer: 'No.'"

From judgment, declaring (1) that the deed of trust, as recorded, containing the provision recited in the issue, is valid and binding as to all its terms, as same appear therein, (2) that the first three notes, held by J. L. Kilpatrick, are entitled to priority in payment out of the proceeds of the sale of the land under the power of sale, contained in the deed of trust, (3) that the notes held by plaintiffs, are entitled to participate in the proceeds of said sale, only after the payment in full of the notes held by J. L. Kilpatrick, and (4) that the order heretofore entered, enjoining and restraining the sale of the land by the trustee be dissolved, plaintiffs appealed to the Supreme Court.

Rouse & Rouse and F. E. Wallace for plaintiffs.
Cowper, Whitaker & Allen and Sutton & Greene for defendants.

CONNOR, J. The notes held by plaintiffs and defendants, at the commencement of this action—executed by H. C. White, each containing an unconditional promise to pay a certain sum of money, at a fixed future time, to the order of J. L. Kilpatrick—are in form negotiable instruments. C. S., 2982, 2985. The recital on the face of each note, to wit: "This is one of a series of notes secured by deed of trust or mortgage" does not affect the negotiable character of the notes. C. S., 2986. *Trust Co. v. Leggett,* 185 N. C., 65, 29 A. L. R., 709 n; *Critcher v. Ballard,* 180 N. C., 111; *Zollman v. Jackson Trust & Sav. Bank,* 32 L. R. A. (N. S.), 858, with note; nor do the words in said recital, "and it is agreed that the failure to pay any note or interest when due shall cause all to become due and payable immediately" render the notes nonnegotiable. The agreement is valid. *Trust Co. v. Duffy,* 153 N. C., 62. Acceleration of the maturity of a note, or of notes in a series, as the result of the failure of the maker to pay interest, or to pay one of the notes of said series, when same becomes due, according to the tenor of the note or notes, by virtue of an agreement to that effect, appearing in the face of the note, or notes, does not make the note, or notes of the series, payable upon a contingency, and therefore nonnegotiable, within the meaning of C. S., 2985. The agreement for acceleration may be enforced as against the maker by the holder of the note or notes in the series, at his option. *White v. Hatcher* (Tenn.), 188 S. W., 60; *Chicago Railway Equipment Company v. Merchants National Bank,* 136 U. S., 34, L. Ed., 349; *Wilson v. Campbell,* 110 Mich., 580, 68 N. W., 278, 35 L. R. A., 544; *Clark v. Skeen,* 61 Kan.,

526, 60 Pac., 327, 49 L. R. A., 190. An instrument payable on or before a fixed date is, by statute, C. S., 2985, payable at a determinable future time, within the meaning of C. S., 2982(3).

A provision for the acceleration of the maturity of a note, or of notes in a series, upon default of the maker, is not automatic; such acceleration is at the option of the holder or holders of the note or notes; the option may be exercised by a holder only upon default by the maker. By paying the interest when due, or by paying each note of the series, as it matures, in accordance with his promise, the maker can deprive the holder of any and all rights under the agreement for acceleration; the right to acceleration may be waived by the holder of the note or notes, containing the agreement. An action upon a note accrues, at its maturity, according to its tenor, notwithstanding a provision for acceleration, if acceleration is waived or not enforced by the holder. 13 R. C. L., 909, sec. 97; 8 C. J., p. 138, sec. 237-242, p. 415, sec. 610.

The notes held by plaintiffs were endorsed by J. L. Kilpatrick, payee named therein, who wrote above his signature on the back of each note, the words, "without recourse." This is a qualified endorsement; its effect is to constitute the endorser a mere assignor of the title to the note, which he held at the date of the endorsement. It does not impair the negotiable character of the note so endorsed, C. S., 3019. *Bank v. Branson,* 165 N. C., 344; *Bank v. Hatcher,* 151 N. C., 359; *Evans v. Freeman,* 142 N. C., 61. By this qualified endorsement of the notes, J. L. Kilpatrick warranted (1) that the instrument is genuine and in all respects what it purports to be, (2) that he had a good title to it, (3) that H. C. White, the maker, and the only prior party thereto, had capacity to contract, and (4) that he had no knowledge of any fact which would impair the validity of the note or render it valueless. C. S., 3046; *Smith v. Godwin,* 145 N. C., 242. He did not engage by his qualified endorsement that, on due presentment, the note would be paid, according to its tenor, or that if the note was dishonored and the necessary proceedings on dishonor should be taken, he would pay the amount thereof to the holder of the note, C. S., 3047. His liability to plaintiffs on said notes is that of a qualified endorser; not that of a general endorser.

When plaintiffs became the holders of these notes, for value and before maturity, by virtue of the transfer of the same by the qualified endorsement of J. L. Kilpatrick, each note carried with it the personal credit of H. C. White, the maker, in support of his promise; *Trust Co. v. Leggett, supra.* Plaintiffs are holders of said notes, in due course; in their hands, the notes are free from any defect in the title of J. L. Kilpatrick, and free from defenses available to H. C. White as against J. L. Kilpatrick. They may enforce payment of each of said notes,

according to its tenor, for the full amount, C. S., 3038. There is no contention upon this appeal, that there has been a breach of any of the warranties made by J. L. Kilpatrick, as a qualified endorser, to the plaintiffs as subsequent holders of the notes.

In addition to the personal credit of H. C. White, upon which plaintiffs may rely to enforce payment of the notes, each note is secured in the deed of trust executed by H. C. White, conveying the land described therein to G. G. Moore, trustee. The security for each note transferred by J. L. Kilpatrick, as a qualified endorser, passes with the note, as an incident thereto, to subsequent endorsers. This is elementary. *Smith v. Godwin, supra.* This security arises from and is determined by the provisions of the deed of trust executed by H. C. White to G. G. Moore, trustee, contemporaneously with the execution of the notes. The notes recite on their face that they are secured in a deed of trust; the deed of trust was duly recorded.

Plaintiffs, as subsequent endorsees, are entitled to the benefit of all security, which the payee and endorser had for the payment of the notes, at the time of the endorsement—neither more nor less. To the extent to which they relied upon the deed of trust, they took the notes subject to all its terms and provisions; by the express provision of the deed of trust, the three notes, secured therein, first maturing and remaining in the hands of J. L. Kilpatrick, had priority upon the funds arising from the sale of the land conveyed therein; payment of these notes, endorsed by J. L. Kilpatrick, who thereby assigned his title thereto, and now held by plaintiffs, who claim title under the qualified endorsement, with notice of such provision, at least, by virtue of the registration of the deed of trust, cannot be enforced, out of said funds, until the payment in full of the three notes first maturing, now held by defendant, J. L. Kilpatrick. The jury has found that the provision relied upon by J. L. Kilpatrick was not inserted in the deed of trust after its execution and delivery. The provision is valid as between the payee of the first three notes and the holders of the remaining notes who acquired their title under the qualified endorsement of the payee. There is no error in the judgment.

The fact that the notes, held by plaintiffs, are postponed as to payment from funds derived from the sale of the land, conveyed by the deed of trust, for the purpose of securing these notes, as well as the notes held by J. L. Kilpatrick, cannot be held to impair their validity, or to render them valueless in breach of his warranty as a qualified endorser. The knowledge of this fact by the qualified endorser is not a breach of warranty by him in the negotiation of the notes. There is evidence upon this record that H. F. Walter had actual notice of the provision in the deed of trust relative to the priority of the first three

notes secured therein; the First National Bank of Kinston, N. C., had constructive notice at least of the provision, from the registration of the deed of trust; the recital on the face of the notes, at the time they were transferred to the bank, certainly was sufficient to put the bank upon notice as to any terms and provision in the deed of trust, affecting the security therein for the payment of the notes; if the bank relied upon the deed of trust, in purchasing the notes, it should have ascertained its terms and provisions.

The evidence offered at the trial tends to show that the notes held by plaintiffs were endorsed and assigned by J. L. Kilpatrick to H. F. Walter, pursuant to an agreement entered into between them prior to the execution of the notes and of the deed of trust; that the provision with respect to the priority in payment, upon the foreclosure of the deed of trust, of the first three notes, which under the agreement, were to be retained by J. L. Kilpatrick, was a part of this agreement and was inserted in the deed of trust with the actual knowledge of H. F. Walter. He subsequently assigned two of the notes to his coplaintiff, the First National Bank of Kinston, who holds the same as his assignee. It does not appear whether he is liable as an endorser, either general or qualified, to his coplaintiff. J. L. Kilpatrick, by his qualified endorsement, gave notice to all subsequent endorsees and holders that he assumed no liability on the notes except for a breach of the warranties which by statute accompanied his qualified endorsement. He made no warranty as to the value of the security for the payment of the notes. He cannot be held to be estopped from setting up and insisting upon his rights to priority under the express provision of the deed of trust. There is

No error.

COTTON GROWERS CO-OPERATIVE ASSOCIATION v. W. W. BULLOCK.

(Filed 24 March, 1926.)

Contracts—Cooperative Marketing—Breach—Liens—Agriculture—Damages—Liquidated Damages.

Under the provisions of the Cotton Growers Cooperative contract requiring that those signing the same deliver all of their crops to the association to be sold, etc., and stipulating their payment of five cents per pound as liquidated damages for their breach of this contract: *Held*, such growers may not sell their cotton in the open market upon the demands of lienors thereon, furnishing money, etc., to make the crop, without subjecting themselves to the payment of the liquidated damages specified, though the cotton at the price then obtainable was insufficient to pay off the valid and subsisting liens created after the time of the execution of the contract.

CONNOR, J., not sitting.

COTTON GROWERS ASSOCIATION *v.* BULLOCK.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1925, of EDGECOMBE.

The plaintiff is a coöperative marketing association, of which the defendant is a member. Laws 1921, ch. 87. On 26 February, 1921, the defendant executed and delivered to the plaintiff a marketing agreement containing the following sections:

2. The association agrees to buy and the grower agrees to sell and deliver to the association all of the cotton produced or acquired by or for him in North Carolina during the years 1922, 1923, 1924, 1925 and 1926.

4 a. All cotton shall be delivered at the earliest reasonable time after picking or ginning, to the order of the association, at the warehouse controlled by the association, or at the nearest public warehouse, if the association controls no warehouse in that immediate district; or by shipment as directed, to the association and by delivery of the endorsed warehouse receipts or bill of lading properly directed.

11. The grower shall have the right to stop growing cotton and to grow anything else at any time at his free discretion; but if he produces any cotton 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 cotton per year; but he shall deliver all the cotton produced or acquired by or for him as landlord or lessor.

13 a. This agreement shall be binding upon the grower as long as he produces cotton directly or indirectly, or has the legal right to exercise control of any commercial cotton or any interest therein during the terms of this contract.

13 c. 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 cotton and to pay off all or part of the crop mortgage for the account of the grower and to charge same against him individually. The grower shall notify the association prior to making any crop mortgage, and the association will advise the grower in any such transactions.

18 a. Inasmuch as the remedy at law would be inadequate, and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the association, should the grower fail so to sell and deliver all of his cotton, the grower hereby agrees to pay to the association for all cotton delivered, sold, consigned, withheld or marketed by or for him, other than in accordance with the terms hereof, the sum of 5 cents a pound, as liquidated damages for the breach of this contract, all parties agreeing that this contract is one

of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts.

The defendant did not deliver to the plaintiff any part of cotton he raised in 1922 and 1923, and in October, 1923, the plaintiff brought this suit to recover liquidated damages for the cotton sold by the defendant and to enjoin any other similar disposition during the continuance of the marketing agreement.

The issues were answered as follows:

1. How many pounds of cotton, of the crop of 1922, did defendant fail to deliver to plaintiff in breach of his contract? Answer: 11,925 pounds.

2. How many pounds of cotton, of the crop of 1923, did defendant fail to deliver to plaintiff in breach of his contract? Answer: 3,375 pounds.

Judgment was given against the defendant for $765 as liquidated damages, $150 as attorneys fees and $25 to cover the initial and two renewal premiums on the injunction bond, with interest on these amounts until paid. The defendant excepted and appealed.

Battle & Winslow, Burgess & Joyner and Henry C. Bourne for plaintiff.

Spruill & Spruill for defendant.

ADAMS, J. When the defendant became a member of the coöperative association he owned two farms, the Lawrence Farm and the Hales Place, on each of which he cultivated cotton in 1922; but in 1923 only on the latter. In 1922 he sold on the open market 11,925 pounds of cotton and 3,375 pounds in 1923. This was admitted; whereupon the defendant, called as a witness in his own behalf, proposed to relate the conditions under which the cotton had been sold. If he had been permitted to do so, he would have said in effect that in 1922 and 1923 he found it necessary to borrow money to make his crops; that crop liens were demanded as security for the loans and were executed by him in good faith solely as such security; that in due time the lienors (Planters Oil & Fertilizer Company in 1922 and First National Bank of Tarboro in 1923) demanded that the defendant sell his crops on the open market and pay the proceeds to them; that he did so; that he applied the proceeds in strict compliance with the demand of the lienors; and that the amount derived from the sales was insufficient to pay the respective liens. Upon objection this testimony was excluded, as were the crop liens, which also were offered in evidence, and the defendant excepted.

The validity of the marketing act and of the marketing agreement has heretofore been declared (*Coöp. Asso. v. Jones,* 185 N. C., 265); and in several cases the equitable jurisdiction of the courts has been exercised to prevent the grower from disposing of his crop in breach of his agreement. In others we have recognized the right of a member of the asso-

ciation to execute a mortgage or agricultural lien on his crop for the current year to enable him to cultivate and produce the crop for which the advances were made; and in one or two cases we have held that an order enjoining the grower's wrongful disposition of the crop should be drawn without prejudice to the right of the mortgagee or lien holder to demand and receive of the defendant the mortgaged property or a sufficient part of it to satisfy his claim. *Coöp. Asso. v. Patterson,* 187 N. C., 252; *Coöp. Asso. v. Harvey,* 189 N. C., 494. But we have never gone to the extent of holding that upon the lienor's demand a member may sell his crop on the open market without the knowledge or consent of the association. In our decisions the marketing agreement has not been given the effect of a right to forbid the lienholder to demand and receive of the mortgagor for the purpose of a sale so much of the mortgaged crop as may be necessary to pay the secured debt; for if the grower should refuse such delivery the mortgagee or lienor could enforce it by an appropriate proceeding. *Coöp. Asso. v. Patterson, supra.* But a sale by the grower upon the open market presents a very different question.

Under the terms of section 18 a, *supra,* the defendant agreed to pay to the plaintiff for all cotton delivered, sold, consigned, withheld, or marketed by or for him, unless in accordance with the agreement, the sum of five cents a pound as liquidated damages for his breach of the contract; and the question for decision is whether the defendant's proposed but excluded proof is sufficient, if accepted by the jury, to relieve him of liability for such liquidated damages.

In our opinion it is not sufficient for this purpose. The defendant definitely agreed to deliver to the association all the cotton produced or acquired by him during the years named in his contract (Agreement, sec. 2); he agreed that all his cotton should be delivered to the order of the plaintiff, at its warehouse, at the earliest reasonable time after picking or ginning (section 4 a); and that his cotton should be sold only to the plaintiff (section 11). The primary purpose running through the entire agreement is to secure the delivery of the whole cotton crop to the plaintiff; the one exception being that the words "all cotton" shall not include such as may have been covered by a crop mortgage or contract existing at the time the defendant signed the marketing agreement. Section 3. When the defendant in plain breach of his express agreement, without the approval, consent, or knowledge of the plaintiff, exposed his cotton to sale in the open market he became liable for the liquidated damages prescribed in section 18 a. In the *Patterson* and *Harvey cases* the terms of the marketing agreement were relaxed to the extent of giving force and effect to the statutes relating to mortgages and agricultural liens given for advances and supplies with which to make the crop;

but in the payment of these liens a strict observance of the legal requirements is essential to the maintenance of the contract between the association and its members. The defendant evidently went beyond these requirements. The fact that there was no surplus after the liens were paid does not affect the principle. If a member of the association is permitted to sell on the market when there is no surplus, he may sell when there is a surplus; and then the door to unfair dealing is thrown wide open. We think the cases decided in other courts are all practically to this effect. *Wheat Growers Association v. Loehr,* 234 Pac. (Kan.), 962. See, also, cases cited in *Tobacco Asso. v. Harvey, supra.*

This construction of the marketing agreement does not curtail or in any way restrict the lienor's right to enforce payment of his claim; but it does prevent the mortgagor from abrogating his contract with the association by selling his crop on the open market. When he has contracted that he will not dispose of his crop in this manner, he should regard it no hardship if he is required to abide by the written word. If we should uphold the contention that the defendant had a legal right to sell his entire crop on the open market, though at the demand of the lien holder, the effect would be the practical nullification of the marketing agreement.

The plaintiff was organized as a nonprofit coöperative association for the purpose of marketing cotton and removing or diminishing the danger of a speculative control of the price at which cotton should be sold in the market; and, as said in *Coöp. Association v. Jones, supra,* the plaintiff's existence is dependent on the enforcement of the contract made with its members. If by any kind of indirection the contract may be disregarded the business of the association will come to an end. We find

No error.

CONNOR, J., not sitting.

T. H. BOWEN AND WIFE, FANNIE V. BOWEN, v. L. F. WORTHINGTON.

(Filed 24 March, 1926.)

1. Appeal and Error—Evidence—Harmless Error—Prejudice.

Where a purchaser of lands has assumed the payment of notes in a series secured by a mortgage on the *locus in quo*, and an issue involves the question of whether the plaintiff had paid one of these notes, the admission of merely cumulative evidence in impeachment or corroboration on the trial in favor of the adverse parties will not be held for reversible error, when the other evidence in the case is sufficiently probative to render the evidence erroneously admitted inconsequential, and it sufficiently appears that a new trial would not result in a different verdict.

2. Bills and Notes—Negotiable Instruments—Possession—Delivery by Mistake—Burden of Proof.

The fact of possession of a negotiable note in the hands of the maker, where the evidence is conflicting upon the question of whether it had been delivered by mistake with another note in the series, attached and marked "paid," does not relieve the maker, asserting payment in his action, to prove that it had been paid.

3. Instructions—Opinion Upon the Evidence—Statutes.

Under the facts of this case: *Held*, no reversible error is found in the instructions to the jury under the exception that the judge had expressed his opinion upon the weight and credibility of conflicting evidence contrary to C. S., 564.

APPEAL by plaintiff from *Bond, J.*, at August Term, 1925, of PITT. No error.

Action to enjoin and restrain the sale of land under the power of sale contained in a mortgage executed by D. C. Creech to L. F. Worthington to secure the payment of seven notes described therein. These notes were executed by D. C. Creech; they are payable to L. F. Worthington and due on 1 November, 1919, 1920, 1921, 1922, 1923, 1924 and 1925, respectively. Subsequent to the registration of said mortgage and before the maturity of any of the notes secured thereby, D. C. Creech and his wife conveyed the tract of land described therein, to plaintiff, Fannie V. Bowen, who assumed the payment of the notes executed by D. C. Creech and payable to defendant. Fannie V. Bowen paid the note which became due on 1 November, 1919, and the interest on the remaining notes accrued to that date. In December, 1920, defendant under the power of sale contained in the mortgage, advertised the land for sale on 24 January, 1921. There is a provision in the mortgage by which it is agreed that upon default in the payment of any one of the notes, all shall become due at date of such default. This action was begun by plaintiff on 15 January, 1921, to restrain the said sale, upon her allegation that she had paid the note due 1 November, 1920. This allegation was denied by defendant. The restraining order was continued to the hearing. At the trial the only issue submitted to the jury was as follows: "Was the note due and payable 1 November, 1920, fully paid and satisfied by plaintiff, Mrs. Bowen, as alleged in the complaint?" The jury answered this issue "No."

From the judgment rendered, plaintiff appealed.

Albion Dunn and F. G. James & Son for plaintiffs.
S. J. Everett and S. O. Worthington for defendant.

CONNOR, J. The validity of the judgment from which plaintiff has appealed to this Court depends upon whether or not she has paid the

note executed by D. C. Creech, payable to L. F. Worthington and due on 1 November, 1920. This is one of a series of seven notes secured in a mortgage executed by D. C. Creech to L. F. Worthington for the balance due by him upon the purchase price for the land described therein; plaintiff is now the owner of said land, having acquired title thereto by the deed of D. C. Creech and his wife to her. She alleges in her complaint that as part of the purchase price which she agreed to pay to Creech for the said land, she "obligated and bound herself to pay and assume the payment of the seven notes" secured by said mortgage. She admits that she thereby became liable for the payment of the note involved in this controversy. The jury has found that said note has not been paid. The court thereupon adjudged that defendant is entitled to recover of plaintiff the amount of the note, and dissolved the order enjoining and restraining defendant from selling the land under the power of sale contained in the mortgage.

Plaintiff contends that there was error on the trial of the issue submitted to the jury which was prejudicial to her; these contentions are duly presented to this Court by assignments of error based upon exceptions to the admissions of testimony as evidence and upon exceptions to instructions given to the jury by the court.

An examination of the exceptions to the refusal of the court to sustain plaintiff's objections to the admission of testimony, as stated in the case on appeal, discloses that the testimony admitted over the objections of plaintiff was offered and admitted, not as substantive evidence, but for the purpose of impeaching witnesses for plaintiff or of corroborating witnesses for defendant. It is admitted that on or about 1 November, 1919, plaintiff, accompanied by her two sons, went in an automobile to the home of defendant and then and there paid to defendant, by check, the amount due on the note which matured on 1 November, 1919, together with the amount due as interest to that date on the remaining notes; that on this occasion the wife of defendant, in his presence and at his request, marked said note "Paid" and delivered same to plaintiff.

Plaintiff and her two sons testified that thereafter, in December following, they again went in an automobile to defendant's home; that plaintiff then and there paid to defendant in currency the amount due on the note which matured on 1 November, 1920, thus paying the note nearly a year before it was due; that defendant's wife at that time, in his presence and at his request, delivered to plaintiff the note due 1 November, 1920, marked "Paid."

Both defendant and his wife testify that plaintiff and her two sons came to their home on only one occasion, to wit, on or about 1 November, 1919; that they did not come to defendant's home in December, 1919, and that plaintiff has not paid the note due 1 November, 1920;

that the note due 1 November, 1919, and the note due 1 November, 1920, were written on the same sheet of paper; that when the amount due on the note maturing on 1 November, 1919, together with interest on all the notes, was paid by plaintiff by check on or about 1 November, 1919, defendant's wife inadvertently and by mistake delivered to plaintiff the sheet of paper on which were written both notes; that only the note due on 1 November, 1919, and then paid by plaintiff was marked "Paid"; that the note due on 1 November, 1920, was not marked "Paid" by either defendant or his wife.

The only witnesses who, according to all the evidence, were present on the occasion of the payment by plaintiff of the note due 1 November, 1919, were plaintiff and her two sons and defendant and his wife. Plaintiff and her two sons who testified as to the second visit, also testified that the only persons then present were plaintiff and her two sons, and defendant and his wife. There was sharp conflict in the testimony of witnesses for plaintiff and defendant as to what occurred on the day when it is admitted that plaintiff came to defendant's home; there is also sharp conflict between witnesses for plaintiff and defendant as to whether or not there was a subsequent visit by plaintiff to defendant's home. Evidence was offered by defendant upon which he contended that the jury should find that the general character of plaintiff was bad. There was evidence offered by plaintiff to the contrary; that she was a woman of good character. There was also much evidence relied upon by both plaintiff and defendant to corroborate their respective witnesses and to contradict the testimony of witnesses for the opposing party. We find no error in the rulings of his Honor upon plaintiff's objections to the admission of testimony which entitle plaintiff to a new trial. *Perry v. Surety Co.*, 190 N. C., 284; *Rierson v. Iron Co.*, 184 N. C., 363; *Brewer v. Ring*, 177 N. C., 477. *Justice Walker*, in the latter case, says: "The motion for a new trial should be meritorious and not based upon merely trivial errors committed, manifestly without prejudice. Reasons for attaching great importance to small and inocuous deviations from correct principles have long ceased to have that effect and have become obsolete. The law will not now do a vain and useless thing." If it be conceded that according to strict principles, and technical rules of practice, some of the evidence should not have been admitted, we cannot hold that the admission of such evidence, merely corroborative, and cumulative even for that purpose, was prejudicial error, entitling plaintiff to a new trial.

In a trial lasting through several days, where the issue submitted to the jury involves only a controversy as to the facts of a transaction between the parties to the action, who each relies chiefly upon his own testimony as substantive evidence to support his contention, where the testimony of many witnesses is offered by each party for the purpose

of corroborating his own witnesses, or of contradicting the witnesses of his adversary—much of such testimony as evidence being merely cumulative—and where latitude is sought by and allowed to each party, by the judge, slight departure from strict rules of evidence, as stated by text-writers, and approved by the courts, although objected to in apt time, and resulting in the admission of evidence contrary to such rules, over objections, will not be held for reversible error unless it clearly appears, upon appeal, that prejudice to the complaining party has manifestly resulted. A verdict rendered upon competent evidence ought not to be set aside because some evidence of slight probative force, and merely cumulative, offered by the successful party, was also submitted to the jury, which under strict rules, should have been rejected. The doctrine of harmless, or nonprejudicial error may not commend itself to some legal minds, which emphasize the letter rather than the spirit of the law; it is, however, essential to a practical administration of the law by the courts which must necessarily rely upon human agencies to perform their functions.

Assignments of error, based upon exceptions to instructions contained in the charge to the jury cannot be sustained. The burden of the issue was, as his Honor instructed the jury, upon plaintiff, who admitted the execution of the note and her liability for its payment. C. S., 3105, has no application. Defendant did not admit that the note had been canceled, or marked "Paid," while in his possession, either unintentionally, or under a mistake, or without his authority. He contended that plaintiff had obtained possession of the note by reason of the mistake or inadvertence of his wife, who unintentionally delivered same to plaintiff. Mere possession of the note by plaintiff, who had assumed the liability of the maker, while evidence of its payment by her, was not sufficient to relieve her of the burden of offering evidence to sustain her allegation that she had paid the note, and that defendant had canceled it, by marking the same "Paid."

Nor can we hold that his Honor failed to observe the provisions of C. S., 564, in his charge to the jury. It does not appear with ordinary certainty that in his statement of the contentions of the parties, his Honor indicated to the jury that he had an opinion as to whether or not any fact involved in the issue had been fully or sufficiently proved. It is apparent that his Honor stated the contentions of the parties in the language used by counsel in the argument to the jury. The jury as intelligent men must have so understood; we find no error in the instructions or in the charge. The judgment must be affirmed.

No error.

J. L. LAWSHE v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 24 March, 1926.)

1. Evidence—Nonsuit.

Upon a motion as of nonsuit, the evidence to support plaintiff's cause of action is to be taken as true, giving him the benefit of every reasonable intendment to be deducible therefrom.

2. Bills of Lading—Possession—Transfer of Goods by Delivery—Intent—Contracts.

A bill of lading is a symbol of the goods therein specified, and may, unendorsed, be transferred by delivery of the possession with the intent to pass title to the shipment. C. S., 311.

3. Actions—Parties—Carriers—Railroads—Consignor and Consignee—Real Party at Interest—Evidence—Questions for Jury.

Where the plaintiff in an action to recover for a damaged shipment from a carrier, produces the bill of lading, unendorsed, upon the trial, and the evidence tends to show that the plaintiff had sold the shipment to another whose name therein appears as consignee, it is sufficient of the intent of the consignee to transfer the title by delivery of the bill of lading, and to sustain the plaintiff's right to maintain his action as the real party in interest. C. S., 446.

4. Carriers—Railroads—Warehousemen—Ordinary Care—Negligence.

Where damages have accrued to a shipment of goods while in the carrier's possession, after arrival at destination, the carrier's liability is that of a bailee or warehouseman, requiring the exercise of ordinary care.

CIVIL ACTION, before *Cranmer, J.*, at October Term, 1925, of WILSON.

This action was originally instituted by W. H. Farmer and J. L. Lawshe v. Norfolk Southern Railroad Company to recover damages occasioned by the negligent conduct of the defendant in exposing certain flooring to the weather. The flooring was ordered from Louisville, Kentucky, by the plaintiff, Lawshe, and shipment was made over the Southern Railway Company and connecting carriers, and in due course was delivered to the defendant, Norfolk Southern Railroad Company. The defendant transported the property to Bailey, North Carolina, and it arrived there in good condition. The plaintiff alleged that thereafter the defendant put the flooring on a platform at its freight station instead of in the station, and that thereby it was exposed to rains and heavy dews for several days, which resulted in rendering the material absolutely worthless. At the trial of the cause W. H. Farmer, who was named as coplaintiff in the action, came into court requesting that his name be stricken from the pleadings for the reason that he had never authorized suit to be brought in his name and had never made any demand upon the defendant for damages, and had never assigned any

right of action in the cause to the plaintiff. Farmer's action was allowed and upon motion by the plaintiff, J. L. Lawshe, Farmer was made a party defendant, and an order made by the judge that summons issue to that end.

The plaintiff testified that he lived in Wilson and that he had a contract with W. H. Farmer, who lived at Bailey, to put flooring in Farmer's house; that he ordered the flooring from Louisville, Kentucky, and paid for the same; that invoice was sent from the vendor in Louisville to him. Plaintiff further testified that he sold flooring to Mr. Farmer for seven rooms; that the flooring was to be shipped from the company in Louisville to Mr. Farmer, and that the flooring still belonged to him. The flooring was shipped to Mr. Farmer, who lived at Bailey, where the work was to be done, in accordance with instructions given the vendor by the plaintiff, Lawshe. Thereupon the plaintiff, Lawshe, introduced in evidence a straight bill of lading duly issued by the Southern Railway at Louisville, Kentucky, in which bill of lading the crates of flooring were consigned to W. H. Farmer at Bailey, N. C. There was further testimony that the shipment arrived at Bailey on 1 October, and the plaintiff, Lawshe, received notice from Farmer on 7 October, advising him that the lumber had arrived but that he could not pay for it as he would have to use cheaper lumber. The evidence tended to show that the words "keep dry" were stenciled on each crate of lumber, and notwithstanding this notice the lumber was left on the platform of defendant, out of the house, under the drip of the warehouse at a season when dews were heavy, and that the lumber was wet. There was also evidence that the agent of the defendant informed the plaintiff, Lawshe, that the reason the lumber was put out under the eaves was that the warehouse was full of tobacco. The weather was foggy at times in October, 1920, and water dripped from the eaves of the house on the lumber.

At the close of plaintiff's evidence the court declined to submit the case to the jury and dismissed it as of nonsuit. The plaintiff appealed from said judgment.

W. A. Lucas for plaintiff.

W. A. Finch and R. L. Brinkley for defendant.

BROGDEN, J. The judgment of nonsuit presents the question: Can the holder of an unendorsed bill of lading maintain an action against a carrier either as carrier or warehouseman for damages to the property while in its possession?

It is an elementary rule that upon a motion for nonsuit the evidence in support of plaintiff's cause of action must: (1) be taken as true; (2) be construed in the light most favorable to plaintiff; (3) give

plaintiff the benefit of every reasonable inference to be deducted from the evidence offered. *Whittington v. Iron Co.*, 179 N. C., 653; *Farming Co. v. R. R.*, 189 N. C., 66. It is also provided by C. S., 446, that every action must be prosecuted in the name of the real party in interest.

The bill of lading is the symbol of the goods specified therein. The plaintiff was in possession of the bill of lading unendorsed. It is admitted that the plaintiff ordered the goods, gave the shipping instructions to the vendor, and that he paid for the goods. He further testified that the goods still belonged to him. Certainly, if Farmer delivered the bill of lading to the plaintiff with the intention of passing title to the property described therein, this would be a sufficient vesting of title to enable plaintiff to maintain the suit. *Horton v. R. R.*, 170 N. C., 384.

The preliminary inquiry, therefore, would be whether or not the plaintiff was the real owner of the property or whether the consignee, Farmer, was the real owner thereof. There was testimony that the plaintiff had sold to Farmer flooring for seven rooms, which was to be shipped from the Wood Mosaic Company of Louisville, Kentucky, to Farmer. There was further testimony that the flooring still belonged to the plaintiff and that it was shipped to Mr. Farmer at Bailey because that was the place where the work was to be done. Upon this testimony the defendant contended that the plaintiff was not the owner of the flooring. The plaintiff contended to the contrary.

It must be conceded that if the plaintiff was not the owner of the property, he could enforce no liability against the defendant either as carrier or warehouseman. The question of ownership of the property, therefore, was directly involved, and this was a question for the jury.

C. S., 311, provides as follows: "A bill may be transferred by the holder by delivery, accompanied with an agreement, expressed or implied, to transfer the title to the bill or to the goods represented thereby." The obvious meaning of the statute is that a valid transfer of a bill of lading is effected by the holder when he delivers it to a third party with the intention of transferring the title to the property represented thereby. As the bill of lading is in itself the legal symbol of the property, the transfer of such symbol would be some evidence of an intention to transfer the title. It appears from the evidence that not only was the bill of lading delivered to the plaintiff, but in addition, Farmer, upon arrival of the property, wrote a letter to the plaintiff informing him of the arrival of the lumber, and that he could not pay for it, as he would have to use cheaper lumber. This evidence, with the inferences reasonably deducible therefrom, is sufficient to be submitted to a jury on the question as to whether or not the bill of lading was delivered to the plaintiff with an "agreement, express or implied, to transfer the title to the bill or to the goods represented thereby." It was

alleged in the complaint and admitted in the answer that the property arrived at Bailey in good condition. Therefore, the only liability incurred by the defendant was that of warehouseman.

The accepted rule prescribing and defining the liability of a carrier as a warehouseman is stated thus by *Walker, J.*, in *Hosiery Mills v. Hines,* 184 N. C., 359: "So long as a carrier has the custody of the goods, although there has been a constructive delivery which exempts it from liability as a carrier, there supervenes upon the original carriage contract, by implication of law, a duty, as bailee or warehouseman, to take ordinary care of the property." 4 R. C. L., 761, sections 228-229; *Turrentine v. R. R.,* 100 N. C., 375; *Young v. R. R.,* 116 N. C., 936; *Motley v. Warehouse Co.,* 122 N. C., 347; *Hanes v. Shapiro,* 168 N. C., 24; *Hemphill v. R. R.,* 170 N. C., 454.

We hold upon the record as presented that the cause should be submitted to a jury with proper instructions by the court.

Reversed.

J. H. WHITLEY v. H. H. POWELL.

(Filed 24 March, 1926.)

1. Mortgages—Powers of Sale—Notice—Advertisement.

In the exercise of a power of sale of lands under a mortgage wherein under its terms it may be foreclosed and the proceeds applied to the payment of notes it secures, requiring that previous notice be given by advertisement for thirty days in some newspaper published in the county wherein the lands are situate, and by posting notices in some conspicuous places in the county for thirty days, and first advertising same for at least twenty days at the courthouse door: *Held,* in the exercise of such power the mortgagee is not required to publish the notice daily, especially when no daily paper was published in the county, or, in the exercise of good faith, to continuously examine to see that they remain posted, after once having originally posted the notices as specified in the mortgage.

2. Same—Contracts—Deeds and Conveyances—Intent.

The notice by publication ordinarily required to be previously given to the exercise of a power of sale contained in a mortgage, will be construed to effectuate the intent of the parties, and the sale thereunder will not be held void when the power has been fairly exercised in accordance with this intent as gathered from the language used in the instrument.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1925, of WILSON. Error.

The action was instituted by plaintiff against defendant to remove cloud from title. It was decided by the court below on the "statement of case agreed." The material facts will be considered in the opinion.

G. W. Taylor and W. A. Lucas for plaintiff.
W. A. Finch and Connor & Hill for defendant.

CLARKSON, J. The power of sale contained in the mortgage, and the subject-matter of the controversy, is as follows: "But if default be made in the payment of said notes, or either of them, or the interest on same, or any part of either at maturity, then and in that event it shall be lawful for and the duty of the said H. H. Powell or his assignee to sell said lands hereinbefore described to the highest bidder, for cash (on the premises), first advertising same for thirty days in some newspaper published in Wilson County, and by posting notices in some conspicuous place in said county and at the courthouse door for at least twenty days before the sale."

In *Hinton v. Hall,* 166 N. C., p. 480, it was said: "It was true that failure to advertise according to the terms of the power of sale invalidates the sale. *Eubanks v. Becton,* 158 N. C., 230. But it is said that such sale is not absolutely void, but will pass the legal title. *Eubanks v. Becton, supra; Brett v. Davenport,* 151 N. C., 58. While such sale would be set aside as to the purchaser, a subsequent or remote grantee without notice and in good faith takes a good title against such defects or irregularities in the sale of which he had no notice. 27 Cyc., 1494." *Kornegay v. Spicer,* 76 N. C., 96; *Shew v. Call,* 119 N. C., 453; *Fleming v. Barden,* 127 N. C., 217; *Ferebee v. Sawyer,* 167 N. C., 201; *Banking Co. v. Leach,* 169 N. C., 706; *Brewington v. Hargrove,* 178 N. C., 146; *Harvey v. Brown,* 187 N. C., 365; *Brown v. Jennings,* 188 N. C., 160; *Douglas v. Rhodes, ibid.,* 584.

It appears in the case agreed:

"On 11 June, 1917, a notice of the sale of the property under mortgage, signed by H. H. Powell, mortgagee, by his attorney, was posted at the courthouse door in Wilson, North Carolina, and three other public places in Wilson County, in which notice was given that the mortgagee would sell the property because of default in the payment of the notes secured by the mortgage, on Monday, 16 July, 1917, at 12 o'clock noon, on the premises, in the town of Stantonsburg, North Carolina, and on 15 June, 1917, a notice was published in the *Semi-Weekly Times* as follows: 'Sale of real estate: By virtue of the power of sale contained in the mortgage executed by J. H. Whitley to the undersigned, dated 8 August, 1914, and recorded in Book 103, page 237, Wilson County registry, default having been made in the payment of the notes recited therein, the undersigned will, on Monday, 16 July, 1917, at 12 o'clock m., on the premises in the town of Stantonsburg, Wilson County, North Carolina, offer for sale at public auction, to the highest bidder, that certain lot or parcel of land lying and being situate in the

town of Stantonsburg, Wilson County, North Carolina, known as the "Garage Lot" and described as follows: (Describing fully the land by metes and bounds.) Terms of sale: Cash.' And a like notice was published in the *Daily Times* on 22 June, 3 July, and 10 July, 1917, and on no other dates. The Daily Times is a newspaper published in Wilson daily except Sundays, and the *Semi-Weekly Times,* twice each, and is in reality a semi-weekly edition of the *Daily Times.*"

The only question raised by the parties is: Whether the publication, on 15 June, 1917, in the *Semi-Weekly Times,* a newspaper published in Wilson, of the notice of foreclosure, and the publication of a like notice in the *Daily Times,* a daily newspaper (except Sunday) published at Wilson, N. C., on 22 June, 3 July, and 10 July, 1917, and on no other dates, and the posting at the courthouse door and at three other public places in Wilson County, on 11 June, 1917, of a notice of sale, to be held on 16 July, 1917, was a sufficient compliance with the power of sale contained in the mortgage, requiring as a condition to the exercise of the power, "first advertising same for thirty days in some newspaper published in Wilson County, and by posting notice at some conspicuous place in said county and at the courthouse door for at least twenty days before the sale." The *Daily Times* is a newspaper published in Wilson, daily, except Sunday, and the *Semi-Weekly Times* is a semi-weekly edition of the *Daily Times.* The court below was of the opinion that publication of said notice in the *Semi-Weekly Times* and the *Daily Times* only on the dates of 15 June, 22 June, 3 July and 10 July, 1917, was not a sufficient compliance with the conditions of the exercise of the power of sale requiring "first advertising same for thirty days in some newspaper published in Wilson County," and that the plaintiff is entitled to the relief demanded. We cannot so hold.

The power of sale in the mortgage must be construed like any other contract. The property was sold on the premises to the highest bidder for cash. It was advertised by posting notices in conspicuous places in the county for 30 days before the sale and at the courthouse door for 30 days before the sale—the contract says at least 20 days before sale. The vice complained of is that it was not advertised each day successively for 30 days in some newspaper published in Wilson County. The language of the contract is conjunctive (1) *first advertising same* for 30 days in some newspaper published in Wilson County; (2) and *first advertising same* for 30 days by posting notice in some conspicuous place in said county; (3) and *first advertising same* at the courthouse door for at least 20 days before sale.

It cannot be contended that *first advertising same for thirty days* by posting notices in some conspicuous place in the county means that each

successive day a notice must be posted; nor can it be contended that the posting each successive day is required at the courthouse door. We think the publication as made was a sufficient compliance with the terms of the mortgage. If the mortgagor desired he could have said in the contract *each successive day for thirty days.* This was not done. It also appears from the record that there is no newspaper published each successive day in Wilson County. Plaintiff's construction of the power of sale contract would make it, so far as utilizing the power of sale contract, a nullity. This could not be the intent of the parties. The record shows that the sale took place on the premises on 18 July, 1917, and the present suit was not instituted until 20 December, 1921—over four years after the sale. Under the facts and circumstances of this case, we do not think plaintiff can disaffirm the power of sale contract. *Hogan v. Utter,* 175 N. C., 332; *Jenkins v. Griffin, ibid.,* 184.

It was said in *Carson v. Fleming,* 188 N. C., p. 602: "The court instructed the jury that if the trustee posted the notices as required in the deed of trust, it would not be necessary for him to show that the notices remained posted continuously for the required period of time; that the fact that he had so posted the notices was sufficient in the absence of evidence that he knew that they had been destroyed and that proper notice had not been given of the sale. . . . There is no evidence in this case that the trustee knew that any of the notices had been destroyed or torn down, if such were the fact. He had fully discharged his duty in causing the advertisements to be made as required by the defendants, in their deed of trust to him, and had a right to presume, on the day of sale, that the notices had remained posted."

For the reasons given, there is

Error.

STATE v. W. O. LUQUIRE.

(Filed 24 March, 1926.)

1. Intoxicating Liquor—Evidence—Witnesses—Punishment—Exemptions—Statutes.

The immunity from punishment of an offender against our prohibition law when testifying against others charged with the same offense, must be claimed by him under the provisions of C. S., 3411(g), which supersedes C. S., 3406, so as to make our statute conform to the Federal Act, whereunder no discovery made by such person shall be used against him and he shall be altogether pardoned for the offense done or participated in by him.

2. Criminal Law—Constitutional Law—Voluntary Testimony of Offender —Evidence.

The evidence in criminal prosecutions that may not be received from the offender, is such as is compulsory, and does not apply to one volunteering his testimony and willingly giving it.

3. Same—Waiver.

An offender against the criminal law relating to prohibition, may waive his constitutional right not to give evidence that would tend to incriminate himself by his voluntary act in so doing.

APPEAL by defendant from *Barnhill, J.*, at January Term, 1926, of WAKE.

The defendant, W. O. Luquire, was arrested at a blockade distillery on or about 1 December, 1925, about the hour of 10:30 o'clock. Deputy sheriff, Joe Lowe, in company with several other officers raided said still near Morrisville, N. C., and discovered four or five men at said still, which was in full operation, but none of the officers present at the still knew the operators or any of those present at said time, all escaping except the defendant, Luquire, and one other. When the cause came on for trial at the December Term, 1925, of Wake Superior Court, the case was continued because same could not be reached and disposed of, and the same was continued to the January Term, 1926. The bill of indictment against the defendant was found at the December Term, 1925. At the January Term, the case, upon motion of the Solicitor, was consolidated with that of Bob Spence, both defendants being tried upon the same state of facts and for the same offense. Both defendants were convicted and the defendant, Luquire, was sentenced for a term of twelve months. Before the trial of the defendant, Luquire, and at the same term of Court, a bill of indictment duly signed by the solicitor was drawn and sent to the grand jury against Eugene Mason and Will Guthrie, charging said parties with having engaged in the manufacture of liquors at the same time and place at which the defendant Luquire was arrested and a true bill was returned in said case. The defendant Luquire, whose name was placed first on the bill of indictment, was the principal witness against said Mason and Guthrie and was directed by officer Lowe to appear before the grand jury and testify. During the trial of the defendant, Luquire, it appeared that he had been used as a witness against other persons alleged to have been at the distillery and defendants' counsel thereupon duly made motion to quash the indictment and asked that the case against the defendant be dismissed and defendant be discharged, as provided by C. S., vol. I, sec. 3406, and C. S., vol. III, sec. 3411 *(g)*.

Upon his Honor's refusal to grant the motion defendant in apt time excepted and gave notice of appeal to the Supreme Court.

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

J. W. Barbee and F. T. Bennett for defendant.

ADAMS, J. There was ample evidence of the defendant's guilt, and his five exceptions are addressed to the sole question whether he was protected from prosecution by section 3406 or 3411(g) of the Consolidated Statutes. These sections are as follows: "No person shall be excused from testifying on any prosecution for violating any law against the sale or manufacture of intoxicating liquors, but no discovery made by such person shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned for the offense done or participated in by him." Sec. 3406. "No person shall be excused, on the ground that it may tend to incriminate him or subject him to a penalty or forfeiture, from attending and testifying, or producing books, papers, documents, and other evidence in obedience to a subpœna of any court in any suit or proceeding based upon or growing out of any alleged violation of this article, but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing as to which, in obedience to a subpœna and under oath, he may so testify or produce evidence; but no person shall be exempt from prosecution and punishment for perjury committed in so testifying." 3 C. S., 3411(g).

Section 3406 was enacted in 1913 (Laws 1913, c. 44, sec. 7), and section 3411(g) in 1923 (Laws 1923, c. 1, sec. 7). The provision last set out is a part of the act which was intended to make the State law conform to the Federal law in relation to intoxicating liquors. In accord with this purpose is section 28 of the act of 1923, which repeals all laws in conflict with it. Section 3411(g) is a reproduction or copy of the National act of 1919 (41 Stat., 317; U. S. Compiled Statutes, 1923, sec. 10138½ (g), and was evidently intended to supersede section 3406. As suggested in the State's brief the latter section has been rewritten and modified and section 3411(g) now constitutes the law within the provisions of which the defendant must bring his claim to immunity from prosecution.

The Constitution provides that in all criminal prosecutions "every man shall have the right . . . not to be compelled to give evidence against himself." But it is compulsion which is inhibited; and the right to invoke the constitutional privilege of exemption from testifying may be waived. *S. v. Thomas,* 98 N. C., 599; *S. v. Allen,* 107 N. C., 805. In *S. v. Mitchell,* 119 N. C., 784, it is said that a party may waive the benefit of a constitutional as well as a statutory provision either by express consent or by failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it.

In the present case the defendant did not testify under compulsion. Section 3411(g) relates to testimony given in obedience to a subpœna. A subpœna is process,—a writ or order requiring a person to be present at a designated time and place for the purpose of testifying as a witness. The defendant's appearance before the grand jury as a witness was not in obedience to the process of the court but in response to his expressed desire to give evidence. The presiding judge found as a fact, "The defendant was not subpœnaed, but was called or summoned orally by the officer of the grand jury when the indictment was under consideration, after having expressed a desire to tell what he knew." Having expressed a desire to testify he was permitted to do so; and naturally he did not object to telling what he knew on the ground that his testimony would tend to incriminate him or subject him to a penalty or forfeiture. He must have known as his Honor states, "The evidence before the grand jury was not used or attempted to be used and could not be used against him." In any view of the case he waived his right to claim immunity.

We find

No error.

STATE v. R. H. MAULTSBY.

(Filed 24 March, 1926.)

1. Health—Cattle—Quarantine—Tick Eradication—Statutes.

One who is notified by the local quarantine inspector to have his cattle dipped in a vat properly charged with chemical solution to eradicate cattle tick and prevent its spread, C. S., 4895(q), may not disregard the notice solely upon the ground that it was improper for his stock and would amount to cruelty to animals that would render him liable to indictment under the provisions of another criminal statute, and thus determine the matter for himself against the judgment of the officials in charge of the enforcement of the quarantine laws in this respect.

2. Same—Constitutional Law.

Our statute requiring the dipping of cattle in a medicated vat under the direction of a local inspector, is constitutional and valid.

APPEAL by defendant from *Daniels, J.*, at October Term, 1925, of BRUNSWICK.

Criminal prosecution tried upon a warrant charging the defendant with a violation of the statute pertaining to tick eradication in that, it is alleged, the defendant unlawfully and wilfully failed and refused to have his mules dipped in a vat properly charged with arsenical solution after having been notified by the quarantine inspector to do so.

From an adverse verdict and judgment that the defendant pay a fine of $50.00 and the costs, he appeals, assigning errors.

STATE *v.* MAULTSBY.

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

Rountree & Carr for defendant.

STACY, C. J. This prosecution was commenced in the recorder's court of Brunswick County and tried *de novo* on appeal to the Superior Court. From the judgment of the latter court the case comes to us for review.

The facts are not in dispute. In March, 1925, the defendant was notified by the local quarantine inspector to have his cattle dipped in a vat properly charged with arsenical solution, as they had been infected with or exposed to the cattle tick, and as the work of tick eradication had been taken up by the State authorities in coöperation with the United States Department of Agriculture, in Zone three, C. S., 4895(q), which includes Brunswick County, the county of the defendant's residence. The defendant complied with this order and had his cattle dipped.

In April following, the defendant was duly notified by the local quarantine inspector, acting on authority from the State Board of Agriculture, to have his mules dipped in the same vat properly charged with arsenical solution, as they had also been infected with or exposed to the cattle tick and as they were subject to the same treatment as cattle under C. S., 4895 (v). This he declined to do on the alleged ground that the vat in question was constructed for dipping cattle and was not properly equipped for dipping mules and that the latter could not be dipped in said vat without serious injury to them. To participate in such dipping, under these circumstances, defendant says, would have rendered him liable to indictment for cruelty to animals. The State's evidence tended to show that the defendant's fears in this respect were not well founded. It is conceded that the defendant's refusal to comply with the above order is made a misdemeanor by C. S., 4895 (bb).

The difficulty with the defendant's position, so far as the present record is concerned, is that, on his own statement, he deliberately and voluntarily elected to violate one law because he feared, or honestly believed, that his compliance therewith would render him liable to indictment under another. It is not to be presumed, short of actual demonstration, that the State would put the defendant, or any other citizen, in a position where he needs must choose between the commission of one of two crimes. At any rate, fear of violating one law, even though more or less plausible but necessarily created by the defendant's own thinking, as the State's evidence was to the contrary, can hardly suffice as a defense to a present indictment charging an offense admittedly committed. Had the defendant complied with this order and then been indicted by reason of such compliance for cruelty to animals, his

position on such indictment would have been unanswerable, but he may not presently be excused for fear of what might have happened had he obeyed the instant law.

It may be observed that the defendant placed his refusal to dip his mules, not principally upon the ground that such dipping would be injurious to them (*S. v. Hay,* 126 N. C., 999), but primarily upon the ground that he would be rendered liable to indictment therefor. The defense is invalid; it is not sufficient to defeat the present prosecution.

The constitutionality of this or cognate legislation was upheld in *S. v. Hodges,* 180 N. C., 751, and the same principle approved in *S. v. Dudley,* 182 N. C., 822, *Provision Co. v. Daves,* 190 N. C., 7, and other cases. See, also, *S. v. McCarty,* 5 Ala., 212, for a general discussion of the subject.

The record presents no reversible error, hence the verdict and judgment will be upheld.

No error.

AMERICAN AGRICULTURAL CHEMICAL CO., INC., v. D. S. WILLIAMSON, SHERIFF OF DUPLIN COUNTY.

(Filed 24 March, 1926.)

1. Taxation—Personal Property—Liens—Levy.

A lien on personal property for nonpayment of taxes arises to a municipality only upon a levy thereon.

2. Same—Real Estate.

The personal property should be first exhausted by the sheriff of a county for the nonpayment of taxes before the land of the same owner may be sold therefor. C. S., 8006.

3. Same—Mortgages—Right of Mortgagee.

It is required by our statute, C. S., 8006, that before the sale of personal property as a prior lien to that of a chattel mortgage may be had for the nonpayment of taxes assessed thereon, the mortgagee be given at least ten days previous notice with the right to pay the assessment and costs incidental to making the levy and obtain a release therefrom, the amount so paid constituting a part of the mortgage debt due to him by the mortgagor by the implication of law.

4. Same—Equity—Injunction.

Where the owner of real and personal property has not paid the taxes thereon assessed by a county, a mortgagee who has not received the statutory notice, may maintain his suit in equity against the sale of the personalty for the payment of the total taxes due. C. S., 8006, C. S., 8008, not applying.

APPEAL by plaintiff from *Bond, J.,* at January Term, 1926, of DUPLIN.

CHEMICAL CO. *v.* WILLIAMSON.

Civil action brought by the holder of a chattel mortgage to enjoin a sale of the personal property covered by said mortgage, sought to be taken by the sheriff under levy to satisfy a claim for both real-estate and personal-property taxes due by the mortgagors.

A jury trial was waived, and on the facts found by consent, the trial court held that the personal property of the mortgagors, though covered by a chattel mortgage, was first liable to be sold under execution by the sheriff to satisfy all the taxes due by the mortgagors, before resort could be had to their real estate. From the judgment rendered in accordance with this ruling, dissolving the temporary restraining order previously entered in the cause, the plaintiff appeals.

John Hill Paylor for plaintiff.
H. D. Williams and Stevens, Beasley & Stevens for defendant.

STACY, C. J. In 1920, J. W. and T. C. Gardner sold a farm in Duplin County and took a second deed of trust to secure a part of the purchase price, a first mortgage having been executed to the North Carolina Joint Stock Land Bank of Durham. On 3 January, 1924, the then owners of the land, R. E. Belcher, R. H. Knott and W. D. Dildy, gave the American Agricultural Chemical Company, Inc., a third mortgage on said land and incorporated in the same instrument a crop lien and first mortgage on certain personal property, the subject of controversy in this action. Thereafter, the second deed of trust, above mentioned, was foreclosed, and J. W. and T. C. Gardner repurchased the land. In the meantime, however, taxes had accumulated on said land in the hands of Belcher, Knott and Dildy to the amount of $476.24, and on 9 December, 1924, the sheriff of Duplin County levied on the personal property belonging to the said Belcher, Knott and Dildy and covered by the plaintiff's chattel mortgage, to satisfy, not only the real-estate taxes levied against the land while owned by them, but also a tax of $17.75 levied against the chattels covered by plaintiff's mortgage. His Honor held that the personal property of the mortgagors, after levy, was liable for both their real-estate and personal-property taxes, or the entire sum of $496.99, before resort could be had to the land in question. The appeal challenges the correctness of this ruling.

It is provided by C. S., 8006, that the personal property of a taxpayer shall be levied upon and sold for the satisfaction of his taxes before resorting to his real estate, if sufficient personalty, subject to levy and sale, can be found in the county of the sheriff having the tax list in hand.

But C. S., 7986, also provides: "Taxes shall not be a lien upon personal property, except where otherwise provided by law, but from a levy

thereon: *Provided,* that no mortgage or deed of trust executed upon personal property shall have the effect of creating a lien thereon superior to the lien acquired by a subsequent levy upon said property for the payment of the State, county, and municipal taxes, assessed against the same; but the sheriff or other tax collector levying upon such property, for the purpose of collecting the taxes due thereon, shall give due notice to the mortgagee or trustee of such property of the amount of such taxes at least ten days before the sale of the same, and such trustee or mortgagee shall have the right to pay said taxes and the costs incident to making the levy, when the sheriff or tax collector shall release the same to such trustee or mortgagee, and the amount so paid by said trustee or mortgagee shall constitute a part of the debt secured in the mortgage or deed of trust."

It will be observed that under this latter section, there is no lien on personal property for taxes, except where otherwise provided by law, but from a levy thereon. *Carstarphen v. Plymouth,* 186 N. C., 90; *Shelby v. Tiddy,* 118 N. C., 792; *Wilmington v. Sprunt,* 114 N. C., 310. And where a mortgage or deed of trust is executed on personal property, it creates no lien thereon superior to the lien acquired by a subsequent levy on said property for the payment of the State, county, and municipal taxes "assessed against the same," *i. e.,* assessed against said personal property; and the sheriff or other tax collector, levying on such property, "for the purpose of collecting the taxes due thereon," is required to give due notice to the mortgagee or trustee of the "amount of such taxes," *i. e.,* the amount of taxes assessed against said personal property and due thereon, at least ten days before the sale of same, etc.

To construe this section otherwise, or to interpret it as contended for by the defendants, would seriously impair the value of chattel mortgages in North Carolina. We think the only tax lien on the personal property here in question, superior to the plaintiff's mortgage thereon, is the lien for $17.75 acquired by the subsequent levy of the sheriff for the payment of State, county and municipal taxes assessed against said personal property and now due thereon, and which the plaintiff has the right to pay and add to the amount of the debt secured by the mortgage. In other words, to the extent of the plaintiff's interest in said property, as the holder of a chattel mortgage thereon, the same is not "subject to levy and sale" absolutely under C. S., 8006 *et seq.,* for taxes, other than those levied on the particular property itself; and such property, when sold to collect taxes other than those levied upon it, would pass subject to the rights of the mortgagee, unless affected by the provisions of C. S., 8008, which is not the case here. *Woody v. Jones,* 113 N. C., 253; *Geer v. Brown,* 126 N. C., 238.

Error.

WILLIAM SPICER v. D. S. WILLIAMSON AND THE BOARD OF COUNTY COMMISSIONERS OF DUPLIN COUNTY.

(Filed 31 March, 1926.)

1. Physicians and Surgeons—Services—Implied Promise to Pay.

The mere request of a stranger to a physician to render needed service to another, to whom he owes no duty, is insufficient, in the absence of an express promise to pay, to render him liable for the value of the services the physician rendered.

2. Same—Sheriffs—Wounded Prisoners.

A sheriff of a county is not responsible for payment for the services of a physician whom he has requested to attend to his prisoner, seriously wounded in resisting arrest, in the absence of a special promise to pay them.

3. Same—Evidence—Questions for Jury.

Held, under the evidence in this case, an issue was raised for the determination of the jury as to whether the physician rendered services to a wounded prisoner in the sheriff's custody upon the sheriff's implied promise to personally pay him therefor.

4. Same—Counties—County Commissioners.

Where a sheriff has in an emergency requested a physician to render services to a prisoner in his custody who had been badly wounded in resisting arrest, and there is evidence tending to show that under the circumstances he could not have obtained in time an order from the board of county commissioners that would assume responsibility on behalf of the county to pay them, the objection of the commissioners that under such circumstances the county would not pay for them, and that liability would only attach as to those prisoners delivered at the county jail, is untenable. C. S., 1317, 1346, 1347.

5. Same—Damages—Questions for Jury.

Where the county is liable for the services of a physician rendered at the request of the sheriff to a wounded prisoner in his custody, upon an implied promise to pay for them, an issue is raised for the jury to determine the reasonable amount to be paid therefor.

APPEAL by plaintiff from *Thorne, Emergency Judge,* at December Term, 1925, of DUPLIN. Reversed.

This is an action commenced by plaintiff, a physician and surgeon, in the Superior Court of Wayne County, to recover of defendant, D. S. Williamson, for professional services rendered to and hospital expenses incurred in behalf of Peter Camel, at the request of said defendant. Peter Camel was a prisoner in the custody of D. S. Williamson, who was sheriff of Duplin County; he was suffering from the effects of a wound inflicted at the time of his arrest by a deputy sheriff of Duplin

County, upon a charge of robbery and larceny, committed in said county. Defendant, D. S. Williamson, denied liability; he alleged that the board of county commissioners of Duplin County was liable for the amount due plaintiff for said services and hospital expenses. Upon his motion, the board of county commissioners of Duplin County was made a party defendant, and the action was removed from Wayne to Duplin County for trial. The board of county commissioners denied liability, on the ground that the said board had not authorized the defendant, D. S. Williamson, sheriff of said county, to take the prisoner to plaintiff for treatment; it alleged that it had not requested or authorized plaintiff to render any services to or to incur any hospital expenses for Peter Camel.

At the close of all the evidence, upon motion of each defendant, there was a judgment of nonsuit, dismissing the action. From this judgment, plaintiff appealed.

Langston, Allen & Taylor for plaintiff.
H. D. Williams and R. D. Johnson for defendant, D. S. Williamson.
Gavin & Boney for defendant, Duplin County.

CONNOR, J. It is admitted that plaintiff, a physician and surgeon, who owns and operates a hospital in Goldsboro, N. C., received into said hospital, as a patient, Peter Camel, and thereafter rendered professional services to and incurred hospital expenses for said Peter Camel, at the request of defendant, D. S. Williamson, sheriff of Duplin County. At the time of such request, Peter Camel was a prisoner in the custody of the said sheriff; he had been arrested by a deputy sheriff, and delivered into the custody of the sheriff, upon a charge of robbery and larceny, committed in Duplin County. Immediately before his arrest, the prisoner had been shot and wounded by the deputy sheriff; he had resisted arrest and, when pursued by the officer, had fired twice at him, with his pistol, thus not only resisting arrest, but also assaulting the officer, with a deadly weapon. When the prisoner came into the custody of the sheriff, his condition, resulting from his wound, was such as to require immediate medical and surgical treatment. The physician who had usually attended prisoners in the custody of the sheriff, and whose bills for services to such prisoners had been paid by the board of county commissioners, was called by the sheriff to see the prisoner, and advised the sheriff that he was unable to care for the prisoner—that his condition required the immediate attention of a surgeon in a hospital, equipped to care for such cases. It was impracticable for the sheriff to consult the board of county commissioners as its members lived at distances

of more than fifteen miles from the place where the prisoner was shot. Acting upon the advice of the physician, the sheriff took the prisoner, in his automobile, at once to Goldsboro, and requested plaintiff to receive him into his hospital as a patient, and to render him such professional services, as in plaintiff's judgment, his condition required. Plaintiff knew that defendant was sheriff of Duplin County, and that Peter Camel was a prisoner in his custody, charged with a violation of the criminal law in Duplin County. Plaintiff received Peter Camel into his hospital and within a few days thereafter performed an operation upon him because of his condition, caused by the gun-shot wound inflicted by the deputy sheriff while undertaking to arrest the prisoner. Plaintiff presented his bill to the sheriff, who filed it with the board of county commissioners, at their next monthly meeting thereafter; the board declined to pay the bill.

The board of county commissioners did not authorize the sheriff to take the prisoner to plaintiff, and had no notice of these facts until after the services were performed and the expense incurred. It had been the custom of the board of county commissioners to pay bills for medical attention rendered to prisoners in the custody of the sheriff, when presented by him to the board at its regular monthly meetings. These bills had been for small amounts. The board is composed of three members, two of whom live about 18 miles from the county seat, and one about 16 miles.

"The rule that where a person requests the performance of a service, and the request is complied with, and the service performed, there is an implied promise to pay for the services, does not apply where a person requests a physician to perform services for a patient, unless the relation of that person to the patient is such as raises a legal obligation on his part to call in a physician and pay for the services, or the circumstances are such as to show an intention on his part to pay for the services, it being so understood by him and the physician." This rule as stated in 30 Cyc., 1597, is supported by authorities cited in the notes, and commends itself to us as sound in law, and just in policy. But for the exception to the general rule, a stranger or neighbor might hesitate to call a physician to the aid of one in need of medical services; the exception is not unjust to the physician who may require an express contract for payment of the value of his services, before responding to the call, or rendering the services. *Smith v. Riddick,* 50 N. C., 343. "The authorities generally support the broad proposition that a mere request by one person to a physician to render services to another to whom the person making the request is under no obligation to furnish medical care, raises no implication of a promise to pay for the services.

Public policy favors the encouragement of those who will summon medical aid for the unfortunate sick who cannot act for themselves." 21 R. C. L., 412(55); *McGuire v. Hughes,* 207 N. Y., 516, 101 N. E., 460, 46 L. R. A. (N. S.), 577 and notes.

It cannot be held that a sheriff, or other officer, is under a legal obligation to provide medical attention for a prisoner in his custody, for the payment of which he is personally liable. The relation between the officer and his prisoner is not voluntary on the part of either. On the part of the officer, it results from the performance by him of a public duty, and while he is liable personally both to the prisoner and to the public for a breach of duty to either—for which he may be required to answer in damages to the prisoner, or upon indictment to the public—he cannot be held liable for medical or surgical services required by the condition of the prisoner, at the time of his arrest, or after he had been taken into custody. The prisoner by his arrest is deprived of his liberty for the protection of the public; it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself. The officer is but the agent of the public, and ought not to be held personally liable for the performance by him, as such agent, of a duty which the public owes to his prisoner, unless he expressly agrees to assume such liability.

There was evidence upon the trial of this case, which should have been submitted to the jury upon plaintiff's allegation that defendant, D. S. Williamson, expressly agreed to pay plaintiff for his services to Peter Camel. An agreement to pay for the services required, cannot be implied merely from the request. Plaintiff testified that after he had concluded, from his examination of Peter Camel, that a difficult operation was advisable, he said to the defendant, "My advice is to consult the commissioners, and see if they will stand for it." Defendant replied, "They will meet tomorrow morning on some road matters. I will talk to them about it." Plaintiff said, "If it will be any help to you, I will go down and take these pictures and explain them." When the plaintiff went to the county seat the next day, and it was ascertained that the commissioners would not meet, as had been expected, plaintiff said to defendant, "What do you want me to do?" Defendant replied, "He is a human being; he is under my charge; I don't know anything to tell you except to go ahead and do the best you can to save him." It was after this conversation that plaintiff performed the operation, and incurred the larger part of the expenses. It was for the jury to say upon this and other evidence submitted to them, whether defendant expressly agreed to pay for plaintiff's services to Peter Camel. If the jury shall find that at the time defendant requested plaintiff to perform

the services for Peter Camel, he intended to pay for such services, that it was so understood between plaintiff and defendant, and that plaintiff rendered such services in reliance upon the agreement of defendant to pay for same, personally, then defendant is personally liable to plaintiff for the value of the services. There was error in the judgment dismissing the action as against defendant, D. S. Williamson. An issue should have been submitted to the jury, in order that the jury might determine whether or not defendant expressly agreed to pay for the services rendered by plaintiff to Peter Camel, pursuant to defendant's request. The burden, upon this issue will, of course, be upon plaintiff. There is evidence, however, to sustain an affirmative answer. The evidence introduced on the trial was sufficient for the consideration of the jury upon the allegation that defendant was liable to plaintiff upon an express contract.

Defendant, the board of county commissioners, contends that it is not liable for the reason, first, that it had not authorized the sheriff to request plaintiff to perform the services or incur the expenses for Peter Camel, and, second, that the board is liable for medical services rendered only to prisoners confined in jail—that it is not liable for such services to one who is in the custody of the sheriff, following an arrest, and who had not been committed to jail, after a preliminary trial, or upon conviction.

It has been stated as a general rule of law, that, in the absence of some express provisions of the law, the public is not liable to a physician or surgeon for services rendered prisoners, even though they are insolvent, and unable to pay for such services themselves. *Nolan v. Cobb Co.*, 141 Ga., 385, 81 S. E., 124, 50 L. R. A. (N. S.), 1223 and note. It has also been held, in some jurisdictions, that by virtue of statutes applicable, liability of the public for medical services is restricted to prisoners confined in jail. *Malone v. Escambia County* (Ala.), 22 So., 503; *Gray v. Coahoma County* (Miss.), 16 So. 903. The board of commissioners was held liable, in *Lamar v. Board of Com.* (Ind.), 30 N. E., 912, for services rendered by a physician, at the request of a jailer, to a prisoner who suddenly became sick, notwithstanding a statute under which the board of commissioners had elected a health officer whose duty it was to care for prisoners in the county jail. In that case, it appeared that the health officer lived at such a distance from the jail, that his attendance could not be had to meet the emergency caused by the sudden illness of the prisoner. In the opinion of the Court, it is said: "We cannot believe that when a man was in jail, and in need of medical services, under the emergency existing in this case, the law intended that the prisoner should be left to suffer

and perhaps to die, because the services of the secretary of the board of health could not be obtained in time to save his life, or that the county would not be liable for services rendered to the prisoner by a physician employed by the jailer who had the prisoner in charge."

It is clearly the duty of the board of commissioners of a county, in this State, as prescribed by statute, to provide for necessary medical attention to a prisoner confined in the county jail, whether such prisoner has been committed to jail as the result of a preliminary trial, or upon a final judgment on his conviction of a violation of law. The board of commissioners owes no less duty to a person, lawfully in the custody of the sheriff, awaiting a preliminary trial, and confined in jail, because he is unable to give bond for his appearance at such trial. A reasonable construction of these statutes extends this duty of the board to a person in the lawful custody of the sheriff, who is unable, because of the condition of the prisoner, to take him at once to the jail. The suggestion in the brief for the board of commissioners filed in this Court, that the board owes no duty to provide for necessary medical attention to a prisoner until he has actually been placed in jail, does not commend itself to us as within a reasonable or necessary construction of the statutes applicable. C. S., 1317, 1343, 1347.

The fact that the board of county commissioners of Duplin County had not authorized the sheriff to request plaintiff to render professional services to his prisoner, prior to the performance of such services, upon the facts as shown by the evidence in this case, does not relieve the board of liability for the reasonable value of such services. Upon these facts, it was the duty of the board of county commissioners to provide necessary medical services for Peter Camel, after he was arrested and taken into custody by the sheriff. In the emergency confronting the sheriff, it was his duty, as sheriff, to procure proper medical attention for his prisoner. Ordinarily, the sheriff or other officer, having in his custody a prisoner whose condition requires medical attention, should report such condition to the board of commissioners before calling in a physician. In an emergency, however, he may without previous authority from the board, procure necessary attention for his prisoner, and the board of commissioners will be liable for the reasonable charge for such services as may be rendered to the prisoner at the request of the sheriff. The authority of the sheriff to act in an emergency such as existed in this case must be sustained. *Miller v. Cornell,* 187 N. C., 550; *Perkins v. Wood & Coal Co.,* 189 N. C., 602.

There was error in sustaining the motion of the board of county commissioners of Duplin County for judgment of nonsuit. An issue should be submitted to the jury, in order that it may determine whether or

not the professional services rendered to, and the hospital expenses incurred in behalf of Peter Camel by plaintiff, were reasonably necessary in view of the condition of Peter Camel while in the custody of said sheriff. If the jury shall answer such issue in the affirmative, then plaintiff is entitled to recover of the board of county commissioners of Duplin County, the reasonable value of such services and expenses, to be determined by the jury in answer to an appropriate issue. There must be a new trial and to that end the judgment is

Reversed.

HANNAH ROSENMANN v. BELK-WILLIAMS COMPANY, INCORPORATED, W. H. BELK, ADOLPH ROSENMANN AND WILLIAM ROSENMANN, GUARDIANS OF M. ROSENMANN, AND ADOLPH ROSENMANN AND WILLIAM ROSENMANN, INDIVIDUALLY.

AND

HANNAH ROSENMANN v. WILLIAM ROSENMANN AND ADOLPH ROSENMANN, GUARDIANS OF MARCUS ROSENMANN AND I. B. GRAINGER, TRUSTEE.

(Filed 31 March, 1926.)

1. Actions—Consideration—Courts.

It is proper for the trial judge to consolidate two pending actions between the same parties involving practically the same subject-matter.

2. Bills and Notes—Negotiable Instruments—Possession—Parol Evidence.

Where the payee of a note is insane, and his wife produces it on the trial endorsed by him to her, claiming it as a gift, it is competent to show by parol evidence that he had never delivered the note to her, but that his guardian had done so, and that it was a part of his estate.

3. Same—Prima Facie Case—Burden of Proof.

Where the genuineness of a note is not in controversy, and the issue is whether the alleged endorsee, the plaintiff in the action, acquired it as a gift from her insane husband, the burden of proof is on the plaintiff to establish her contention by the greater weight of the evidence.

4. Same—Gift—Intent—Evidence—Memoranda.

Where the genuineness of the note, the subject of the controversy, is not in dispute, and the issue is whether the maker having endorsed it to his wife who produced it at the trial, had delivered it to her, it is competent to show by parol evidence that the husband had deposited the note in question as collateral with other securities to a note for money he had borrowed at the bank, and the officer of the bank, so testifying, may refresh his memory from a memorandum thereof he had made; and the objection that such is incompetent as not the best evidence, is untenable.

5. Gifts—Bills and Notes—Negotiable Instruments—Husband and Wife.

Where the wife asserts ownership of a note as a gift from her insane husband, she must show both an intent to transfer the title, and an act designated to effectuate the intent.

6. Same—Delivery—Presumptions—Requests for Instructions — Appeal and Error.

Where the wife, the plaintiff in the action, asserts ownership of the note in controversy as a gift from her insane husband, and there is evidence tending to show that she acquired possession from his guardian and not from him, the question of his intent is one for the jury, and a requested instruction that the endorsement of the note by the husband to the wife raised a presumption of a gift, and that he, if the evidence is believed, delivered it to a bank for her benefit when pledging it as collateral to his own note, is properly refused.

7. Instructions—Evidence—Assuming Facts as Proven—Appeal and Error.

An instruction that assumes a fact proven from conflicting evidence, or a fact or facts not in evidence or in dispute, and draws therefrom conclusions which do not necessarily follow, is properly refused.

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

Exceptions to the refusal to give requested prayers for instruction substantially given in the general charge, will not be sustained on appeal.

9. Bills and Notes—Negotiable Instruments—Endorsements—Gifts—Evidence.

Where the holder of a note claims title by endorsement from the payee named therein, and the controversy upon the evidence is as to whether it constituted a valid gift, and the note has been paid and the proceeds held by the court subject to its final judgment as to whether the gift was valid, or the intent legally established as a matter of law upon the evidence in the case, the donee's position is untenable that the note was irrevocable, and that parol evidence to the contrary was inadmissible.

APPEAL by plaintiff from *Daniels, J.*, at October Term, 1925, of NEW HANOVER.

In the first of these cases the plaintiff brought suit on a note for $24,798.65, executed and delivered to her on 11 September, 1923, by Belk-Williams Company, Inc., payable ninety days after date, and endorsed by W. H. Belk. Prior to the maturity of the note the Belk-Williams Company received a notice from Adolph Rosenmann forbidding payment to the plaintiff on the ground that the note was a part of the partnership assets of M. Rosenmann & Son, of which Adolph Rosenmann was a partner, and on the further ground that the plaintiff claimed the note as a gift from M. Rosenmann, who was mentally incapacitated. The Belk-Williams Company was notified that if it made payment to the plaintiff, Adolph Rosenmann would hold the company responsible for

any loss or damage he might thereby sustain; and thereupon the company paid to the clerk of the Superior Court the full amount due on the note and was discharged, together with W. H. Belk, from further responsibility. Adolph Rosenmann and William Rosenmann, individually and as guardians of M. Rosenmann, were then made parties and permitted to file an answer. In their answer they allege that the partnership of M. Rosenmann & Sons sold to the Belk-Williams Company its stock of goods at the price of $54,798.68, a part of which was represented by the note sued on; that M. Rosenmann attempted to give the plaintiff the note she claims but did not deliver it to her prior to the time of his commitment to a sanitarium, but retained possession of it and collected and used the interest until the plaintiff came into possession of the several notes and began to collect the interest thereon; that M. Rosenmann had no authority to make the gift; and that the pretended gift was without consideration and of no effect. They pray that the notes and the proceeds therefrom be declared the property of the partnership and the alleged gift void.

To this answer the plaintiff filed a reply and cross-complaint alleging that the notes executed by the Belk-Williams Company were first made payable to M. Rosenmann and that all these, including the note sued on had been renewed many times in her name and given her as a part of M. Rosenmann's estate and that she was the actual owner thereof. She alleged also that the notes executed by the Bladenboro Cotton Mills had been renewed by her from time to time.

In the second case the plaintiff filed a petition before the clerk of the Superior Court in which she alleged that M. Rosenmann, her husband, had been adjudged insane and had been committed to a hospital in Mamaroneck, N. Y.; that up to 31 July, 1924, she had received $300 a month for her support and maintenance; that she had to stay near her husband at great expense, and that her income was insufficient; and that for several months she had not received her monthly allowance. She filed her petition under C. S., 2294, for the purpose of having a part of her husband's estate sold for her maintenance.

Adolph Rosenmann, guardian, and William Rosenmann filed separate answers to the petition; Adolph denying the material allegations and pleading substantially the same defense set up in the first action, and specifically alleging that a part of the money paid by the Belk-Williams Company had been loaned to the Bladenboro Cotton Mills, and that the plaintiff had no interest in the notes given for the loan. The answer of William Rosenmann admits practically all the allegations of the plaintiff.

The clerk made no order but transferred the case to the Superior Court docket; and it appearing that the matters in controversy in the

first case were in controversy in the second and that the issues were the same in each, the court made an order consolidating the two causes.

The following verdict was returned:

1. Is the plaintiff the owner of the proceeds of the Belk-Williams notes now in the hands of the Murchison National Bank? Answer: No.

2. Is the plaintiff the owner of the proceeds of the Bladenboro Cotton Mills notes now in the hands of the Murchison National Bank? Answer: No.

Judgment on the verdict, and appeal by the plaintiff. No error.

Marsden Bellamy and John D. Bellamy & Sons for plaintiff.
Rountree & Carr and E. K. Bryan for Adolph Rosenmann, guardian.

ADAMS, J. The only question litigated on the trial and involved in the appeal is the title or ownership of five promissory notes aggregating $54,798.65. Two of these notes, each in the sum of ten thousand dollars, payable to the order of the plaintiff, were executed by the Bladenboro Cotton Mills, Inc., on 23 November, 1922, and 21 February, 1923, respectively. Of the remaining notes one in the sum of $24,798.65 and two, each in the sum of $5,000, payable to the plaintiff, were executed by the Belk-Williams Company, Inc., respectively on 11 September, 1923, and on 10 and 12 December, 1923. The plaintiff alleges that she is the owner and entitled to the possession of these notes or to such amount paid thereon as may be subject to the order of the court.

Adolph Rosenmann, one of the defendants, answered the complaint and the petition, alleging that in 1918 the partnership of M. Rosenmann & Son (composed of M. Rosenmann, Adolph Rosenmann, and William Rosenmann) sold to the Belk-Williams Company their stock of goods and received in part payment of the purchase price notes of the Belk-Williams Company amounting to $54,798.65; that the sum of $20,000 was paid and afterwards loaned to the Bladenboro Cotton Mills; that the notes were first made to the partnership or to M. Rosenmann for the benefit of the partnership; that M. Rosenmann without authority of the other partners afterwards caused the notes in controversy to be made payable to the plaintiff; that he is now insane; and that Adolph Rosenmann and William Rosenmann are his guardians. Given this outline, the contentions of the parties and special phases of the evidence will be considered in connection with the exceptions.

We see no error in the order consolidating the two cases. In *Hartman v. Spiers,* 87 N. C., 28, it was held to be improper to consolidate causes which are essentially different or causes in which the parties are not the same; but in the present case the pleadings show and the order states that the questions raised in the first suit are substantially the

same as those presented in the second. That this conclusion is correct and that the consolidation was not improper may be seen by reference to the issues that were submitted to the jury. *Henderson v. Forrest,* 184 N. C., 230; *Wilder v. Greene,* 172 N. C., 94; *Von Glahn v. De Rossett,* 76 N. C., 292.

The plaintiff called as a witness Isaac B. Grainger, vice-president of the Murchison National Bank, who testified that the bank, previously appointed trustee of the Rosenmann estate, received the notes in question from the plaintiff on 27 March, 1925. For the purpose of showing how she had obtained possession of the notes the defendants proved by the cross-examination of this witness that he received them from M. Rosenmann on 19 February, 1923, and delivered them to Adolph Rosenmann as guardian of M. Rosenmann about two months later, the defendants contending that Adolph Rosenmann wrongfully turned them over to the plaintiff, who had not theretofore had them in her possession. The witness was permitted to read a list of securities attached to a receipt given by the bank, or by the witness as trustee, to M. Rosenmann in February, 1921; a list of securities deposited with the bank by M. Rosenmann on 19 February, 1923; and a list of securities set forth in a receipt given the bank by Adolph Rosenmann, as guardian, on 14 April, 1923. The plaintiff objected to the reading by the witness of the lists of the securities for the several reasons assigned in her brief.

Of course it is elementary that the party alleging a fact must ordinarily prove it by the best evidence and that a written instrument is the best evidence of its contents. Also, while a witness must usually speak from his recollection, he may refer to a paper, entry, or other written instrument in order to refresh his memory. But it is important to note that neither the plaintiff's cause of action nor the defense thereto is based upon the contents of the papers referred to in the cross-examination. The issues were addressed to the ownership of the notes which the plaintiff produced at the trial; and the object of the cross-examination was to show that they had never been delivered to the plaintiff by her husband, but by his guardian, and that they were in fact a part of her husband's estate. The substance of the testimony was that M. Rosenmann had deposited the securities with the bank and had taken a receipt therefor in the first instance; that among the securities held by the bank in February, 1923, were the notes in controversy, which, on 14 April, 1923, the bank delivered to the guardian. The point in controversy was the title or ownership of the notes and, necessarily, the question of delivery; not primarily the contents of the several papers. There was no dispute as to the genuineness of the receipts and the mere fact that the securities were identified by the witness is not ground for a new trial.

The plaintiff excepted to the instruction that as to each issue she was required to establish the truth of her contentions by the greater weight of the evidence. She relies in part on the provision that "where the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proven" (C. S., 2997); and she contends that by producing and offering the notes in evidence she made out a prima facie case which placed on the defendants the burden of disproving her title. If it be granted that she made out a prima facie case in this way, the burden of disproving her ownership of the notes did not devolve upon the defendant. There was no controversy between the plaintiff and the makers of the notes—no question as to the liability of the parties "whose signature appeared thereon," but a dispute between the plaintiff, who claimed the notes as a gift from her husband and the defendants, his children, who denied her title. The question was, not the liability of the makers, but the plaintiff's ownership. The asserted gift of the notes by the husband to the wife involved both an intent to transfer the title and an act designed to effectuate the intent. Having alleged the gift, the plaintiff had the burden of making good her allegation. The principle has been applied in a number of recent decisions and need not be repeated here. *Hunt v. Eure,* 189 N. C., 483 and cases cited.

Exceptions were taken by the plaintiff to the court's denial of these requested instructions: (1) that the execution and renewal of the notes to the plaintiff as payee raised the presumption of a gift from her husband; (2) that if the jury should find from the evidence that her husband deposited in the bank her shares of stock in certain corporations, certificates, deposit book, etc., and with these articles the notes in suit, payable to her, there was a presumption that he delivered the notes to the bank for her benefit. Neither exception can be sustained. A gift of personal property is a unilateral act. It imports, not only an intention to give, but an actual or constructive delivery of the property; for the donor's present relinquishment of dominion over the thing given is essential to a valid gift. Personal property cannot be delivered and retained at the same time. Whether the notes in controversy were retained or delivered was a question for the jury to determine upon the testimony of the witnesses. The plaintiff never had the actual possession of the notes prior to her husband's affliction, and herein her case is distinguishable from *Swindell v. Swindell,* 153 N. C., 22, *Arrington v. Arrington,* 114 N. C., 116, and similar decisions. As to the alleged symbolical delivery of the notes the evidence was submitted to the jury under proper instructions. *Kelly v. Maness,* 123 N. C., 236; *Newman v. Bost,* 122 N. C., 524; *Paschal v. Hall,* 58 N. C., 108.

Assignments 12, 19, 20 relate to other prayers. The first of them is defective in that it assumes a fact or facts not in evidence or in dispute and draws therefrom conclusions which do not necessarily follow. The second prayer was given in substance, perhaps more favorably than the plaintiff requested; and the third is subject to the objection that it sets forth the evidence recited as establishing constructive delivery of the notes, thereby withholding from the jury the question of intent as a fact and treating it as an inference of law. As to principles which the plaintiff intended to present, see *Handley v. Warren,* 185 N. C., 95; *Thomas v. Houston,* 181 N. C., 91; *Parker v. Mott,* 181 N. C., 435.

His Honor declined the following instruction which is the subject of the 15th assignment of error: "That the notes being on their face made expressly payable to the plaintiff by Belk-Williams and the Bladenboro Cotton Mills makes the notes irrevocable and the said M. Rosenmann had no right thereafter to change the payee, it being different from a case where the note is transferred or assigned by the payee to another, in which case the retention of the note by the payee puts it in his power to cancel the assignment or transfer, which he could not do in this instance, Mrs. Hannah Rosenmann deriving her title from the maker instead of from her husband."

It will be observed that this prayer is based on the propositions that the notes were irrevocable and that the plaintiff derived her title to them from the makers and not from her husband. The notes have been paid and the proceeds are subject to the final judgment of the court; so there is no possibility of a revocation by the makers. And as to the title the plaintiff alleges that the notes, first in her husband's name, were afterwards made payable to her, and that he caused the change to be made because he intended them as a gift to his wife. It was upon this theory that the issues were prepared and the case was tried—the theory of a controversy between the plaintiff and her husband's successors as to the ownership of the notes; and this, as we have said and as the parties recognized during the trial, presented primarily the question of a delivery of the notes by the husband to the wife. Under these conditions the instruction was properly denied.

The instructions referred to in assignments 13 and 21, we think, are sufficiently incorporated in the charge; for in his recital of the contentions of the parties his Honor presented as evidence all the circumstances set out in these prayers and correctly instructed the jury in reference to them. In our opinion the refusal to give the two remaining prayers (assignments 22, 23) is not good cause for a new trial.

We find

No error.

SEARS, ROEBUCK & COMPANY, A CORPORATION, v. ROUSE BANKING COMPANY, A CORPORATION.

(Filed 31 March, 1926.)

1. Banks and Banking—Principal and Agent—Vendor and Purchaser—Special Accounts—Implied Scope of Authority.

The cashier of a bank has implied authority to agree with the purchaser and seller of materials for a dwelling, that, for the protection of the seller it will create a special deposit from funds it has on deposit from the purchaser, to pay for the materials upon notice by the depositor that the materials ordered had been received and had come up to specifications, etc.

2. Same—Contracts—Breach.

Where the cashier of a bank has agreed with the seller of goods to its depositor to create a special account from his deposit to pay for the materials upon notification that the goods had been received and were as contracted for, an express condition that the bank would not assume liability in connection with the transaction: *Held*, the responsibility referred to was one which may arise between the vendor and vendee, and did not contemplate that which would follow the breach of the bank's agreement to perform its own contract.

3. Same—Evidence.

Where a bank has agreed to create a special deposit to be held for the security of one selling goods to its depositor, and to be paid upon the latter's notification that the goods specified were in accordance with the terms of purchase, evidence that the bank had permitted its depositor to withdraw the special account, after he had received and used the goods, is sufficient upon the question of whether the bank had breached its contract, and its liability to the seller.

4. Evidence—Pleadings.

It is competent to introduce in evidence distinct and separate parts of the adversary's pleadings, without introducing other parts thereof qualifying or explaining the subject-matter.

5. Trials—Argument of Counsel—Statutes—Instructions.

While the attorneys in the case are permitted by statute, C. S., 203, to argue the whole case as well of law as of facts to the jury, it is for the trial judge to instruct them upon the law, and he may correctly tell them to disregard the law as argued to them by counsel.

6. Interest—Contracts—Tort—Judgments.

In an action upon contract, interest upon its breach may be awarded from the time the principal sum was due thereunder, and in tort, the allowing of interest may be made or not as the jury sees fit: and where no interest is allowed by the verdict in case of torts the judgment bears interest from the first day of the term in which it was rendered.

APPEAL from *Barnhill, J.*, and a jury, November Term, 1925, of LENOIR. No error.

This action was founded on the following correspondence:

"LaGrange, N. C., July 13.

"Sears, Roebuck & Company,
"Chicago, Ill.

"J. E. Warters deposited $3,418.45 to pay for material when inspected and found satisfactory ship out lumber at once.

"Rouse Banking Company."

"July 27.

"Rouse Banking Company, LaGrange, N. C.
"Gentlemen:—

"We have your telegram advising that J. E. Martins (Warters) deposited $3,418.45 with your bank to pay for material when inspected and found satisfactory.

"We are entering the order for shipment to go forward as promptly as possible. To complete the transaction and in line with our regular order, we desire the attached form properly signed, and for your convenience in returning are enclosing a stamped envelope.

"We appreciate your coöperation in connection with this deal and take this opportunity to thank you. Yours truly,
Enc. "Sears, Roebuck & Company."

"Sears, Roebuck & Company
"Chicago."

"In reply to this letter address department—

"Date—July 30, 1920."

"Sears, Roebuck and Company,
"(Credit Department),
"Chicago, Ill.
"Gentlemen:—

"J. E. Warters, Box 112, LaGrange, N. C., has deposited with us the sum of $3,418.45, which has been set aside in a special fund subject to your order, same to be paid to you on delivery of the building material ordered, with the understanding that the goods are to conform with your specifications and meet with this depositor's approval. The material is to be inspected immediately on receipt and, if satisfactory, accepted by depositor, who will then notify us to send you the money.

"It is understood, however, that no responsibility in connection with any of the foregoing matters is to attach to this bank or any of its officers. Yours truly,

"Rouse Banking Company (Bank)
"By J. P. JOYNER, *Assistant Cashier,*
"LaGrange, N. C."

"February 1, 1921.

"Rouse Banking Company,
"LaGrange, N. C.

"Gentlemen:—

"Attention Mr. J. P. Joyner, Assistant Cashier.

"Referring to the building material account of Mr. J. E. Martins, (Warters), which is open under our number CR-805641, for which Mr. Martins (Warters) deposited $3,418.45, with you to pay the account, we wish to advise that as we have complied with our part of the agreement, the above amount should be forwarded to us without delay.

"It is important that this matter should have your prompt attention and we will look for a check for the above amount in payment of the account very shortly. Yours truly,

"Sears, Roebuck & Company."

The assets of Rouse Banking Company, were taken over by the National Bank of LaGrange, and it has been made a party to the action. It had notice of plaintiff's claim, and plaintiff contended it was liable and had assumed "liability and responsibility for the payment of the claims." This was denied by defendants.

"The defendant, Rouse Banking Company, (1) denied the authority of the assistant cashier, and contended that the transaction was *ultra vires;* (2) There had been no compliance on plaintiff's part "in respect to conforming to specifications, meeting the consignee's approval, nor with the inspection provided for not advised as to acceptance by the consignee nor any notification in respect to sending the money as set forth." (3) "It is understood, however, that no responsibility in connection with any of the foregoing matters is to attach to this bank or any of its officers," and this defendant is advised, informed and believes, and upon information and belief alleges, that the defendant assumed no responsibility in respect to the payment of said funds; and this defendant is further advised, informed and believes, and upon information and belief alleges, that if the said writing had been authorized by this defendant, the defendant realleging that it was not authorized, that nevertheless the plaintiff was guilty of such laches and negligence in respect thereto that this defendant would be relieved and absolved from liability in the premises."

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

"1. Did J. E. Warters deposit with the Rouse Banking Company $3,418.45 to be set apart subject to the order of the plaintiff to be paid to the plaintiff on delivery of the building material ordered when such material was received and accepted by said Warters? Answer: Yes.

"2. Did the plaintiff, Sears, Roebuck & Company, ship to and did J. E. Warters receive and accept the lumber and material ordered by Warters from the plaintiff as alleged in the complaint? Answer: Yes.

"3. What amount, if any, was J. E. Warters required to pay out as freight which the plaintiff had contracted to pay? Answer: $105.99.

"4. Has the defendant, Rouse Banking Company, failed and refused to pay over said funds to the plaintiff as alleged? Answer: Yes.

"5. Is the defendant, National Bank of LaGrange, liable upon said account? Answer: Yes."

Numerous exceptions and assignments of error were made in the court below. The material ones and necessary facts will be considered in the opinion.

Dawson & Jones, F. E. Wallace and Manning & Manning for plaintiff.
Rouse & Rouse for defendants.

CLARKSON, J. The whole controversy hinges on the letter of the assistant cashier of defendant, Rouse Banking Company, to plaintiff Sears, Roebuck & Company. Analyse the letter: (1) J. E. Warters, Box 112, LaGrange, N. C., has deposited with us the sum of $3,418.45, which has been set aside in a *special fund* subject to your order; (2) same to be *paid to you on delivery* of the building material ordered, with the understanding that the goods are to conform to your specifications and *meet with this depositor's approval;* (3) The material is to be *inspected immediately* on receipt and if satisfactory accepted by depositor, who will then notify us to send you the money. (4) It is understood, however, that no responsibility in connection with any of the foregoing matters is to attach to this bank or any of its officers.

The above letter was dated 30 July, 1920, and demand was made by plaintiff on 1 February, 1921. It is admitted by the Rouse Banking Company, "that at the time of sending the letter above referred to, that the said Warters had the amount in bank, but that it was never advised that the material had been inspected, found satisfactory or inspected by Warters, and that it had never been notified by Warters to remit the money to the plaintiff, and that when demand was made, on 1 February, 1921, by the plaintiff upon the bank for payment, Warters had withdrawn all his moneys from the bank and had no money on deposit."

The first ground of defense by defendant: "It is understood, however, that no responsibility in connection with any of the foregoing matters is to attach to this bank or any of its officers." This ground is untenable, the bank never carried out its agreement. The representation by the bank to plaintiff was that it had a deposit set aside in a *special*

fund subject to plaintiff's order. In this respect it broke its agreement and allowed J. E. Warters to withdraw this *special fund.* No responsibility would attach to the bank or any of its officers if it had kept its agreement and the *special fund* remained in bank. The defendant bank cannot take advantage of its own wrong. *Nullus commodum capere potest de injuria sua propria.* No one can obtain an advantage by his own wrong. Co. Litt., 148; Broom Max., 279; Black's Law Dic. (2 ed.), 837.

The defendant, Rouse Banking Company, further contends that there was no evidence that the material upon receipt was inspected and found satisfactory by the consignee, and excepted and assigned as error the following excerpts from the charge of the court below: "Gentlemen of the jury, if you should find from this evidence, that Warters deposited with the Rouse Banking Company, already having money there, instructed them to set it apart and hold the same to the use of the order of Sears, Roebuck & Company, to be paid to Sears, Roebuck & Company, when they had complied with the order that he had made to them for certain lumber, and when the same had been received and approved by him, and that they so received the deposit and so advised the plaintiff company and that they had the money, then they had no right to return that money to Warters without the consent of Sears, Roebuck & Company, any more than they had the right to pay it to Sears, Roebuck & Company, until it had complied with that order, and delivered the merchandise with the approval of Warters, who ordered the same. It was their duty to hold it after they so received it in accordance with that agreement, if they did so receive it, and the plaintiff has complied with their part of the contract by delivering the material, and same has been received and approved by Warters, then it is their duty to turn the money over to the plaintiff, as they contracted to do, that is, they held it subject to the order and subject to the disposition of the plaintiff company irrespective of anything that may have been said in the letter that they sent to the plaintiff."

Without repeating, we think there was abundant evidence, direct and circumstantial, to support this charge which went to the heart of the controversy and under the facts of this case a correct charge of the law.

In the case of *Mason v. Wilson,* 84 N. C., p. 51, one Green owed a note of $80.00 to plaintiff Mason. Green left the State, but before going left his property in the hands of Wilson, the defendant. The plaintiff testified, and it was so found by the jury, that Green told her "that he had left all of his property in the hands of the defendant Wilson, out of which her debt would be paid, as he had given Wilson instructions to that effect. To which Wilson replied that he had the property and that as soon as he could sell it, he would pay her debt. That the de-

fendant had since sold the property and that she had after such sale demanded payment which the defendant refused." The court below charged the jury: "That if they believed that the defendant Wilson received the property from the defendant Green promising to pay the plaintiff's debt out of the proceeds, and had thereafter verbally promised plaintiff to pay her debt in the manner described by her, and afterwards refused to do so, that plaintiff was entitled to their verdict." *Ashe, J.*, sustained the charge in the case. In the case the liability was attacked *solely* on the statute of frauds. This case has been approved many times and recently in *Mercantile Co. v. Bryant,* 186 N. C., p. 551.

It is contended by defendant, Rouse Banking Company, that it had no authority to make the promise, and the agreement was *ultra vires,* and cites the case of *Quarries Co. v. Bank,* 190 N. C., p. 277. In the *Quarries Company case,* the principle laid down "a banking corporation cannot lend its credit to another by becoming surety, endorser or guarantor for him. 3 R. C. L., 425." In that case it was a bare, naked promise and the bank had no fund in its possession, as in the present case, upon which the promise was made.

The principle laid down in 3 R. C. L., part sec. 437, is as follows: "Officers of a bank are but its agents, and like other agents can bind the bank only when acting within the scope of their authority, but when a bank opens its doors for business with the public, *and places officers in charge, persons dealing with them in good faith, and without any notice of any want of authority, will be protected where an act is performed in an apparent scope of the officer's authority, whether the officer was actually clothed with such authority or not.* (Italics ours.) Officers of banks are held out to the public as having authority to act according to the general usage, practice and course of business of such institutions, and their acts, within the scope of such usage, practice and course of business, bind the bank in favor of third persons having no knowledge of a limitation on their authority, and it is immaterial what the person's official position may be if he is actually engaged in the management of the bank's interests." *Bobbitt Co. v. Land Co., ante,* p. 323.

The introduction of portions of the answer comes within the rule laid down in *Jones v. R. R.,* 176 N. C., 268, where it is held: "It is the settled rule of procedure in this jurisdiction that a party may offer in evidence a portion of his adversary's pleadings containing an allegation or admission of a distinct and separate fact relevant to the inquiry and without introducing qualifying or explanatory matter, the rule being further to the effect that in such case it is open to the opposing party to introduce such qualifying matter if he so desires. *Wade v. Contracting Co.,* 149 N. C., 177; *Sawyer v. R. R.,* 145 N. C., 24;

Lewis v. R. R., 132 N. C., 382." *Weston v. Typewriter Co.*, 183 N. C., p. 2; *Construction Co. v. R. R.*, 185 N. C., 46.

The defendants' counsel argued to the jury that the case of *Quarries Co. v. Bank, supra,* was authoritative and complains that the court below instructed the jury that it was good law and the law of North Carolina, but not the law as applicable to the facts in the present case. That the jury should disregard anything said by counsel as to that being the law of the case at bar and they should be guided by what the court said is the law in the case. Counsel have a right to argue the law and facts to the jury, but it is incumbent on the court below to charge the law in the particular case applicable to the facts, and it is incumbent on the jury to follow the law as laid down by the court and not by counsel. Any other rule would make the jury both construe the law and decide the facts. Such is not the statute. "In jury trials the whole case as well of law as of facts may be argued to the jury." Latter part C. S., 203. The *Quarries case, supra,* was not applicable to the facts in the present case. The court below was correct in its charge.

The alleged contract of assumption by National Bank of LaGrange of outstanding contracts and obligations of Rouse Banking Company, under the disputed facts was left to the jury. We think the charge correct. Defendants' objection cannot be sustained. We think the plaintiff was entitled to interest.

In *Chatham v. Realty Co.*, 174 N. C., 674, it is held: "In an action on contract, when the jury finds the principal sum due thereon, which in this case was $10,000 (or nothing), said sum bears interest as a matter of law, and the court should give interest from the date of the contract, or from the time at which it was due under the contract. *Bond v. Cotton Mills,* 166 N. C., 20. But when the action is in tort, the jury can allow interest or not, as it sees fit, and, therefore, when the jury does not assess interest the verdict and judgment bear interest only from the first day of the term at which the judgment is rendered. *Harper v. R. R.*, 161 N. C., 451; *Hoke v. Whisnant,* at this term." C. S., 2309; *Cook v. Mfg. Co.*, 182 N. C., 205; *Perry v. Norton,* 182 N. C., 589; *Bell v. Danzer,* 187 N. C., 224.

We have considered the material assignments of error, the others present no novel or new proposition of law. On the entire record we think the case properly tried in accordance with law. Individuals must perform their contracts—so must corporations. Two corporations are contesting over a written contract easily understood. The bank, by its letter to plaintiff, distinctly informed it that it had a special fund put there for the purpose of paying for building material to be shipped by plaintiff to the party who had ordered the material and deposited the

fund. Plaintiff, relying on this letter, shipped the material and the finding of the jury, from competent evidence, was that the conditions of the contract were complied with by plaintiff. Defendant banking company, pleads lack of authority and *ultra vires*. It had the money in its bank for the purpose of paying for the building material. It allowed this special fund to be withdrawn contrary to its contract, and it cannot now set up the plea of lack of authority and *ultra vires*. No fraud or mutual mistake is alleged or shown. Such a plea, under the facts here, would destroy business confidence and the integrity of contracts. We find No error.

D. H. WILLIS, ADMINISTRATOR, v. CITY OF NEW BERN.

(Filed 31 March, 1926.)

1. Municipal Corporations—Cities and Towns—Streets—Safety of Travelers—Due Care.

The public is entitled to free passage along any portion of the street of a city maintained for this use, and the city is required to exercise due care for the safety of those traveling thereon.

2. Same—Termini of Streets.

The streets so far as the exercise of due care is required of the city is concerned, includes the sidewalks and termini, and dangerous places adjacent, where injury may be threatened to the travelers by not safeguarding the boundaries of the street by proper guards, lights or signals, as the circumstances may require.

3. Same—Wharves.

Where a seaport town has for a long period of time maintained an important street, terminating at a wharf for shipping on a river, with an abrupt fall to deep water at the end of the street, which it had kept guarded to prevent injury to the public using the street, and had permitted this guard to fall or decay, it is evidence of negligence that will make the city liable in damages proximately caused to one driving an automobile over the unguarded end of the street.

4. Municipal Corporations—Cities and Towns—Streets—Maintenance and Repairs—Negligence.

It is required of a municipality that it shall construct its streets in a reasonably safe manner, and continuously and at all times exercise ordinary care to keep them so, including all bridges, dangerous pits, embankments, dangerous walls, and like perilous places very near and adjoining the streets, guarding them by proper railings and barriers, or other reasonably necessary signals for the safety of the public.

5. Same—Notice of Defects.

In order to hold a city liable for an injury inflicted on one of the public users thereof caused by a defective or dangerous place in a street,

in the absence of a contrary provision of a statute, there must be sufficient actual notice by the city of the defect to have afforded it a reasonable opportunity for its repair; or notice of the dangerous condition will be implied by a sufficient time for its repair.

6. Same—Contributory Negligence.

Where one of the users of a public street of a city is negligently injured by a defect therein, in order to recover damages therefor against the city, he is required to have exercised due care as to conditions known to him, or which he should have known from his own observation at the time, and his failure therein will be contributory negligence that will bar his right.

7. Appeal and Error—Evidence—Cross-Examination—Harmless Error.

Incompetent evidence on the direct examination may be rendered unobjectionable on cross-examination of the witness on the same subject-matter.

8. Evidence—Nonexpert Witness—Collective Facts.

Upon a disputed fact upon the question of whether the plaintiff's own negligence contributed to the injury that had been caused him by a defective or dangerous place in a street, in an action for damages against a city, occurring at night at a place lighted by electricity, it is competent for the witness to testify from his own personal observation and experience, that the light would have the effect of blinding a person under the existing conditions there.

9. Municipal Corporations—Cities and Towns—Negligence—Public Policy—Commerce.

While the encouraging of commerce is a sound policy to be pursued by a city, it is no defense for its negligence in not maintaining its streets in a reasonably safe condition, to the injury of one using the same.

CIVIL ACTION for damages, instituted by D. H. Willis, administrator of Mitchell Willis, deceased, tried by *Bond, J.*, at November Term, 1925, of CRAVEN.

The city of New Bern is located at the junction of Neuse and Trent rivers, and the streets running north and south terminate, at the southern end, at Trent River, and the streets running east and west terminate, at the eastern end, at Neuse River. This has been the condition for more than one hundred years. Craven Street is a public highway of New Bern, running through the residential and business sections, passing the courthouse, postoffice, city hall, and other public places in the city. The southern terminus of said street is at Trent River. This terminus is used as a dock or public wharf and has been so used for fifty years or more. The surface of the street is about seven feet above the water and terminates abruptly above deep water. At the time of the injury complained of warehouses had been erected on both sides of the terminus of said street, extending therefrom and in line therewith

into the water a distance of 125 or 150 feet, leaving a body of water known as a boat slip between the warehouses and up to the terminus of the street. The street had been paved by the city of New Bern with oyster shells, and some eighteen or twenty years ago the street was paved with brick up to the terminus, leaving a slight incline from the terminus, extending back for some feet northward. A railroad track was laid across the southern end of Craven Street about ninety feet from the terminus. A large arc light had been placed on the eastern sidewalk or curbing of Craven Street at a distance of seventy-six feet from the terminus of the street at deep water. Craven Street runs north and south. Up until about seven years ago there was a wharf log at the terminus of the street which extended about eight or twelve inches above the surface thereof. This wharf log had rotted away. On the night of 22 April, 1925, Mitchell Willis, the deceased, came into New Bern on a boat and docked at the Hollister & Cox warehouse or wharf about 150 feet from the terminus of Craven Street. The deceased lived in Carteret County, but had visited New Bern at intervals. The night of 22 April, was a dark, rainy night, and the streets were wet. Mitchell Willis borrowed a Ford car from his brother, taking with him a boy named Clyde Gray, and in driving along Craven Street, drove off the terminus thereof into deep water, killing himself and the boy who was riding with him. At the time of his death the deceased was 21 years old.

There was no barrier, rail, guard, light or any device for giving notice that the street terminated abruptly above deep water. The plaintiff contends that it constituted negligence to leave the street in this condition, and particularly so, when the warehouse extended out into the water on each side of the street, which would give the impression to a traveler not actually acquainted with the conditions, that the street extended certainly to the length of these warehouses. The defendant contended that the arc light on the curb stone on the east side of Craven Street furnished sufficient light to warn the plaintiff's intestate of danger if he had been keeping a proper lookout, and that the river itself was also a warning of danger.

The issues and answers of the jury thereto were as follows: (1) Was plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes. (2) If so, did plaintiff's intestate, by his own negligence contribute to and cause his death as alleged in the answer? Answer: No. (3) What damage, if any, is plaintiff entitled to recover from defendant? Answer: $8,000. (4) Did plaintiff, D. H. Willis, qualify as administrator of Mitchell Willis' estate? Answer: Yes.

From judgment upon the verdict the defendant appealed.

J. H. Davis, Guion & Guion and D. L. Ward for plaintiff.
E. M. Green, Moore & Dunn and R. A. Nunn for defendant.

BROGDEN, J. Craven Street in the city of New Bern terminates abruptly at deep water on Trent River. The surface of the street at this terminus is seven or eight feet above the water of the river.

The courts have universally held that a street includes the roadway, or traveled portion, and sidewalks. A street must also include the terminus thereof. Public highways belong, from side to side and end to end, to the public, and the rule is well founded both in reason and judicial pronouncement that the public is entitled to free passage along any portion of it. Elliott on Roads and Streets, 2d vol., sec. 828; *Graham v. Charlotte,* 186 N. C., 663. It is essential to the public safety that the terminus of a street shall be kept in as reasonably safe condition as any other portion thereof, for the manifest reason that it would be obviously futile to charge municipal authorities with the duty of keeping a street in a reasonably safe condition and yet permit it to terminate abruptly in an unsafe and dangerous manner. It would be a ruthless doctrine to allow a public highway to be improved for its entire length and thereby invite a traveler thereon, and, after being lulled into a sense of safety, to be suddenly put to death by an unguarded embankment, precipice, or other dangerous defect, when such defect was known or could have been discovered by the exercise of reasonable diligence, and when, of course, the traveler was using due care for his own safety.

While it appears that there was a dock or wharf at the terminus of Craven Street, it also appears from the evidence that the city of New Bern had originally paved the street with oyster shells to the wharf log, and fifteen or eighteen years ago had paved the street with permanent paving up to the wharf log. It is immaterial therefore as to whether this street terminated in a public wharf or a dock for the reason that the city had exercised control over every part of the street, including its terminus, for many years. Indeed, the overwhelming weight of testimony introduced by the defendant was to the effect that the terminus of this street had been used by the public in connection with the street itself for more than fifty years. So that, as far as the rights of the parties are concerned, this wharf or dock was the terminus of one of the principal streets of the city of New Bern, and therefore the liability of the defendant must be governed by the established rules of law regulating streets and highways.

What then are the duties which the defendant owed the public?

The decisions of this State, and, indeed, of all the states, have established and imposed the following positive obligations upon municipal authorities with reference to streets and highways, to wit: (1) They

shall be constructed in a reasonably safe manner, and to this end ordinary care must be exercised at all times; (2) They shall be kept in proper repair or in a reasonably safe condition to the extent that this can be accomplished by proper and reasonable care and continuing supervision; (3) proper repair implies that all bridges, dangerous pits, embankments, dangerous walls and the like perilous places and things very near and adjoining the streets shall be guarded against by proper railings and barriers or other reasonably necessary signals for the protection of the public. *Russell v. Monroe,* 116 N. C., 720; *Neal v. Marion,* 126 N. C., 412; *Fitzgerald v. Concord,* 140 N. C., 110; *Brown v. Durham,* 141 N. C., 249; *Darden v. Plymouth,* 166 N. C., 492; *Foster v. Tryon,* 169 N. C., 182; *Duke v. Belhaven,* 174 N. C., 96; *Stultz v. Thomas,* 182 N. C., 470; *Goldstein v. R. R.,* 188 N. C., 636.

It is further established by the decisions referred to that a municipal corporation is not an insurer of the safety of its streets, nor is any duty imposed upon it to warrant that the condition of its streets shall at all times be absolutely safe. Neither will the breach of such duties imposed, warrant a recovery by the mere showing that a defect existed and that an injury has resulted proximately therefrom. It must be further shown that the governing authorities of the municipality had notice of the defect. This essential notice arises from: (1) Actual notice or knowledge directly imparted to the proper officials of the municipality; (2) implied, constructive or imputed notice. The principle creating and governing, implied, constructive or imputed notice is thus stated in Shearman & Redfield on the Law of Negligence, 6 ed., vol. 2, sec. 369: "Unless some statute requires it, actual notice is not a necessary condition of corporate liability for the defect which caused the injury. Under its duty of active vigilance, a municipal corporation is bound to know the condition of its highways, and for practical purposes, the opportunity of knowing must stand for actual knowledge. Hence, where observable defects in a highway have existed for a time so long that they ought to have been observed, notice of them is *implied,* and is imputed to those whose duty it is to repair them; in other words, they are presumed to have notice of such defects as they might have discovered by the exercise of reasonable diligence."

The decisive question is therefore presented as to whether or not, under the circumstances existing, it was the duty of the city of New Bern to erect a barrier, red light, chain, or other device for the protection of the public at the terminus of this street.

It must be conceded that if the terminus of this street was a dangerous place, then it was the duty of the city, under our decisions, to exercise ordinary care for the protection of the public. The principles of safety deduced from the authorities require municipal corporations to use

ordinary care not only in protecting dangerous places in the street itself, but also to cover dangerous places near the street or highway. As stated by *Justice Connor* in *Goldstein v. R. R.*, 188 N. C., 639: "If the hole or excavation had not been there or if a fence or rail had been erected between the road and the hole, plaintiff would not have been injured." *Duke v. Belhaven,* 174 N. C., 96; *Bunch v. Edenton,* 90 N. C., 431; *Brown v. Durham,* 141 N. C., 249.

In *Brown v. Durham, supra,* the principle imposing liability upon municipal corporations to guard dangerous places on or near the street is squarely presented thus: "The judge below charged the jury that it would be a breach of duty on the part of the city for it to permit a hole or washout one or more feet wide and eight inches or more deep, and extending two feet or more across the sidewalk, adjacent to and opening into a large hole five feet or more deep and four feet in diameter just outside of the sidewalk, to remain *without light and without railing or barriers to protect the same for an unreasonable length of time.*" The trial judge further charged the jury that if such a hole had been permitted to remain near the sidewalk of a much used street in the city of Durham, without rails or barriers or light to guard such a hole for a space of ten days, it would constitute an unreasonable length of time. The rules of liability so laid down by the court were approved in the opinion written by *Justice Hoke.*

It must be borne in mind, however, that a traveler using a highway or street must exercise ordinary care for his own protection and safety.

The trial judge charged the jury fully upon this aspect of the case. In defining the duty of the plaintiff's intestate, under the circumstances, the trial judge, at the request of the defendant, charged as follows: "A traveler using the public streets of a city is required to exercise ordinary care and prudence to observe obstructions or defects in the street or road traveled; and if the jury shall find from the evidence that the plaintiff's intestate carelessly, or without due care and observation, drove down the end of Craven Street and into the water when said street was lighted so that a person exercising ordinary care could have observed the condition thereof and avoided the injury, then, though the jury might find that the city had been negligent, yet such negligence would not be the proximate cause of the injury and the jury would answer the first issue, no. The right of a person to use a street for the purpose of public travel does not excuse the traveler from being required to take into consideration the right not only of his fellow travelers and others who may use the highway for purposes other than those of traveling and to conform to its uses and customs which have grown up with civilization or commerce of the city in which the road or street is constructed."

This charge was perhaps more favorable to the defendant than it was entitled to under the law.

The court further charged that if the plaintiff's intestate knew of the condition of the terminus of Craven Street, and notwithstanding the same, drove down said street at a high rate of speed, this would constitute contributory negligence, and the jury should answer the issue relating thereto in the affirmative.

The court further charged the jury that if the plaintiff's intestate was violating the speed limit at the time of his death, that this caused or contributed to his death, he would not be entitled to recover; and further, that if plaintiff's intestate was driving at such a rate of speed so that the radius of the lights of his car would not bring out the terminus of the street and the water at the end thereof in time to have stopped the same and avoided the injury, plaintiff was not entitled to recover.

These instructions and others of similar import so given by the trial judge imposed to the fullest extent the obligation of ordinary care required of plaintiff's intestate.

Applying the law to the facts disclosed by the record, it appears that there was competent evidence tending to show: (1) That the terminus of Craven Street was dangerous; (2) that the particular danger at this particular place imposed upon the defendant the duty to erect a guard, rail, barrier, light, or some adequate device for giving reasonable notice of the danger to a traveler using said street in a lawful manner and for a lawful purpose; (3) that the conditions had existed for such a period of time as to constitute legal notice to the municipal authorities of said danger; (4) that the plaintiff's intestate, at the time of his death, under the circumstances existing, was exercising reasonable care for his own safety.

The jury by its verdict, under a proper charge from the court, and upon competent evidence, has established the liability of the defendant, and the judgment rendered thereon must be upheld.

There are eighty-two exceptions in the record and a separate discussion of each would draw out this opinion to a burdensome and intolerable length, and therefore they will not be considered *seriatim.*

There is a group of exceptions based upon testimony relating to the condition of other streets in the city of New Bern and the terminus of other streets in the city of New Bern. It was strongly intimated, though not expressly decided, in *Dowell v. Raleigh,* 173 N. C., 197, that evidence of similar defects, obstructions or conditions in the immediate vicinity, is admissible as tending to show the existence of a particular defect or to fix constructive notice thereof on the municipality.

However, this may be, the defendant in the cross-examination of plaintiff's witnesses undertook to show the condition of other streets in the city of New Bern, and for this purpose submitted a diagram of certain streets of the city. Thereupon the plaintiff, replying to this evidence and attempting to explain it, offered testimony as to barriers or other protection at the termini of these streets in the city.

In *Cook v. Mebane, ante,* p. 1, the opinion written by *Clarkson, J.,* holds that "the erroneous admission of evidence on direct examination is held not to be prejudicial when it appears that on cross-examination the witness was asked substantially the same question and gave substantially the same answer." *Hanes v. Utilities Co., ante,* 19; *Gentry v. Utilities Co.,* 185 N. C., 286; *Ledford v. Lumber Co.,* 183 N. C., 614; *Marshall v. Tel. Co.,* 181 N. C., 292.

In other words, the rule is, that if evidence offered by one party is objected to by the adverse party and thereafter the objecting party elicits the same evidence, the benefit of the objection is lost, and further, if on cross-examination evidence is developed without objection, the adverse party can offer evidence in reply relating to the same questions, even though such evidence in reply might have been incompetent in the first instance.

A group of exceptions assails the competency of evidence admitted by the trial judge as to the effect of the street light upon a person driving a car at the place in controversy. The witness testified that the effect of the street light was to blind a person and that the result was "you would be in the river before you could stop the car." Visibility at the place complained of would be competent on the question of contributory negligence. In addition, a nonexpert witness who has observed a place, can from his observation and acquaintance, testify as to such matters of fact depending on his ordinary powers of observation. The identical question as to the effect of a light was discussed and held competent in *Arrowood v. R. R.,* 126 N. C., 632. The principle is further amplified in: *Britt v. R. R.,* 148 N. C., 40; *Marshall v. Tel. Co.,* 181 N. C., 292; *S. v. Skeen,* 182 N. C., 845; *Graham v. Power Co.,* 189 N. C., 387.

The defendant contends that as the terminus of this street was a public dock or wharf, it would greatly interfere with commerce to have the same blocked with any sort of barrier or device to give warning to travelers. It is undoubtedly the mandate of sound public policy to encourage commerce and to lend to its legitimate expansion the full power of the law, but it is also true that the sanctity of commerce must yield to the sanctity of life, "for the life is more than meat and the body than raiment."

The carefully prepared briefs of counsel for the parties have been of helpful service in the investigation of the merits of this controversy, and upon the whole record we are forced to the conclusion that the principles of law have been properly applied by the trial judge and that the judgment as rendered should be upheld.

No error.

ELVINGTON v. WACCAMAW SHINGLE COMPANY ET ALS.

(Filed 31 March, 1926.)

1. **Deeds and Conveyances—Timber—Extension Period—Consideration—Payment—Time the Essence.**

   To enforce against the grantor an option of an extension period for cutting and removing growing timber sold upon lands, it must be exercised by the purchaser by paying the consideration within the time specified in the contract, and time will be deemed to be of the essence of the contract.

2. **Same—Offer after Expiration of Extension Period—Damages—Rights and Remedies—Motive.**

   The optionee of an extension period for cutting and removing timber growing upon lands is within his legal rights in tendering the payment required by the contract, after the time therein stipulated and required, without liability to the grantor for damages by reason of causing without personal interference a proposed purchaser from the latter to refuse to accept a proposition he had made for the timber, the subject of the option, whatever the ulterior motive the optionee may have had.

CIVIL ACTION before *Daniels, J.*, at September Term, 1925, of BRUNSWICK.

On 7 May, 1922, the plaintiff conveyed certain timber rights to W. C. Manning, trustee, which rights were purchased by the defendant. The contract of sale provided for a period of ten years for cutting and removing the timber, and further provided for an additional term "by paying annually to said Elvington, his heirs or assigns, six per cent of the purchase money herein mentioned. The first period provided in the contract expired on 7 May, 1922. The defendant did not make tender for the extension privilege until 10 May, 1922, which was three days after the time expired. The defendant contended that time was not of the essence of the contract and that therefore his tender was valid. This Court, however, in the case of *Elvington v. Shingle Co.*, 189 N. C., 366, held that the defendants' right to the extension privilege had been lost by failure to make a tender in accordance with the contract.

The plaintiff alleged "that after the expiration of said option this plaintiff, as he had a right to do, contracted with J. J. Knox for the sale of said timber for the sum of $3,500, and the said Knox was ready, willing and able to pay this amount for the said timber and but for the wrongful, unlawful and unwarranted interference with the said timber of the aforesaid plaintiff by the defendants, the contract with the aforesaid J. J. Knox would have been consummated." The plaintiff further contended that the tender of the money by the defendant, after his contract had expired and after he had sold the timber to Knox, prevented Knox from buying the timber for the reason that Knox then stated that he would not take the timber, as he "did not want to have anything to do with it if there was to be litigation."

The plaintiff contends that the tender of money by the defendant after the time had expired constituted an unlawful interference with his contract with Knox because by reason thereof Knox declined to take the timber.

At the conclusion of the evidence for plaintiff judgment of nonsuit was entered and the plaintiff appealed.

Robt. W. Davis for plaintiff.
C. Ed. Taylor for defendant.

BROGDEN, J. The legal basis of plaintiff's cause of action is wrongful, unlawful and unwarranted interference with the contract of sale made by him with John J. Knox.

It is a violation of a legal right, recognized by law, to interfere with contractual relation, if there be no sufficient justification for the interference. Pollock on Torts, 12 ed., 332. A clear and comprehensive statement of the principle is found in *Angle v. Chicago St. P. M. & O. R. Co.*, 151 U. S., 55, and is in this language: "Wherever a man does an act which in law and in fact is a wrongful act, and such act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." The opinion cites *Jones v. Stanly*, 76 N. C., 355, and *Haskins v. Royster*, 70 N. C., 601, which hold that, if a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. And these cases further hold that the same reasons cover every case where one person maliciously persuades another to break any contract with a third person.

The trial judge nonsuited the plaintiff, and therefore the only question to be considered is whether or not there was any evidence of an unlawful and wrongful interference with the contract of sale made by the plaintiff.

The only evidence to support the cause of action was the fact that the defendant tendered the money for the extension privilege after the time expired, and that at the time of the tender the defendant's agent said "I am going to get that timber." There is no evidence that the defendant ever spoke to Knox or had any communication with him whatever about buying the timber. Knox refused to buy because he did not want to "buy a law suit." The defendant had a right to make the tender. Therefore it was not a wrongful act for him to do so. Even if it be conceded that the defendant made the tender with a malicious motive, then plaintiff would be in no better plight. "An act which does not amount to a legal injury cannot be actionable because it is done with bad intent. That the exercise by one man of his legal right cannot be a legal wrong to another is a truism." *Biggers v. Matthews,* 147 N. C., 299; *Swain v. Johnson,* 151 N. C., 93; *Bell v. Danzer,* 187 N. C., 224.

The principle is thus expressed: "An act which is lawful in itself and which violates no right cannot be made actionable because of the motive which induced it. A malicious motive will not make that wrong which in its own essence is lawful." "If an act be lawful—one that the party has a legal right to do—the fact that he may be actuated by an improper motive does not render it unlawful." *Bell v. Danzer, supra.*

Applying these principles of law to the facts in this case, it is clear that the defendant had a right to make the tender and to assert his claim in a lawful way. Therefore, the attempted tender of the money by the defendant could in no sense be construed as an unlawful and wrongful interference with the contractual rights of plaintiff with a third party. The judgment of nonsuit was properly entered.

Affirmed.

R. G. ALLEN v. B. F. McMILLAN, SHERIFF, AND ROBT. U. PATTERSON, INTERVENOR.

(Filed 31 March, 1926.)

1. Interpleader—Attorney and Client—Affidavits—Defects—Waiver—Appearance.

A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervenor, as not having been made in accordance with the requirements of our statute, by appearing at the taking of depositions in his behalf and cross-examining his witnesses. C. S., 840.

2. Same—Orders—Judgments—Parties—Exceptions.

Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party

to the action must first attack the validity of the order if he so desires, and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive.

3. Tenants in Common—Personal Property—Claim and Delivery—Sole Ownership.

One tenant in common of personal property may not maintain claim and delivery against a third person in possession, without the other owners, it being required that the claimant show sole ownership.

4. Same—Evidence—Questions for Jury.

Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in claim and delivery, the question is one for the jury.

APPEAL by plaintiff from *Dunn, J.*, at September Term, 1925, of ROBESON. New trial.

On 25 April, 1925, defendant, B. F. McMillan, sheriff of Robeson County, arrested plaintiff in the town of St. Pauls, in said county, upon a warrant, duly issued, charging that plaintiff was a fugitive from justice, having stolen an automobile in Washington, D. C., C. S., 4550. There was evidence that the Dodge Sedan, found in the possession of plaintiff, at the time of his arrest, was the automobile which had been stolen in Washington, D. C. Plaintiff was delivered by the sheriff into the custody of officers from Washington, D. C., who took him to said city to answer the charge there pending that he had stolen the automobile. The sheriff retained the automobile in his possession, in order that he might deliver it to the owner.

On 30 April, 1925, plaintiff commenced this action to recover the automobile from the sheriff; pursuant to a writ of claim and delivery, issued herein, the coroner of Robeson County took the automobile from the sheriff. On 1 May, 1925, Paul A. Sherrier, as attorney for Robert U. Patterson, filed an affidavit in this action, alleging that said Robert U. Patterson was the owner of said automobile and praying that he be made a party to the action, in order that he might intervene and set up his rights as such owner. Upon the filing of bond as required by statute, an order was made, in accordance with the prayer in said affidavit and petition, and the automobile was thereupon delivered by the coroner to Robert U. Patterson, intervenor. At the trial, the sheriff disclaimed title or right of possession to the automobile. The issues submitted to the jury were answered as follows:

1. Is the intervenor, Robert U. Patterson, the owner and entitled to the possession of the Dodge Sedan in controversy, as alleged in his petition? Answer: Yes.

2. What was the value of said automobile at the time of the seizure? Answer: $1,000.

From judgment in accordance with the verdict, plaintiff appealed.

McLean & Stacy for plaintiff.
McNeill & Hackett for intervenor.

CONNOR, J. The affidavit upon which Robert U. Patterson was allowed to intervene in this action, and to set up his claim to the Dodge Sedan, was made by Paul A. Sherrier, as attorney for Robert U. Patterson, and was signed "Robert U. Patterson by Paul A. Sherrier, attorney." Plaintiff contends that said affidavit was not sufficient for that it was not made by the claimant, as required by statute; that an affidavit made by an attorney or an agent for a claimant, is not sufficient to support an order that the claimant may intervene, or interplead in the action, C. S., 840. If it be conceded that plaintiff's contention is correct, it will not avail him upon the facts appearing on this record. Plaintiff alleged in his complaint that "an intervenor's oath and bond" had been filed in the action; plaintiff appeared by his attorney at the taking of depositions in behalf of Robert U. Patterson, intervenor, at Washington, D. C., on 4 September, 1925, and cross-examined the witness whose depositions were then and there taken. Plaintiff thereby waived any defect or irregularity in the affidavit upon which Robert U. Patterson was made a party to the action. If plaintiff wished to attack the validity of the order by which the intervenor was made a party to the action, he should have done so, in the first instance, before recognizing its validity by the allegation in his complaint and by his appearance and participation in the taking of depositions in behalf of the intervenor. A voluntary recognition that the court has acquired jurisdiction of a party to the action is conclusive not only upon the party, but also upon his adversary. *Rector v. Logging Co.*, 179 N. C., 59; *Harris v. Bennett,* 160 N. C., 339; *Caldwell v. Wilson,* 121 N. C., 458. Plaintiff's assignments of error based upon his exceptions to the refusal of the court to dismiss the intervenor as a party to the action cannot be sustained.

There was evidence that the intervenor, Robert U. Patterson, is a colonel in the United States Army, and that during the year 1925, he was on duty in Washington, D. C. He purchased the automobile in controversy on 25 February, 1925, from a dealer in Washington City. Before concluding the bargain for the automobile, he requested the salesman to show it to his wife, Mrs. Eleanor R. Patterson. The salesman complied with this request; Mrs. Patterson approved the automobile and gave the salesman $25 to "clinch the bargain." Subsequently, the purchase price of the automobile was paid by two checks, one signed by Col. Patterson and one by Mrs. Patterson. Col. Patterson testified, "I made two payments—one by myself, and one by my wife." The salesman testified that he sold the automobile to Col. Patterson and his wife.

The automobile was stolen from the street in Washington, where Col. Patterson had parked it, on 9 April, 1925. Thereafter, the bill of sale for the car, dated 4 May, 1925, to Mrs. Eleanor R. Patterson, was delivered to Colonel and Mrs. Patterson. The automobile recovered from plaintiff at Lumberton, N. C., on 25 April, 1925, was restored to Col. Patterson in Washington, D. C., in May, 1925, by the police authorities of said city.

His Honor instructed the jury, upon the first issue, as follows:

"If the intervenor has satisfied you by the greater weight of the evidence that he is the owner of the automobile, or joint owner, together with his wife, it will be your duty to answer the first issue, Yes." Plaintiff excepted to this instruction and assigns same as error.

The court further instructed the jury that "if the intervenor has failed to satisfy you that the automobile is his property, or the joint property of himself and wife, or if you find upon the whole evidence that it is the sole property of intervenor's wife, and not his sole property, or not the joint property of the intervenor and his wife, it will be your duty to answer the first issue, No."

There was evidence from which the jury could have found that at the time Col. Patterson became a party to the action, he was the sole owner of the automobile; or that he and his wife were joint owners; or that she was the sole owner.

It has been held by this Court that ordinarily one cotenant or joint owner of specific personal property cannot recover possession of said property, or damages for its conversion, from one who is a joint owner, or cotenant with him of said property, *Doyle v. Bush,* 171 N. C., 10; *Waller v. Bowling,* 108 N. C., 294.

It has also been held that an action for the recovery of the possession of personal property, owned by two or more joint owners, or cotenants, cannot be maintained by one of the several joint owners or cotenants, *Cain v. Wright,* 50 N. C., 283; *Heaton v. Wilson,* 123 N. C., 399.

The general rule is that each cotenant has a right to the possession of all the property held in cotenancy, equal to the right of each of his companions in interest, and superior to that of all other persons; but the possession of a chattel cannot be recovered from a stranger in an action brought by less than all the owners of it, for to maintain the action the plaintiff must show a right to the exclusive possession of the property; 23 R. C. L., 869; *McDonald v. Bailey,* 37 L. R. A. (N. S.), 267 and note; *Thomas v. Armstrong,* L. R. A., 1916 B, p. 1182.

It was error to instruct the jury that if they found from the evidence that Col. Patterson and his wife were joint owners of the automobile, they should answer the first issue "Yes." They should have been in-

structed that they could not answer the issue "Yes" unless they found that Col. Patterson, the intervenor, was the sole owner of the automobile. Col. Patterson can recover in this action only if he is the sole owner of the automobile taken from the possession of plaintiff by the sheriff of Robeson County. There must be a

New trial.

HOSEA BARBEE, EXECUTOR, ET AL. v. E. M. BUMPASS, ADMINISTRATOR, ET AL.

(Filed 31 March, 1926.)

1. Deeds and Conveyances—Husband and Wife—Probate—Certificates.

A deed from a married woman to her husband of her separate lands is void, when not made in accordance with the requirement of statute that the probate officer certify in the certificate of probate, that at the time of its execution and the wife's privy examination, the conveyance was not unreasonable or injurious to her. C. S., 2515.

2. Deeds and Conveyances—"Color"—Adverse Possession — Burden of Proof.

The burden of proof is on the party to the action claiming title to lands by adverse possession under color, to prove sufficient legal possession to ripen his title.

3. Same—Husband and Wife—Tenant by the Curtesy.

Without evidence to the contrary, the possession of the husband of lands of his deceased wife as tenant by the curtesy, is not adverse, and will not ripen title in him, for the time of such possession, or for those claiming under him.

4. Deeds and Conveyances—Adverse Possession—Color—Legal Title—Presumptions.

The possession of lands is presumed to be held under the true legal title.

APPEAL by defendants from *Devin, J.*, at March Term, 1926, of DURHAM.

Civil action to quiet title and to remove a cloud therefrom, arising from claim of defendants under deeds executed by Jennie Barbee to her husband, 19 February, 1913, without complying with the requirements of C. S., 2515, thus rendering them void.

From a judgment for plaintiffs entered on an agreed statement of facts, the defendants appeal, assigning error.

Victor S. Bryant for plaintiffs.

A. T. Johnson for defendants.

STACY, C. J. In the language of a Cherokee Indian, "the plaintiffs have lawed the defendants to kill a deed," in fact two; or, in other words, the action is one, brought under C. S., 1743, to quiet title or to remove a cloud therefrom, which, it is alleged, arises out of a claim by the defendants to the lands in question by reason of two deeds executed by Jennie Barbee to her husband, Green Barbee, 19 February, 1913, without complying, in either case, with the provisions of C. S., 2515, requiring the probate officer, as a condition precedent to the validity of the conveyance, to certify in his certificate of probate, that at the time of its execution and the wife's privy examination, such contract was not unreasonable or injurious to her. It is conceded that the failure on the part of the probate officer to observe this requirement of the statute, rendered both deeds absolutely void. *Davis v. Bass,* 188 N. C., 200; *Wallin v. Rice,* 170 N. C., 417.

But the defendants, who are the lawful heirs of Green Barbee and as such, or as devisees under his will, claim the land by, through, or under him, say that notwithstanding the invalidity of these deeds, yet, they were good as color of title, and that as Green Barbee held the lands under such deeds from 1913 until his death in 1923, being more than seven years under color, his claim thereto ripened into a perfect title, leaving him seized in fee of such lands at the time of his death, 10 October, 1923. *Norwood v. Totten,* 166 N. C., 649.

The plaintiffs, on the other hand, who are the children and only heirs at law of Jennie Barbee, and who claim the lands by, through or under her, say that while it is true these deeds existed and were on record for more than seven years prior to Green Barbee's death, yet his possession was not adverse; that Jennie Barbee and Green Barbee, her husband, continued to live together and occupied a part of said lands jointly, as their home, until 17 March, 1916, the date of the death of Jennie Barbee; and that Green Barbee, following the death of his wife, being advised by counsel learned in the law that the above deeds held by him were void, continued to occupy said lands as tenant by the curtesy and did not pretend or claim to be the absolute owner thereof.

It is clear that the plaintiffs are entitled to the relief sought. *Whitten v. Peace,* 188 N. C., 298.

The possession of Green Barbee was not adverse to his wife during her lifetime. *Clendenin v. Clendenin,* 181 N. C., 465. It was held in *Kornegay v. Price,* 178 N. C., 441, that the husband could not, while living with his wife on the land, acquire title against her by adverse possession, and the same was held as to the wife in *Hancock v. Davis,* 179 N. C., 283. "Adverse possession, which will ripen a defective title, must be of a character to subject the occupant to action."—*Hoke, J.,* in *Smith v. Proctor,* 139 N. C., 314.

Nor is there any evidence or finding that Green Barbee's possession was adverse to the plaintiffs after his wife's death. Under the advice of counsel as to his rights, he only claimed and occupied the lands as tenant by the curtesy following his wife's death. *Whitten v. Peace, supra.* In addition to this, every possession is deemed to be under and in subordination to the true legal title, unless such possession is shown to be adverse. C. S., 432; *Bland v. Beasley,* 145 N. C., 168. There is no presumption of adverse possession against the true owner (*Shermer v. Dobbins,* 176 N. C., 547); and when title is claimed against such owner by adverse possession, the burden is on the one who relies upon such claim to show that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action. *Land Co. v. Floyd,* 171 N. C., 543; *Bland v. Beasley, supra.* This, the defendants have not done in the instant case.

The record presents no reversible error, hence the judgment of the Superior Court must be upheld.

Affirmed.

JACOB STOVE WORKS v. C. O. H. BOYD, TRADING AS NEW BERN FURNITURE COMPANY.

(Filed 31 March, 1926.)

1. Vendor and Purchaser—Carriers—Principal and Agent—Damages.

Where goods sold are to be transported and delivered by a common carrier, the delivery thereof in good condition by the seller to such carrier is a delivery to the buyer's agent, and he is liable to the seller for the purchase price, though the shipment is received at destination in a damaged or worthless condition.

2. Instructions—Evidence—Issues—Appeal and Error—Statutes.

Where an instruction upon the law is necessary for the jury to arrive at a verdict upon a material issue, it is the duty of the trial judge to charge the law thus arising without a request for special instruction having been offered and refused. C. S., 564.

3. Vendor and Purchaser—Carriers—Constructive Delivery—Consignor and Consignee—Evidence—Questions for Jury.

Where the purchaser of goods to be transported and delivered by a common carrier denies liability in the seller's action to recover the purchase price, upon the ground that they were delivered to him by another consignee, a local agent of the seller, who had received them from the carrier, a delivery to the carrier by the seller in good condition is not a delivery to the purchaser, and upon conflicting evidence the question is for the jury.

4. Same—Counterclaim—Set-Off—Statute.

Where damages are claimed by the plaintiff in the action, the seller of goods, for the contract price, the purchaser may set up as a counterclaim or set-off, any loss to him by reason of damages to the goods, caused by the plaintiff in failure to perform his obligations under the contract of sale. C. S., 521.

APPEAL by defendant from *Bond, J.*, at October Term, 1925, of CRAVEN. New trial.

Action on account for goods sold and delivered. The issues, as answered by the jury, were as follows:

1. Is the defendant indebted to plaintiff as alleged in the complaint? Answer: Yes.

2. If so, in what amount? Answer: $396, with interest on same from 10 January, 1920.

From judgment upon this verdict, defendant appealed to the Supreme Court.

H. P. Whitehurst for plaintiff.
Guion & Guion for defendant.

CONNOR, J. On 3 November, 1919, defendant, a merchant, engaged in business at New Bern, N. C., purchased from plaintiff, a corporation, engaged in business at Bridgeport, Alabama, thirty-four stoves and heaters, agreeing to pay therefor the sum of $396 on 10 January, 1920.

Plaintiff alleges that it delivered the said stoves and heaters, in good order, together with other merchandise of like character, to a common carrier, at Bridgeport, Alabama, to be transported in a "pool car" to defendant at New Bern, N. C.; that this method of shipment, to wit, by a "pool car," was used by plaintiff by reason of special instructions and at the special request of defendant; that defendant has failed and refused to pay the purchase price for said stoves and heaters, to wit, $396, and that same is now past due.

Defendant denies that he instructed or requested plaintiff to ship the stoves and heaters, which he purchased from plaintiff, in a "pool car"; he alleges that plaintiff agreed to deliver the stoves and heaters to him at New Bern, N. C.; he contends that plaintiff did not deliver the said stoves and heaters to a common carrier, consigned to him, but that they were consigned to the Turner-Tolson Furniture Company, at New Bern, and delivered to him, in a damaged condition, by said company.

As a further defense, he alleged that some time after he had made the purchase, thirty-four stoves or parts of thirty-four stoves were placed in his warehouse in New Bern; that said stoves were unsalable,

because of their broken, mutilated and damaged condition; he contends that said broken stoves were delivered to his drayman, by the Turner-Tolson Furniture Company, to whom plaintiff had shipped them; that said stoves were so badly damaged at the time they were delivered to his drayman by the Turner-Tolson Furniture Company, that they were then unsalable, and therefore worthless.

There was evidence tending to support the allegations and contentions of both plaintiff and defendant.

The case on appeal to this Court, as settled by counsel, shows that his Honor instructed the jury as follows:

"So that I have no hesitation to say to you, if you believe the evidence and find the facts to be as it tends to prove, that the plaintiff shipped to the defendant, Boyd, in a so-called 'pool car,' with some stoves for two or three other folks, a certain lot of stoves to get reduced freight rates by shipping a car instead of sending each piece to pay its own freight, and that they got here, and the defendant received the goods. He admits that he has never paid for them. The Jacob Stove Works, if the evidence is to be believed, delivered the freight at the point at which it was to start, so that if you all believe the evidence in the case and find the facts to be as it tends to prove, you would answer the first issue, 'Yes.'" Defendant's assignment of error, based upon exception to this instruction must be sustained.

There were no requests by defendant for special instructions, but his contentions, with a statement of the evidence, tending to support them, should have been submitted to the jury, with instructions by the court as to the principles of law applicable. C. S., 564. The evidence was conflicting as to facts material to the controversy; the burden is on plaintiff to show delivery of the stoves and heaters, in good order, to defendant, "Ordinarily when goods are to be shipped to the buyer, a delivery by the seller to the carrier, designated by the buyer, is a delivery to the buyer, and constitutes a full performance of the seller's obligation to make delivery. This is on the theory that the carrier is made the agent of the buyer to accept delivery." 23 R. C. L., 1423. In this case, while all the evidence shows a delivery to defendant of the stoves, it becomes material to determine as a fact whether the delivery was made to him by the common carrier or by the Turner-Tolson Furniture Company, as agent at New Bern for plaintiff. If defendant instructed or requested plaintiff to ship in a "pool car," and the goods were delivered to the carrier in good order to be so shipped, plaintiff is entitled, upon all the evidence, to recover, notwithstanding the condition of the stoves, when they reached New Bern. If, however, plaintiff consigned the stoves to Turner-Tolson Furniture Company at New Bern, and the goods

were in a damaged condition when delivered to defendant by said company, as agent for plaintiff, plaintiff failed to deliver in good order, and defendant is entitled to recover damages for breach of contract to deliver; any sum so recovered may be set up as counterclaim or set-off to the purchase price, C. S., 521. For the error in the instruction to the jury the judgment must be reversed, and the verdict set aside in order that there may be a

New trial.

STATE v. JAS. FRANKLIN ADAMS, ALIAS R. L. JOHNSON.

(Filed 31 March, 1926.)

Intoxicating Liquor—Spirituous Liquor—Evidence—Presence and Conduct of Defendant—Instructions—Appeal and Error.

The mere presence of the defendant on trial for the violation of our prohibition law, with others, at a place where preparations were being made for the illicit distilling of intoxicating liquor, may not alone be sufficient to convict him, but it may be received with other competent evidence, his conduct while being arrested, etc., and under proper instructions, sustain a verdict against him.

APPEAL by defendant from *Calvert, J.*, and a jury, at December Term, 1925, of GATES. No error.

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

Bridger & Eley for defendant.

PER CURIAM. Defendant was indicted on three counts (1) Did distill, manufacture and make and aid, assist and abet in distilling, manufacturing and making intoxicating liquor; (2) Keep and possess materials, substances and property, designed for the manufacture of liquor, for use in unlawful manufacture, sale and handling intoxicating liquors; (3) Did have and keep on hand intoxicating liquor for the purpose of being sold and otherwise disposed of in violation of law. The jury returned a verdict of guilty.

The defendant introduced no evidence and at the close of the State's evidence, under C. S., 4643, moved to dismiss the action or for judgment of nonsuit. The court below overruled the motion, and this we consider the only material assignment of error.

The evidence succinctly: Sheriff W. J. Rountree testified, in part: "I looked back and saw two men. I saw the defendant at the still.

The one that told me his name was Johnson. I continued my circle near the edge of the swamp. Heard the boys, Hinton, Harrell and his sons, hello 'Halt.' I jumped and ran. When I started running beside the swamp I heard some one in the swamp and saw the same man that was at the still. I caught him. I ran into him face to face about 75 or 80 yards from the still where I had seen him. I could see another man at the still. I ran after the defendant and caught him in only a short distance. . . .

Q. Did you find any barrels of mash there? Answer: Yes, sir, we found twenty barrels of mash, twelve was in one bin and eight in the other. They were built up in bins with rubber roofing over them and they had a frame built around each bin and around the edge was a rubber roofing, and over them was rubber roofing and bags and in between them was lanterns.

Q. Is this modern rubber or asbestos roofing? Answer: Yes, sir.

Q. How much would one of these barrels hold? Answer: Fifty gallons.

Q. About a thousand gallons of mash then? Answer: Yes."

T. J. Harrell, testified, in part: "Heard some tinkering at the still. We were right behind some bushes, about sixty yards away. I looked the whole time, peeping over the ridge. Saw Adams. Jumped up and ran for him. Adams ran. I am sure Adams there is the man. Saw another man, saw him run in the swamp. I ran after him. Fell in a well. The well was about 20 yards from the still. This still was between two hundred and two hundred and fifty yards from Mr. Caddy's house. We found some mash at the still."

There were other facts and circumstances in the case.

The court below charged the jury, in part, as follows: "The mere circumstance that the defendant was present is not sufficient of itself to justify the jury in returning a verdict of guilty; it is a question for the jury, as to whether under all the facts and circumstances the State has satisfied or shown you beyond a reasonable doubt that he himself, or in connection with others took part in the manufacture of liquor; or with respect to the other charge whether he himself or in connection with another or others had possession of material and property designed and intended for use in the manufacture of liquor."

We think the court below charged the law correctly.

In *S. v. Dickerson,* 189 N. C., 332, speaking to the subject of flight in cases of this kind, we said the fact that parties fled was only a circumstance to be considered in connection with other evidence as to their guilt.

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." *S. v. Dickerson, supra.*

The evidence was sufficient to be submitted to the jury. *S. v. Killian,* 178 N. C., 753; *S. v. McMillan,* 180 N. C., 741; *S. v. Smith,* 183 N. C., 725; *S. v. Sigmon,* 190 N. C., 684. The probative force of the evidence was for the jury to determine.

We can find no prejudicial or reversible error on the record.

No error.

STATE v. CRUSO BUCK.

(Filed 31 March, 1926.)

1. Evidence—Discretion of Court—Leading Questions.

The allowance of leading questions is within the sound discretion of the trial judge, and not reviewable on appeal.

2. Intoxicating Liquor—Spirituous Liquor—Evidence—Smell.

Evidence that empty cans or containers had the smell of whiskey is competent against the defendant on trial for the violation of our prohibition law, with other relevant evidence.

3. Same—Corroboration—Instructions—Appeal and Error.

The admission of corroborative evidence is not error when properly confined to that purpose by the trial judge.

APPEAL by defendant from *Calvert, J.,* at December Term, 1925, of GATES. No error.

Indictment charging violations of the prohibition statute. Verdict guilty. From judgment, defendant appealed.

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

Bridger & Eley for defendant.

PER CURIAM. Assignments of error, based upon exceptions to the overruling by the court of objections to question, on the ground that same was leading, and of objections to testimony on the ground that same was in violation of the "hearsay" rule, cannot be sustained.

Whether counsel shall be permitted to ask a leading question, is within the discretion of the trial judge. The exercise of such discretion will not be reviewed on appeal. *Crenshaw v. Johnson,* 120 N. C., 270; *Bank v. Carr,* 130 N. C., 481; *S. v. Cobb,* 164 N. C., 419; *Howell v. Solomon,* 167 N. C., 588.

The testimony objected to was offered and admitted for the purpose of corroboration. His Honor was careful to so instruct the jury. *Burnett v. Railroad,* 120 N. C., 517; *Belk v. Belk,* 175 N. C., 69. The testimony of witness that he smelled the liquor in the can, and that it had the odor of whiskey was competent. *S. v. Sigmon,* 190 N. C., 684. There is

No error.

HOSEA BARBEE, EXECUTOR OF GREEN BARBEE, CORA BARBEE, JEFF FOUST, BESSIE FOUST, MARY F. DANIELS, ED. BUMPASS, EDMONIA BUMPASS, CHARLIE JONES, ANNA JONES, JONAH BARBEE, AND DAISY BARBEE v. W. P. CANNADY AND BERLINA BARBEE.

(Filed 7 April, 1926.)

1. Abatement and Revival—Actions—Parties—Executors and Administrators.

Where the plaintiff in an action dies testate pending the litigation, after filing his complaint, his heirs at law and not his executor, are the proper persons to be made parties in the suit to reform a deed, in the absence of the creation of some duty required of him under the terms of the will, and where the rights of creditors to have lands sold for the payment of debts against the estate do not arise. C. S., 446.

2. Courts—Parties—Pleadings—Amendments—Abatement and Revival.

In order to make a complete disposition of a pending action, the trial judge may either permit or order those having a material interest therein to be made parties, and give them time to file their pleadings, when such does not substantially change the cause of action. C. S., 446, 547, 460.

3. Same—Causes of Action.

Where a party has commenced his action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest, either under the original title of the action, or the court in substituting them may continue the case in their name, and they may with the permission of the court, adopt the original complaint, or file new pleadings which do not substantially change the cause of action.

4. Evidence—Depositions—Statutes—Actions—Abatement and Revival.

Where the deposition *de bene esse* of the plaintiff in an action has been taken in accordance with law, C. S., 1821, who has since died, but the cause of action survives, it may properly be read in evidence in behalf of those who survive him in interest, and have properly been made parties to the original action.

5. Pleadings—Amendments—Trials—Orders Signed Nunc Pro Tunc—Abatement and Revival.

It is within the sound discretion of the trial court to permit amendments to pleadings to conform them to the evidence after the trial has

commenced, where the cause has survived the death of the plaintiff in the action as originally brought, and he may sign the order after the conclusion of the trial *nunc pro tunc.*

APPEAL by defendant, W. P. Cannady, from *Grady, J.*, at November Term, 1925, of DURHAM. No error.

CASE ON APPEAL.

"This was a civil action brought by Green Barbee v. W. P. Cannady and Berlina Barbee, on 17 August, 1923, the complaint being filed on the same date. Thereafter, to wit, on 4 October, 1923, an order was entered by W. H. Young, clerk Superior Court of Durham County, permitting the defendant, W. P. Cannady, to file answer upon giving bond in the sum of $200, with proper surety, which bond was given on said date and said Cannady filed answer to said complaint on said 4 October, 1923. The defendant, Berlina Barbee, having filed answer on 10 September, 1923.

"The purpose of the action was to have set aside a deed from said Green Barbee and Berlina Barbee, his wife, to the defendant, W. P. Cannady, executed on 23 April, 1923, and duly recorded in Book 66, at page 453, in the office of the register of deeds of Durham County, which deed conveyed to the said Cannady a certain lot of land in the city of Durham reserving for the said Green Barbee a life estate. The complaint alleges that the execution of said deed was procured by false and fraudulent representations, which allegations are denied in the answer of the defendant, W. P. Cannady, and the answer of the defendant, Berlina Barbee, neither admits nor denies said allegations, but demands strict proof of same.

"But thereafter, to wit, on 10 October, 1923, Green Barbee died and Hosea Barbee, executor of the estate of said Green Barbee, in his representative capacity was directed to appear and make himself party plaintiff in said action by an order of W. H. Young, clerk Superior Court of Durham County, dated 24 November, 1923. That pursuant to said order the said Hosea Barbee, executor of the estate of said Green Barbee, appeared and became party plaintiff in the above entitled action, and adopted the complaint filed therein as will appear from the record in this case. No other pleading or amendments were filed and the case came duly on for trial at the November Term of the Superior Court of Durham County.

"The case was called for trial at said November Term, 1925, Durham Superior Court, the jury was selected and empaneled and the pleadings were read, at which time the court announced that the plaintiff, Hosea

Barbee, executor of the estate of Green Barbee, deceased, had no interests in the subject-matter of this action, whereupon, counsel for plaintiff moved the court to permit them to have the heirs at law of the said Green Barbee made parties plaintiff to this action, to which motion defendants objected. Objection was overruled by the court and motion allowed, to which the defendants excepted.

"In overruling the objection the court stated that the trial would be proceeded with, and he would allow the motion and would sign a formal order making the heirs at law of Green Barbee parties plaintiff.

"That on account of the ill health of the said Green Barbee, his deposition *de bene esse* was taken after due notice to the defendants in the original action of Green Barbee v. W. P. Cannady on 22 August, 1923, before James R. Stone, commissioner.

"To the introduction of said deposition by the present plaintiffs, the defendant, Cannady, in apt time, objected—objection overruled, and defendant, Cannady, excepted.

"This deposition was then offered by the present plaintiff at the trial of said action, and which tended to prove the allegations of the complaint.

DEFENDANT'S TESTIMONY.

"The defendants offered the deposition of E. Stewart Cole, who took the acknowledgment of Green Barbee and wife, to the deed in controversy, which tended to prove the defense set forth in the answer.

"After the charge of his Honor and the jury had answered the issues submitted to them in favor of the plaintiff, his Honor signed the following order, to wit:

"Order making Hosea Barbee, Executor of Green Barbee, and others, Parties Plaintiff.

"Upon motion of counsel for the plaintiff in the above entitled action, it appearing that the plaintiff has died since the commencement of this action, it is hereby ordered that Hosea Barbee and wife, Cora Barbee, Jeff Foust and wife, Bessie Foust, Mary F. Daniel, widow, Ed. Bumpass, husband of Theodosia Bumpass, deceased, and Edmonia Bumpass, only daughter of Theodosia Bumpass, Charles Jones and wife, Anna Jones, Jonah Barbee and wife, Daisy Barbee, and Hosea Barbee, executor, all of the heirs at law and representatives of Green Barbee, be made parties plaintiff to this action; and counsel for said parties, having appeared in open court and agreed to adopt the complaint and other pleadings filed in behalf of the plaintiff in this action, it is thereupon ordered that Hosea Barbee and wife, Cora Barbee, Jeff Foust and wife, Bessie Foust, Mary F. Daniel, widow, Ed. Bumpass, husband of Theodosia Bumpass, deceased, and Edmonia Bumpass, only daughter of Theodosia Bumpass,

Charles Jones and wife, Anna Jones, Jonah Barbee and wife, Daisy Barbee, and Hosea Barbee, executor, be, and they are hereby, made parties plaintiff in this action in the place and stead of Green Barbee, deceased.

"HENRY A. GRADY, *Judge Presiding.*

"To the signing of the foregoing order the defendants objected. The objection was overruled by the court, and the defendant, Cannady, excepted."

The main assignments of error are as follows:

"1. The action of his Honor in permitting the present plaintiffs to be substituted as parties after the trial had commenced and the jury had been selected.

"2. The action of his Honor in permitting introduction of deposition of Green Barbee.

"3. The action of his Honor in signing the formal order making plaintiffs parties after the completion of the trial."

Victor S. Bryant for plaintiff.
R. O. Everett and Brawley & Gantt for W. P. Cannady.

CLARKSON, J. The defendant's first assignment of error is as follows: "The action of his Honor in permitting the present plaintiffs to be substituted as parties, after the trial had commenced and the jury had been selected."

The action was instituted originally by Green Barbee to set aside a deed. Barbee died and his executor was then made a party plaintiff.

As far as can be ascertained from the record, the will of Green Barbee had no bearing on the land in controversy. In *Harris v. Bryant,* 83 N. C., p. 571, it is held the executor and not the heirs, represents the estate where land is directed by will to be sold and converted into money, and the latter are not necessary parties to a suit concerning the disposition of and charges on such estate.

In *Speed v. Perry,* 167 N. C., p. 129, it is held: "The real estate did not vest in them, unless there is a provision in the will to that effect, which is not yet shown. This Court held in *Floyd v. Herring,* 64 N. C., 409, following *Ferebee v. Proctor,* 19 N. C., 439, that 'a personal representative has no control of the freehold estate of the deceased, unless it is vested in him by a will, or where there is a deficiency of personal assets and he obtains a license to sell real estate for the payment of debts. The control derived from a will may be either a naked power of sale or a power coupled with an interest. The heir of the testator is not divested of the estate which the law casts upon him, by any power or trust, until it is

executed.' See, also, *Womble v. George,* 64 N. C., 759; *Fike v. Green, ibid.,* 665; *Beam v. Jennings,* 89 N. C., 451; *Holton v. Jones,* 133 N. C., at p. 401; *Munds v. Cassidey,* 98 N. C., 558; *Perkins v. Presnell,* 100 N. C., 220; *Gay v. Grant,* 101 N. C., 219."

When Green Barbee died, under the facts in the present case, the real estate did not vest in the executor, but in the heirs at law of Green Barbee and they were the "real party in interest."

C. S., 446, in part, is as follows: "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided"; etc.

C. S., 547, is as follows: "The judge or court may, *before and after judgment,* in furtherance of justice, and on such terms as may be proper, *amend any pleading, process or proceeding, by adding or striking out the name of any party;* by inserting other allegations material to the case; or *when the amendment does not change substantially the claim or defense,* by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto."

C. S., 460, in part, is as follows: "The Court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the rights of others, *but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in.* When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject-matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment," etc.

The language of the statute, C. S., 547, is that an amendment cannot "change substantially the claim or defense." An amendment cannot change the nature of the action or defense without consent, nor essentially change the original cause of action. In the case at bar, the amendment did not change substantially the claim or change the nature of the action, or essentially change the original cause of action. On the death of Green Barbee the action did not abate; he had filed the complaint and died during the pendency of the action, and when his heirs at law were made parties they adopted the complaint already filed.

C. S., 461, is as follows: "1. *No action abates by the death,* marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survives, or continues. In case of death, except in suits for penalties and for damages merely vindictive, or in case of marriage or other disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint,

may allow the action to be continued, *by, or against, his representative or successor in interest.* In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action," etc.

After death of party or transfer of interest in an action for land, there is no abatement. *Burnett v. Lyman,* 141 N. C., 500; *Ins. Co. v. R. R.,* 179 N. C., 255; *Redmon v. Ins. Co.,* 184 N. C., 481.

In *Joyner v. Fiber Co.,* 178 N. C., 635, it was held: "The court had the right, and in fact it was its duty, to require all the parties to be brought in whose rights would be affected by the proceeding. Rev., 414 (C. S., 460). The trial judge found as a fact that said company was a proper and necessary party after the alleged compromise, and his action was not reviewable. *Aiken v. Mfg. Co.,* 141 N. C., 339. The judgment 'may determine the ultimate rights of the parties on each side between themselves.' Rev., 563 (C. S., 602). An order making additional parties is not appealable. *Bennett v. Shelton,* 117 N. C., 103; *Emry v. Parker,* 111 N. C., 261; *Lane v. Richardson,* 101 N. C., 181; and would have been premature, *Etchison v. McGuire,* 147 N. C., 389; *Bernard v. Shemwell,* 139 N. C., 447; *Tillery v. Candler,* 118 N. C., 889." *Bynum v. Bynum,* 179 N. C., 14.

20 R. C. L., p. 698, says: "The general rule that an amendment may be made at any time in the discretion of the court, if the claim or defense is not thereby changed, applies generally to the substitution of parties. . . . No amendment of any pleading nor the filing of any additional pleading is required when the pleadings already filed state the cause of action or defense for or against the party substituted. And, as a general rule, the substituted party takes up the prosecution or defense at the point where the original party left it, assuming the burdens as well as receiving the benefits."

We think the case cited by defendant, *Merrill v. Merrill,* 92 N. C., 665, not inconsistent with the view here taken: "The court has no authority to convert a pending action that cannot be maintained, into a new one, by admitting a new party plaintiff solely interested, and allowing him to assign a new and different cause of action, if the defendant shall object. The statute allowing necessary additional parties to be made in an action does not contemplate such an exercise of power. There is neither principle, nor statute, nor practice that allows such a course of procedure; it would certainly lead to endless complications, confusion and injustice. An action, separate and distinct from a pending one, must be begun according to the ordinary course of procedure." *Cooper v. R. R.,* 165 N. C., p. 578.

The second assignment of error: "The action of his Honor in permitting introduction of deposition of Green Barbee." On the death of Green Barbee, the action did not abate. There was no new action by making his heirs at law parties. The record shows "that on account of the ill health of the said Green Barbee, his deposition *de bene esse* was taken after due notice to the defendants in the original action of Green Barbee v. W. P. Cannady on 22 August, 1923, before James R. Stone, commissioner." The deposition was regularly taken in accordance with C. S., 1821, which is as follows: "Every deposition taken and returned in the manner provided by law may be read on the trial of the action or proceeding, or before any referee, in the following cases, and not otherwise: . . . (4) If the witness is so old, sick or infirm as to be unable to attend court." *Cooper v. R. R.*, 170 N. C., p. 493. This assignment of error cannot be sustained.

Under our civil procedure, and the decisions of this Court, the object to be obtained is to try cases on their merits and see that substantial justice is done. The limit to amendments is that they do not change substantially the claim or defense or assign a new and different cause of action.

It was earnestly argued by the able counsel for defendant that injustice has been done defendant in allowing the amendment making the heirs of Green Barbee parties to the action after the trial had commenced and the jury selected and empaneled. The action did not abate, and allowing the amendment was a matter in the sound discretion of the court below. The court was the impartial arbiter in the controversy with no bias in favor of either side, but to see that exact justice was done. The fact that the court signed the order after the trial *nunc pro tunc,* having previously allowed the amendment, was in the sound discretion of the court.

From the record, there was no error in law.

No error.

MURCHISON NATIONAL BANK v. T. C. EVANS ET AL.

(Filed 7 April, 1926.)

1. Actions—Pleas in Bar.

A good plea in bar of an action is one that goes to its entire merits, and one that is finally determinative of the cause alleged, if sustained. Instances of good pleas in bar stated by *Brogden, J.*

2. Same—Reference—Statutes—Appeal and Error.

Objection that the order of reference of the trial court was erroneously entered to a plea in bar will not be sustained on appeal, when it appears

that the compulsory reference complained of involved the stating of a long and complicated account between the parties litigant authorized by statute and necessary to a final disposition of the case. C. S., 573.

3. Same—Banks and Banking—Bills and Notes—Negotiable Instruments—Collaterals—Payment.

Where defendants are endorsers of notes, with collateral given to a bank by the maker, who also has a number of other notes given to the bank with a mass of other collaterals subject by agreement to the payment of the note in question, a plea that the bank should have or had collected sufficiently from these collaterals to have paid off the note sued on, and that the trial should have proceeded without the peremptory order of reference, is not a good plea in bar.

4. Reference—Statutes—Liberal Interpretation.

Our statute allowing a compulsory reference by order of the trial judge should be liberally construed, to expedite the trial of causes and to promote substantial justice between the parties litigant. C. S., 573.

CIVIL ACTION, before *Daniels, J.*, December Term, 1925, of NEW HANOVER.

On 16 September, 1924, the Bank of Maxton executed and delivered to the plaintiff two promissory notes aggregating $15,000, payable on demand. Prior to the delivery of said notes they were duly endorsed by the defendants. At the time of the delivery of said notes the Bank of Maxton was indebted to the plaintiff upon certain other notes in a sum in excess of $150,000, said indebtedness being secured by certain bills and notes receivable which had been executed and delivered to the Bank of Maxton and hypothecated by said bank with the plaintiff as collateral security for the payment of money borrowed by said bank from the plaintiff. At the time of delivery to the plaintiff of the notes endorsed by the defendants there was an understanding between the parties that if said Bank of Maxton had any equity in the bills, notes and other collateral, which had been pledged by it to the plaintiff for the payment of the $150,000 indebtedness, then such equity should be considered as security for the payment of the notes endorsed by defendants.

On 3 October, 1924, the Bank of Maxton executed and delivered to the plaintiff its promissory note for $10,000, which said note was duly endorsed by the defendants before delivery to the plaintiff. As security for the payment of said note the Bank of Maxton hypothecated with the plaintiff fifty-two notes of various parties, ranging from $75.00 to $700. The plaintiff alleged that there was a credit of $1,892.52 derived from collections made by it on the collateral specified and that all the collateral had been exhausted, and, as the notes were long past due, plaintiff demanded judgment against the defendants, and further, that the securities held by plaintiff for the payment of the said note should be sold by a commissioner for the purpose of applying the proceeds to the liquidation of said note.

The defendants admitted the endorsement of said notes, alleging that their said endorsement was for the accommodation of the Bank of Maxton, and that their liability, if any, thereon, was contingent, and further, that such collections as may have been made on the evidences of debt were not correctly stated in plaintiff's complaint, and that, as they are advised, informed and believe, much more money has been collected and much more money should be credited to the Bank of Maxton, which would relieve the liability of defendants accordingly, than is set out in the complaint; and these defendants ask that plaintiff be required to make a full statement showing all collections made, not only on the evidence of debt set out in the complaint but from all securities held by it at the time when a receiver was appointed for the Bank of Maxton, and through and by whom such collections were made, together with the cost and expense thereof. The defendant further alleged that the security in addition to that listed in the complaint was greatly in excess of the note set out in the complaint and that the plaintiff has other property of value upon which considerable sums can be realized. The defendant further alleged "that as defendants are advised and believe, the said account should be revised and corrected, and the plaintiff should be required by the court to submit a full statement in detail of all such charges, not only for the benefit of these creditors, but also for the benefit of other creditors of the Bank of Maxton."

The defendants in their answer, while admitting the endorsement of the notes, allege in substance, that their liability is contingent for the reason that sufficient security was pledged by the Bank of Maxton with the plaintiff to pay said notes under the agreement and therefore relieve the defendants of liability on said endorsement. And there are further allegations in the answer of waste and mismanagement on the part of plaintiff in handling said securities, the various aspects of the contention being contained in the forty-two allegations of the answer.

After the pleadings were read, Daniels, J., being of the opinion that the cause involved the taking of a long and complicated account, referred the case to D. H. Bland with direction to take the testimony and find the facts upon all issues of fact raised by the pleadings and to report his findings with his conclusions of law arising thereon to the next term of court.

From the order of reference the defendants excepted and appealed.

Rountree & Carr, Varser, Lawrence, Proctor & McIntyre for plaintiff.
Henry A. McKinnon and J. G. McCormick for defendants.

BROGDEN, J. The defendants base their appeal upon the sole proposition that the answer filed by them constitutes a plea in bar, and therefore the trial judge had no authority to order a compulsory reference under

C. S., 573, subsec. 1, until the merits of the plea in bar had first been determined. The rule of law invoked by the defendants, is declared as follows in *Duckworth v. Duckworth,* 144 N. C., 620: "It has been established with us that no order of reference to take and state an account should be made when there is a plea in bar of account which goes to the entire demand until said plea has been first considered and determined."

What then is a plea in bar? The word "bar" has a peculiar and appropriate meaning in law. In a legal sense it is a plea or peremptory exception of a defendant, sufficient to destroy the plaintiff's action, a special plea constituting a sufficient answer to an action at law, and so called because it barred—i. e., prevented—the plaintiff from further prosecuting it with effect, and, if established by proof, defeated and destroyed the action altogether. *Wilson v. Knox County,* 34 S. W., 45.

Black's Law Dictionary defines a plea in bar as follows: "A plea which goes to bar the plaintiff's action; that is to defeat it absolutely and entirely." It has been further defined as "any plea that denies the plaintiff's right to bring and maintain his action." *Jones v. Beaman,* 117 N. C., 261.

In North Carolina the following pleas have been held to be pleas in bar: (1) Statute of Limitations. *Oldham v. Rieger,* 145 N. C., 254. (2) Account stated. *Kerr v. Hicks,* 129 N. C., 141; 131 N. C., 90; *Jones v. Wooten,* 137 N. C., 421. (3) Failure to comply with the provisions of a contract which are conditions precedent to liability. *Bank v. Fidelity Co.,* 126 N. C., 320. (4) Plea of sole seizin by reason of adverse possession of twenty years against a tenant in common. But plea of sole seizin which by its very terms involves an accounting, is not a good plea. *Duckworth v. Duckworth,* 144 N. C., 620. (5) Release. *McAuley v. Sloan,* 173 N. C., 80. (6) Accord and satisfaction. *McAuley v. Sloan,* 173 N. C., 80. (7) Estoppel by judgment. *Jones v. Beaman,* 117 N. C., 259.

The latest utterance by the court on this question is contained in the comprehensive and pointed opinion of *Connor, J.,* in *Lumber Co. v. Pemberton,* 188 N. C., 532, and the sound reasoning of that opinion is conclusive of the merits of this controversy.

The record discloses that the answer of the defendant does not constitute a plea in bar or such a plea as would deny the plaintiff's right to bring and maintain his action; but, upon the other hand, when liberally construed, the liability of defendants was contingent upon a proper collection and application of a mass of collateral securities. This, in itself, and by its essential nature, "requires the examination of a long account on either side" and thus comes within the principle prescribed by C. S., 573, subsec. 1. Therefore, the judgment as rendered is correct and must abide.

It is generally agreed that the civil issue dockets of the State are greatly congested by reason of the overwhelming increase in business incident to the progress and expansion of commercial and industrial activities, and for this reason it is, perhaps, not amiss to be reminded of the practical wisdom contained in an utterance by *Faircloth, C. J.,* in *Jones v. Beaman,* 117 N. C., 259: "Our statutes relating to trials by referees serve a useful purpose, and must be liberally construed. They aid and simplify the work which would otherwise fall upon the court and jury, and often expedite the litigation and save the parties from trouble and expensive trials, and are a saving in time to witnesses and attorneys."

Affirmed.

K. C. GARNER ET ALS. v. MRS. HATTIE B. HORNER ET ALS.

(Filed 7 April, 1926.)

1. Deeds and Conveyances—Husband and Wife—Statutes—Probate—Title—Adverse Possession.

A conveyance of her land by the wife to her husband directly or in trust for him, is void when not probated in accordance with the express provision of C. S., 2515, though in proper instances it may ripen title in him as color by sufficient adverse possession.

2. Same—Trusts—Evidence—Pleadings—Instructions—Appeal and Error.

Where from the complaint in evidence it appears that a deed from the wife to her husband not probated in accordance with C. S., 2515, was given to divest the legal title to lands held in trust by her for her husband, it is reversible error for the trial judge to instruct the jury that the wife's deed being void, they should answer the issue as to the title for the plaintiffs, claiming as her heirs at law against the heirs at law of her husband, the defendants in the action.

CIVIL ACTION before *Dunn, J.,* at October Term, 1925, of CUMBERLAND.

Annie Jane Garner, a widow with some children, who are plaintiffs in this action, married J. T. Horner. Thereafter on 28 February, 1907, for a recited consideration of $400, Andrew J. Barrett conveyed to Annie Jane Horner (formerly Garner) the land in controversy. The deed was duly acknowledged and probated by the clerk of the court of Cumberland County and recorded in Book of Deeds L., No. 6, at page 117. On 30 November, 1912, Annie Jane Horner and J. T. Horner executed and delivered to G. W. Horner a deed for said land which was not registered until 19 March, 1915, in said county in Book of Deeds W., No. 8, at page 516. On 17 June, 1919, there was placed upon the records of said county in Book of Deeds No. 252, at page 253, a deed from G. W. Horner and wife to J. T. Horner for the land, said deed

being dated 26 February, 1913. Annie Jane Horner died intestate on 26 April, 1913. Therefore, the deed from Annie Jane Horner and J. T. Horner to G. W. Horner, and the deed from G. W. Horner and wife, to J. T. Horner, while purporting to have been executed during the lifetime of Annie Jane Horner, were not registered until after her death. After the death of Annie Jane Horner, J. T. Horner married Hattie B. Horner in 1914, and died intestate on 23 June, 1923, leaving him surviving his widow, Hattie B. Horner, and four minor children, to wit, Mable Horner, Winnifred Horner, Pauline Horner and Tom Horner, and two children by his first wife, (he, the said J. T. Horner, having been married three times). Thereupon the children of Annie Jane Horner (formerly Garner) brought this suit against the children of J. T. Horner by his first wife and the children of his third wife, Hattie B. Horner, and Hattie B. Horner, his surviving widow. The deed from Annie Jane Horner (formerly Garner) and J. T. Horner to G. W. Horner, above referred to, was not acknowledged in accordance with C. S., 2515, because the justice of the peace before whom the deed was acknowledged and who took the private examination of Annie Jane Horner, failed to state and set out in his certificate his finding of fact that the contract was not unreasonable or injurious.

The plaintiffs contend, therefore, that the deed from Annie Jane Horner and J. T. Horner to G. W. Horner is void, and therefore the title to said property remained in their mother, Annie Jane Horner, and as her heirs at law they are entitled to the same.

The defendants, upon the other hand, contend that Annie Jane Horner was never the true owner of said land but only held the same in trust for her husband, J. T. Horner.

The issues were as follows: (1) Are the plaintiffs the owners and entitled to the possession of the land described in the complaint? (2) What is the fair rental value of the land mentioned in the complaint?

The judge charged the jury as follows: "If you find the facts to be true as testified to by the several witnesses and as appears in the record, you will answer that first issue, yes."

From the judgment on the verdict the defendants appealed.

Averett & Blackwell, H. F. Seawell for plaintiffs.
Downing & Downing, Nimocks & Nimocks for defendants.

BROGDEN, J. Failure to comply with C. S., 2515, renders a deed void, although it is good as color of title. *Best v. Utley,* 189 N. C., 361; *Whitten v. Peace,* 188 N. C., 298.

This statute also applies to conveyances by the wife of her land, in trust to another, for her husband. *Best v. Utley,* 189 N. C., 361; *Davis v. Bass,* 188 N. C., 200.

For the purpose of showing that the deed from Annie Jane Horner and her husband, J. T. Horner, to G. W. Horner was intended as a conveyance in trust for her husband, and thus within the contemplation of the statute, plaintiffs offered in evidence paragraph 10 of the amended answer of defendants, as follows, to wit: "It is admitted that G. W. Horner was not a bona fide purchaser of said land from Annie J. Horner, and never paid anything therefor—that at the time of the execution of the conveyance by Annie J. Horner and husband, J. T. Horner, to G. W. Horner, the said Annie J. Horner was in declining health, and said conveyance was executed and delivered to said G. W. Horner at the request of the said Annie J. Horner in anticipation of her approaching death, which occurred soon thereafter, having been executed by her for the purpose of ultimately vesting title to said land in fee in her husband, J. T. Horner."

So that, nothing else appearing, the deed from Annie J. Horner and her husband to G. W. Horner being void by reason of failure to comply with the law, the plaintiffs as heirs at law of Annie J. Horner, would be entitled to the property by virtue of the fact that said deed did not divest the title.

But the plaintiffs go further and offer in evidence part of paragraph 11 of defendants' amended answer, as follows, to wit: "The successive conveyances *from A. J. Barrett to Annie J. Horner,* and from Annie J. Horner and husband to G. W. Horner, and from G. W. Horner and wife to J. T. Horner, as hereinbefore mentioned, were all executed and delivered for the purpose of ultimately vesting the title to said land in J. T. Horner in fee simple."

This evidence so offered by the plaintiff is a denial that Annie J. Horner held the title to the land under the deed from A. J. Barrett in her own right but merely as trustee for her husband, and that she received the title from Barrett as a trustee only, and "for the purpose of ultimately vesting the title to said land in J. T. Horner in fee simple."

Therefore, upon plaintiffs' own evidence, it was error for the trial judge to charge the jury: "If you find the facts to be true as testified to by the several witnesses and *as appear in the record,* you will answer that first issue, yes."

There are many other exceptions in the record, but we express no opinion as to them, for the reason that a new trial must be awarded for the error specified.

New trial.

ORANGE TRUST COMPANY v. J. L. G. HAYES ET AL.

(Filed 7 April, 1926.)

1. Judgments—Claim and Delivery—Replevin Bond—Statutes.

Where the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with the provisions of the statute. C. S., 610.

2. Claim and Delivery—Replevin Bond—Judgments.

Where the plaintiff is successful in his action wherein claim and delivery has been issued, the surety on defendant's replevin bond given in accordance with C. S., 610, is liable for the full amount thereof, to be discharged upon the return of the property and the payment of damages and costs recovered by the plaintiff; or second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment to the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action.

3. Same—Appeal and Error—Reversible Error.

A judgment against the defendant and the surety on his replevin bond in claim and delivery for the value of the property wrongfully detained, but if it should be surrendered within ten days from the date of the judgment, the amount of the judgment be reduced by the value of the property at the time of its delivery, the jury to determine such value if the parties cannot agree, is contrary to the requirements of the statute, and is reversible error, to the prejudice of the surety.

APPEAL by N. W. Brown, surety on replevy bond, from *Grady, J.*, at October Term, 1925, of ORANGE.

Gattis & Gattis for appellant.
A. H. Graham for appellee.

STACY, C. J. The case involves the form of judgment to be entered in a claim and delivery proceeding, especially as it undertakes to fix the liability of the surety on the defendant's forthcoming bond.

The plaintiff brought this action, invoking the aid of ancillary proceedings in claim and delivery, to recover the possession of certain articles of personal property, consisting of several pieces of parlor furniture and a $50 liberty bond. The property was seized by the sheriff, but before its delivery to the plaintiff, the defendant replevied and retained possession thereof by giving bond in the sum of $550, conditioned as required by law, with N. W. Brown as surety.

On the trial, it was found by the jury that the plaintiff was the owner and entitled to the possession of the property, and its value was fixed, by agreement, at $150 for the furniture and $50 for the liberty bond. Whereupon, judgment was entered declaring the plaintiff to be the owner and entitled to the possession of the property as found by the jury, with the following provision inserted in the judgment, which was without consent and forms the basis of appellant's exception:

"It is further ordered, adjudged and decreed that the plaintiff is entitled to judgment against the defendant J. L. G. Hayes, and the defendant, Julia Hayes, and N. W. Brown, the surety, and the replevin bond in the amount of $200, same being the value of the furniture and the liberty bond described in the complaint, but if said furniture and liberty bond shall be surrendered by said defendants and their bondsman to the plaintiff in this action within ten days from the date of this judgment then said judgment is to be reduced by the value of said liberty bond and furniture at the time same is delivered to said plaintiff. If the parties to this action cannot agree upon the value of said liberty bond and furniture at the time same should be surrendered, then said question shall be presented to a jury for determination."

This provision, it will be observed, runs counter to the form of judgment usually entered in such cases, and has occasioned the present appeal. The furniture and liberty bond not having been surrendered to the plaintiff within the ten days as provided by the judgment, execution was issued against the surety for the sum of $223.65, the value of the property, plus the costs of the action.

Appellant says that as the judgment against him was a summary one, it should have been entered strictly in accordance with the statute and the terms of his bond, and that the execution, in the first instance, should have been for the seizure of the property and its return to the plaintiff; whereas, under the judgment as rendered, he is without remedy against his principal who refuses to surrender the property to the plaintiff.

It is undoubtedly the law that in claim and delivery proceedings, when the plaintiff recovers, he is entitled to summary judgment against the sureties on the defendant's forthcoming bond, but it must be such as the law sanctions (*Hall v. Tillman,* 103 N. C., 276), and the form of the judgment should be "for the possession of the property, or for the recovery of the possession, or for the value thereof in case a delivery cannot be had, and damages for the detention" (C. S., 610) plus costs, with the further provision that the plaintiff recover of the sureties on the defendant's replevy bond the full amount of such bond, to be discharged, first, upon the return of the property and the payment of the damages and costs recovered by the plaintiff, or, second, if a return of the property

cannot be had, upon the payment to the plaintiff of such sum as may be recovered against the defendant for the value of the property at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action, the total recovery against the sureties in no event to exceed the penalty of the bond. *Hendley v. McIntyre,* 132 N. C., 276.

Agreeable with the requirements of C. S., 836, the tenor of the defendant's forthcoming bond in the instant proceeding, and on which appellant became surety, is to the effect that, if the plaintiff be adjudged the owner and entitled to the recovery of the possession of the property described in the plaintiff's affidavit, the defendant and his surety bind themselves for the delivery thereof to the plaintiff, with damages for its deterioration and detention, if delivery can be had, together with the costs of the action, and if such delivery cannot for any cause be had, the defendant and his surety bind themselves for the payment to the plaintiff of such sum as may be recovered against the defendant for the value of the property at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action. *Hall v. Tillman,* 110 N. C., 220. The judgment, therefore, should have followed the statute and the terms of the bond. *Council v. Averett,* 90 N. C., 168.

The condition of the bond is not that the surety binds himself, in all events, to pay to the plaintiff whatever sum may be fixed as the value of the property, at the time of its wrongful taking and detention, with interest thereon as damages for such taking and detention, together with the costs of the action, but this he agrees to do if for any reason the property cannot be returned. *Motor Co. v. Sands,* 186 N. C., 732; *Randolph v. McGowans,* 174 N. C., 203. And where, as in the case at bar, the property can be taken in execution and the surety held in damages for its deterioration and detention, together with the costs of the action, we think it is but just to the surety to require the judgment to be entered in form as prescribed by the statute so that he can insist upon his rights and have the property returned to the plaintiff, thus reducing his liability, according to the terms of his bond, to damages for the deterioration and detention of the property, together with the costs of the action. If this be not done, the surety would be greatly inconvenienced if not without remedy against his defaulting principal in the present proceeding.

The judgment will be vacated and the cause remanded, to the end that a judgment as above indicated may be entered on the verdict.

Error and remanded.

STATE v. R. M. ANDREWS.

(Filed 7 April, 1926.)

1. Automobiles—Auto-vehicles—Taxation — License — Public Service — Regulations—Statutes—Criminal Law.

It was the intent of the statute, chaper 50, Public Laws of 1925, to regulate the public service of automobiles on the highways of the State between cities and towns through classifications of the Corporation Commission requiring a license therefor, and making a violation thereof indictable as a criminal offense.

2. Same—Public Service.

Under the three classifications by the Corporation Commission as to licensing automobiles, under Public Laws of 1925, ch. 50, for the business of transporting passengers, etc., upon the public highways of the State for compensation, to wit: (a) Designated routes between fixed termini; (b) those so engaged without fixed schedules; (c) and those so engaged but not soliciting or receiving patronage along the route or at terminal stations of classes (a) and (b): *Held*, the "service" rendered in contemplation of the statute construed with the classifications made by the Corporation Commission, does not include within the intent and meaning thereof an occasional service rendered at the request of the passenger, and not constituting a regular business or practice of a public service between or at the termini of designated or fixed routes, and an indictment under class "c" will not be upheld.

3. Same—"Operating"—"Service"—Words and Phrases.

The statute requiring a license tax under rules fixed by the Corporation Commission for "operating a service" by automobile, etc., over the public highways of the State between cities and towns, contemplates a continuous business.

APPEAL by the State from *Nunn, J.*, at February Term, 1926, of ALAMANCE. No error.

The defendant was charged in an indictment, which is admitted to be regular in form, with a breach of the provisions of chapter 50, Public Laws 1925, in that he carried passengers for hire by automobile without obtaining a license certificate from the Corporation Commission. The jury returned the following special verdict:

"The defendant is duly licensed and engaged in the business of operating a taxicab in the city of Burlington, North Carolina, and holds State, county and municipal licenses to run for hire. On the day specified in the indictment, the defendant was requested by one Jeffreys to transport the said Jeffreys and several other persons for hire from Burlington, over the improved public highway known as Route 10, to Greensboro; that for the sum of six dollars paid to him, the defendant did transport said persons as requested. The said Jeffreys and others

had been waiting for several hours at the regular bus station for the regular bus operating between Burlington and Greensboro, which was then late and had failed to call for passengers for Greensboro. From time to time the defendant has, upon special request, transported passengers for compensation from Burlington to Greensboro and other points on Route 10. His regular business is confined to Burlington and nearby territory. The defendant does not pretend to maintain a regular schedule or infrequent schedule between said towns but does from time to time and upon special request and for compensation transport travelers from Burlington to Greensboro and other towns upon said highway. The defendant has not applied for or obtained license certificate from the Corporation Commission as provided in chapter 50 of the Public Laws of 1925. Upon the foregoing facts, if the court should be of opinion that the defendant is guilty, then we, the jury, find the defendant guilty, otherwise we find the defendant not guilty. The court upon the foregoing verdict found by the jury, being of the opinion that the defendant, is not guilty, entered a verdict of 'not guilty.' Judgment discharging defendant. From the verdict and judgment the State excepts and gives notice of appeal."

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

I. M. Bailey for the Corporation Commission.

John J. Henderson for defendant.

ADAMS, J. In 1925 the General Assembly enacted a series of statutes designed to regulate, supervise, and control motor vehicles used in the business of carrying persons or property on the improved highways of the State. Public Laws, 1925, ch. 50. It is provided in these statutes that every person or corporation before engaging in such business shall obtain from the Corporation Commission a license certificate (sec. 3), and that the term "motor vehicles" or "motor-propelled vehicles" shall mean "motor vehicles operating a service between different cities or towns." Section 1(d). The defendant's regular business, for the prosecution of which State, county and municipal licenses have been issued, is confined to Burlington and the adjacent region; but without having obtained or applied to the Commission for a license certificate the defendant for compensation carried passengers in his automobile from Burlington to Greensboro under the circumstances set out in the special verdict. It will be seen, then, that the pivot of the controversy is the question whether the defendant was engaged in "operating a service between different cities or towns" in the contemplation of the statute.

In the exercise of power claimed to have been conferred upon it by the act of 1925 (section 4) the Corporation Commission arranged in the following order all motor vehicle carriers transporting persons or property:

"Class 'A' shall include only motor vehicle passenger carriers operating over specifically designated routes, between fixed termini, upon fixed time schedules.

"Class 'B' shall include only motor-vehicle passenger carriers operating over specifically designated routes, but not upon fixed time schedules.

"Class 'C' shall include only motor-vehicle passenger carriers holding themselves out for private employment only to or from the city or town from which carrier operates and other cities and towns and not soliciting or receiving patronage along the route or at terminal stations of classes 'A' and 'B' carriers."

It is argued for the State that the defendant when indicted was one of the passenger carriers embraced in class "C" and that his business could have been authorized only by the license certificate provided for in the third section. The force of this argument may be determined by ascertaining whether within the meaning of section 1(d) the defendant was actually engaged in "operating a service," or whether, assuming that the Commission was clothed with power to make the classification, he held himself out as engaged in the operation of such service.

It is apparent, we think, that the word "service" as used in the statute signifies more than the mere act of serving, for the idea of infrequent or occasional service rendered upon special request seems to be excluded. The statute contemplates the means of supplying a general demand and in this sense imports service which may be regarded as at least a *quasi*-public business. The very purpose of the recent act is to control the operation on the improved highways of motor vehicles used in the business of transporting persons and property for compensation, and the principle upon which this kind of legislation rests is the fundamental right of protecting the interests and conserving the safety of the public. The phrase is, "operating a service." The word "operating" as used here implies such continuous activity as the nature of the business requires, not simply acts done at long or uncertain intervals; such acts are not enough to establish the business which the Legislature intended to supervise. This, in our opinion, is the reasonable interpretation of the statutes construed in the light of the evil to be prevented and the result to be attained.

In applying these principles we must approve his Honor's conclusion that upon the facts set forth in the special verdict the defendant is not guilty.

No error.

A. F. MINCEY v. GOODE CONSTRUCTION COMPANY.

(Filed 7 April, 1926.)

Appeal and Error—Evidence—Issues—Objections and Exceptions—Motion to Set Aside Verdict.

In an action to recover damages for a personal injury alleged to have been negligently inflicted, involving the issues of negligence and contributory negligence, the answer in the affirmative on the second issue will not be set aside on plaintiff's motion made upon the ground of the lack of sufficient evidence and after verdict without objection made in apt time to the submission of the issue.

APPEAL by plaintiff from *Devin, J.*, at January Term, 1926, of DURHAM. No error.

This is an action to recover damages for personal injury alleged to have been caused by the defendant's negligence in failing to provide for the plaintiff a safe place in which to work. The specific allegations are that the plaintiff was working for the defendant and that its superintendent directed him to go upon a scaffold which the defendant had negligently constructed; that the scaffold broke; and that the plaintiff fell to the ground and was injured. The defendant filed an answer denying the material allegations, and at the trial the following verdict was returned:

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

2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? Answer: Yes.

3. What damage, if any, is the plaintiff entitled to recover? Answer:

Judgment was given for the defendant and the plaintiff appealed.

R. O. Everett for the plaintiff.

Burgess & Joyner, Fuller, Reade & Fuller and Oscar Leach for defendant.

ADAMS, J. The appellant did not except to the admission or rejection of evidence or to the instructions given the jury, but before the judgment was signed he made a motion to set aside the answer to the second issue on the two grounds that it was against the weight of the evidence and that there was no evidence to support it.

The first objection, which was addressed to the sound discretion of the trial court, was not presented on the argument here; but the appellant insisted on the proposition that if there was no evidence to support the second issue the answer thereto should have been set aside as

a matter of law. To this proposition we cannot assent. It is not to be assumed that in the absence of any evidence of contributory negligence the appellant without timely objection permitted the second issue to be submitted to the jury and answered; and for this reason in part it has been held with marked uniformity that an objection that there was no evidence or no sufficient evidence to support a verdict cannot be taken for the first time after the verdict has been returned. *Roberts v. Massey,* 185 N. C., 164; *Mica Co. v. Mining Co.,* 184 N. C., 490; *Wilkerson v. Pass,* 176 N. C., 698; *Moon v. Milling Co., ibid.,* 407; *S. v. Leak,* 156 N. C., 643; *Hart v. Cannon,* 133 N. C., 10; *S. v. Huggins,* 126 N. C., 1055; *S. v. Harris,* 120 N. C., 577; *Holden v. Strickland,* 116 N. C., 185; *S. v. Kizer,* 115 N. C., 746. Under the principle adhered to in these cases and in many others which are not cited it is unnecessary to discuss the testimony on which the defendant relied in support of the second issue.

No error.

FREEMAN BOSWELL, ALIAS FREEMAN PAGE, BY A. R. BOSWELL, NEXT OF FRIEND, v. WHITEHEAD HOSIERY MILLS.

(Filed 7 April, 1926.)

1. Evidence—Nonsuit.

Upon a motion as of nonsuit, the evidence is to be taken in the light most favorable to the plaintiff, giving him the benefit of every reasonable intendment and inference to be drawn therefrom.

2. Master and Servant—Employer and Employee—Safe Place to Work—Negligence.

While the master is not an insurer of the safety of an employee engaged in the course of his employment to work in a place where power driven machinery is located, he is required to exercise for the safety of such employee the care of an ordinarily prudent man to provide him a reasonably safe place to perform the duties required of him, and the failure of the employer in this respect constitutes actionable negligence.

3. Same—Proximate Cause—Damages.

The actionable negligence in the failure of the master to exercise ordinary care in furnishing his employee a safe place to perform his duties within the scope of his employment, makes the master liable in damages arising as the proximate cause of such failure.

4. Same—Evidence—Nonsuit.

Evidence that the master had removed for a week or more two power driven knitting machines from each side of power-driven shafting, and thus had left the shafting exposed about one foot from the floor, and that threads had been permitted to accumulate thereon which caught in

the overalls of an inexperienced lad of sixteen years of age, who was not instructed as to the danger, causing the injury in suit, is sufficient to take the case to the jury upon the issue of the defendant's actionable negligence, and to deny his motion as of nonsuit.

5. Same—Contributory Negligence.

Where there is evidence that the master has negligently permitted power-driven shafting operating its knitting machines to be exposed in a room where employees were at work, and that an inexperienced employee in the room was injured thereby while going to get a drink of water by a route usual among employees in the room and known to the vice-principal of the master: *Held*, sufficient for the determination of the jury upon the issue of the plaintiff's contributory negligence, though the employer had provided a less convenient way that would have been safer in its use under the circumstances.

6. Same—Safe and Unsafe Places—Contributory Negligence—Questions for Jury.

Where the master has furnished an employee a safe place in which to go for drinking water in its knitting mills, and the evidence is conflicting as to whether the vice-principal permitted employees to pass and repass at the end of a rapidly revolving power-driven shaft, where it was dangerous, and in so doing a sixteen-year-old inexperienced and uninformed employee was injured while going for a drink of water, and the danger was not clearly obvious to him, the question of contributory negligence is one for the jury.

7. Same—Ignorance of Danger—Evidence—Nonsuit.

A master in its servant's action for damages for its negligence in failing to use due care to furnish him a safe place to work, may not escape liability on the issue of contributory negligence solely because the servant was aware of the facts making the place a menace, when under the circumstances the servant was unaware that the observable facts were such as to cause the injury in suit, and he did not appreciate the risks, a motion as of nonsuit should be overruled.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1925, of ALAMANCE. Reversed.

The complaint succinctly alleges: (a) that A. R. Boswell is next of friend to Freeman Boswell, who is a minor, and authorized to bring the suit; (b) defendant White Hosiery Mills is a corporation engaged in business of manufacturing and dealing in hosiery, and Freeman Boswell was employed by it; (c) that Freeman Boswell was employed by defendant in the hosiery mill engaged in what is known as "topping" or preparing the tops of stockings for the machines, and while passing about his work the bottom of the left leg of his overalls was caught by a rapidly revolving shaft and he was suddenly drawn down, under and around the shafting and was permanently injured. That the injury was caused by defendant's failure to use due or ordinary care to provide Freeman Boswell with a safe place to work; failure to warn him of the

dangers of exposed shafting, he being a youth of tender years and inexperienced in such work. That it operated its mill with the drive-shafting about one foot above the surface of the floor, in the room Boswell worked, exposed and unprotected. It permitted waste material to accumulate around the shafting and likely to catch the clothing of employees, which defendant knew about and permitted to exist. That Boswell was 16 years old when injured. The extent of his injuries are set forth in the demand for damages.

The defendant answering admits that Boswell sustained minor injuries, but denies (a) the injuries were sustained in the course of employment, but were sustained outside the scope of his employment; (b) that Freeman Boswell was engaged in preparing the tops of stockings for the machines in one of the knitting rooms, said machinery being lined one beside the other. The shafting was guarded and protected. That prior to the injury the defendant removed certain of the machines at one end of the line of the machinery away from where Boswell worked for the purpose of replacing same. The place made by the removal caused only a few feet of the shafting to be left exposed. To protect the exposed shafting, defendant's overseer had placed on either side of the shafting two heavy waste cans which completely filled the space. (c) That Boswell, attracted to the window, left his work and instead of proceeding around the end of said line of machinery, deliberately removed the waste cans and stepped over the shafting in motion and went to the window of the mill and returned the same way, and while stepping over the shafting his overalls were caught and in this way he received his injuries. (d) That he was not at his place of work when injured, which was safe and free from danger, but he went for his amusement to another part of the building outside the scope of his employment. That the deliberate act upon the part of said Freeman Boswell in removing said waste cans from the space where part of the machines in said line of machinery had been removed, which theretofore had fully and completely protected any and all employees from any danger by reason of the removel of said machines, as aforesaid, thereby exposing said revolving line of shafting, and there attempting to cross through said opening and over the exposed line of shafting and pulley attached thereto, when at such time the said Freeman Boswell could have proceeded around the east end of said line of machinery about nine feet away and which course any prudent person using due care and reasonable thought and diligence would have taken, constituted negligence on the part of said Freeman Boswell which contributed to and was the sole proximate cause of any and all injuries sustained by the said Freeman Boswell upon said occasion, and defendant does hereby plead said negligence in bar of any claim for damages on account of said

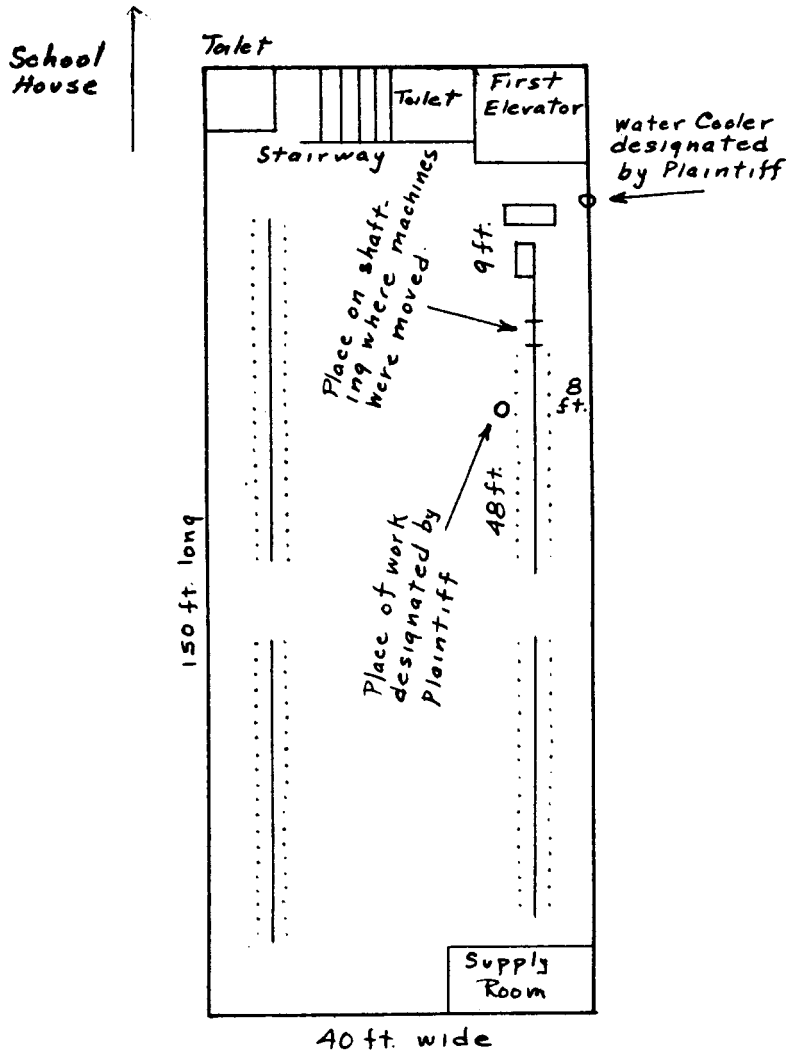
injury. (e) That Freeman Boswell assumed all the ordinary risk incident to the employment and pleads assumption of risk.

Upon the conclusion of the evidence the court below rendered the following judgment: "At the close of plaintiff's evidence having moved for judgment as of nonsuit, and the court being of the opinion that the facts disclosed by the plaintiff's own evidence, and which are not controverted, show such contributory negligence as bars recovery, and the motion for nonsuit should be sustained."

Brooks, Parker & Smith and J. Dolph Long for plaintiff.
Coulter, Cooper & Carr for defendant.

CLARKSON, J. The following map was in evidence.

The plaintiff's evidence substantiated the allegations of the complaint. The evidence of Freeman Boswell, in part, was that he had been working at the hosiery mill three or four months. "At the place I got caught two machines had been taken out, one on each side of the shafting. They had been out for sometime. This left a pretty good space. Since I had been working there had been some cans there, but these had been moved. The space between the machines across the shafting, was just room enough for a pretty good size can to sit, about two feet wide. Tin cans in which waste was kept had been placed where the machines had been taken out. These had been moved for several days when I was hurt. I was hurt about 5 o'clock in the afternoon. There were other persons working in the room with me. Mr. Cleve Garrison was superintendent, he was in the room. No one had ever cautioned me with regard to any danger of that shafting. I had seen other employees of the mill, in that room, crossing over that shafting. They went across there every little bit to get water. The water was at the lower end of the shafting and was brought into the mill through a spigot, for drinking water for the employees. . . . The afternoon I was hurt I had gone from my work to get water and had crossed over the shafting where I was hurt, and came back by the window and looked out at the men working outside. After I came back the same way I had gone and was going back to my work, and when I stepped across the shafting it caught my overalls, it was revolving close to where I got caught, and there were threads wrapped around it, not much of the thread. I guess the shafting was smooth. When I stepped over the shafting it caught my overall leg and I commenced falling. . . . I have explained on this map where I was working and the location of the break on the shafting where I crossed. There was a sewing machine there at the end of the shafting and a table went across the shafting, that is where they sewed up dropped stitches in the socks. The table projected across and came about here,



on this side. There was room to pass if you went around the table, but in going this way (across the shafting) you did not have to go around the table. I had seen other persons working there cross this shafting, had been seeing this for a right smart while. . . . I do not know who moved those cans. I did not move them. The other lines of

shafting in this mill had machines on them. They were completely protected by the machines. This line where I was hurt was protected by the machines at every point, except where those cans were moved. No one had given me any instructions with regard to observing that shafting as being dangerous." . . . On cross-examination, he testified, in part: "I had not seen the cans there in two or three days. Had been a right smart while since I had seen them. When they were there they completely filled the space and I did not have room to go through there, or anyone else. On the day I was hurt I had left my work and come down the line of machinery towards the school house, and came to where those two machines had been removed, I could have gone just a few steps further and gone around the east end of the line, but I went through that place where the two machines had been removed. When I went through there the line of shafting that was operating the machines was moving and the shafting was revolving pretty fast. . . . I went to get a drink of water and then came back to the window. The water spigot was at the other end of the mill, I was not quite at the end of the mill. It was the only way to get across there. The water spigot was at the end of the line of machinery. When I had come to the end of the line of machinery I would have been at the water spigot. It would have been out of my way to go around to the other end of the mill and get water. There was considerable space between the two lines of machines right in the middle of the mill. I could have gone around that end and come down, but I would have had to go up to the other end of the mill and I was pretty close to the water then. . . . It would have been safer to have gone around this end and stepped over there to the water-cooler than to have gone across the shafting. I was not caught by the line of shafting as I went through the first time, but I was caught as I came back across it. I got my water and went to the window and looked out and turned around and came right back and was caught by my overalls."

Garrison, the superintendent, stopped the revolving shafting when plaintiff was caught and was being revolved over and under the shafting.

Joe Lee Boswell, testified, in part: "The machinery is arranged in two rows with the shafting in the middle, this is the usual way that hosiery mill machinery is installed. Two rows of machines run by one shafting. The shafting that ran these machines is fastened to the floor and has a row of machines on each side of it. These machines guard the shafting and the ends of the shafting are boxed up. A machine had been removed from the row on each side of this particular line of shafting on that side of the building that has been discussed. This left an open passage. . . . I cannot say how long it had been vacant like that, a week or two as well as I remember. During the time that I had

observed these machines away from there I had not seen anything else there to protect the shafting. I guess it was about a week I had observed it like this. I had been going up there once or twice a day and had noticed it open for that period of time. . . . As well as I could tell that space left open was about four feet; I know it was over two feet. I have seen these waste cans that were spoken of; I don't guess they would have completely filled that space."

Clyde Cole, testified, in part: "I was working in the room where he was hurt. I know this opening where the machines were out at this shaft. I don't know how long they had been away, but as near as I can say two or three weeks. I had seen these cans there. They had just been pulled back, it had been a right smart while ago. I had seen people in the mill passing backwards and forwards through that opening over the shafting, I do not know how long they had been doing that, it had been going on for some days, a week or two. I don't know what they had been passing there for, but they had been passing both ways. . . . I worked in the room with Freeman. Mr. Garrison (defendant's superintendent) was in and about the room. I don't know whether or not he saw people when they would pass backward and forward across this shafting. He was in the room when they were doing that."

The only assignment of error is in the court below, under C. S., 567, granting the motion of judgment as in case of nonsuit.

"On a motion to nonsuit, 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." *Southwell v. R. R., ante,* 153, and cases cited.

Is there sufficient evidence, as to actionable negligence, to be submitted to the jury? The master is not an insurer. The duty of the master is set forth in *Riggs v. Mfg. Co.,* 190 N. C., p. 258, as follows: "That an employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision." The employer failing in this duty renders himself liable to an employee who may sustain injuries as the proximate result of his negligence.

Taking the testimony as true, on the question of nonsuit. Provision was made for the employee to get water from a spigot or water cooler in the corner of the room near the elevator. The machinery was arranged in two rows, the shafting in the middle runs the machines. The machines guard the shafting and the end is boxed up. Two machines had been removed, which left about four feet of the revolving shafting exposed,

cans had been put in the space where the machines had been taken out to protect the revolving shafting exposed, these were removed. Waste thread was on the revolving shafting. The plaintiff was about 16 years of age and was given no instructions that the revolving shafting was dangerous or as to the risk. For a week or two before the injury, the employees in the mill passed forwards and backwards through the opening over the revolving unprotected shafting. Plaintiff knew it would have been safer to have gone around the end to get to the water cooler than to have taken the near cut and stepped over the revolving shafting. At the end of the shafting was a sewing machine and it was some considerable distance around than the short cut. Plaintiff had gone to get water at the place fixed for the employees and crossed the unprotected revolving shafting about a foot or more high from the floor, stepping over it and was returning when his overalls were caught.

In *Tisdale v. Tanning Co.*, 185 N. C., 500, similar in many respects to the present case, it was said: "This Court has repeatedly held that it is negligence for the employer using rapidly revolving shafting to leave the point of the screws, or the taps, exposed, which may thus catch in the clothing of those nearby, exposing employees like the plaintiff's intestate to such danger. In all such cases ordinary prudence requires, as this Court has often held, that the point of the screw and the taps should either be countersunk or protected by a cup or some other similar device which will not catch in the clothing of the employee and drag him to his death. This is such a simple protection that an ordinary regard for the safety of the employees imperatively requires these to be done." *Ensley v. Lumber Co.*, 165 N. C., 696; *Holt v. Mfg. Co.*, 177 N. C., 175-6; *Gordon v. Silks Corp.*, 178 N. C., 470.

In *Brooks v. DeSoto Oil Co.*, 100 Miss., p. 849, 31 Am. & Eng. Anno. Cases, note p. 658, it was said: "A number of recent cases support the doctrine that even in the absence of a statutory requirement it is the master's duty to guard shafting, set screws, etc., or at least that the question of the master's negligence in failing to guard such appliances is one for the determination of the jury. *Homestake Min. Co. v. Fullerton*, 69 Fed., 923, 36 U. S. App., 32, 16 C. C. A., 545; *Rabe v. Consolidated Ice Co.*, 91 Fed., 457; *Prattville Cotton Mills Co. v. McKinney* (Ala.), 59 So., 498; *Paducah Box, etc., Co. v. Parker*, 143 Ky., 607, 136 S. W., 1012, 43 L. R. A. (N. S.), 179; *Dettering v. Levy*, 114 Md., 273, 79 Atl., 476."

In 18 R. C. L., p. 591-2, the principle is well stated: "A question that has often been under judicial consideration is whether an employer owes to his employees any duty to box, fence, or guard the appliances and machinery in the vicinity of which the work is done. The rule formerly was generally recognized, and is supported by some recent

decisions, that the employer is, in the absence of statute, under no obligation to his employees to affix guards to gearing, shafting and other dangerous moving parts of machinery. No doubt the guarding of some appliances is unnecessary and impracticable, the danger being obvious and avoidable by employees; *but public policy in respect of such matters has in recent times undergone a very decided change, and the tendency now is to hold the employer negligent in failing to guard all dangerous appliances; especially is this noticeable in the rulings of the late cases.* And, of course, if it can be shown that an injured employee was not informed of or did not appreciate the danger of the unguarded appliance, it is not to be supposed that a *recovery will be denied in any jurisdiction.*" (Italics ours.)

In the *Tanning Co. case, supra,* it was further said: "If it be conceded that there was a rule of the company forbidding an employee to go over or under the shafting, still the evidence is that such rule had been habitually violated to the knowledge of the employer. In *Biles v. R. R.,* 139 N. C., 528, it is held: 'Where a rule is habitually violated to the knowledge of the employer, or where a rule has been violated so frequently and openly and for a length of time that the employer should by the exercise of ordinary care have ascertained its nonobservance, the rule is considered as waived or abrogated.'" *Hinnant v. Power Co.,* 187 N. C., p. 299.

In *Roth v. Northern Pacific Lumbering Co.,* 22 Pac. Rep., 845 (18 Ore., 205), it was said: "But it is to be borne in mind that there is a difference between a knowledge of the facts and a knowledge of the risks which they involve. One may know the facts, and yet not understand the risk; or, as *Mr. Justice Byles* observed, 'A servant knowing the facts may be utterly ignorant of the risks.' *Clarke v. Holmes,* 7 Hurl. & N., 937. For, after all, *Mr. Justice Hallett* said, 'It is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed.' *McGowan v. Mining Co.,* 3 McCrary, 393, 9 Fed. Rep., 861. So that in a case like the present, where the evidence is conflicting as to whether or not the defendant had knowledge of the risks to which he was exposed, the question is preëminently for the jury."

Defendant cites *Dunnevant v. R. R.,* 167 N. C., 233, where it is said: "If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence. *Fulghum v. R. R.,* 158 N. C., 555; 29 Cyc., 520; *Whales v. Gas Light Co.,* 45 N. E., 363; *Johnson v.*

Wilcox, 19 Atl., 939. And where a person *sui juris* knows of a dangerous condition and voluntarily goes into the place of danger, he is guilty of contributory negligence, which will bar his recovery. *Royster v. R. R., supra* (147 N. C., 347); *Fulghum v. R. R., supra; Saunders v. Smith Realty Co.*, 86 Atl., bot. p. 405; *Columbus Ry. v. Asbell*, 66 S. E., 902; *Southern Ry. Co. v. Rowe*, 59 S. E., 462; *Woodman v. Pitman*, 10 Alt., 321." Plaintiff testified that it would have been safer to have gone around the end, but that others went across the revolving, unprotected shafting to get water; no one had cautioned him of the danger or risk. There is no evidence in the record that plaintiff crossed the short cut over the revolving machinery "with knowledge of the danger," or that he knew the risks. Plaintiff and others were permitted to make the short cut a walkway without warning of the danger and risks. If the jury should find that the plaintiff knew the danger and risks he would be guilty of contributory negligence and could not recover; but it was a question for the jury to say whether a boy 16 years of age, under the facts and circumstances, acted as a prudent man.

In *S. v. Fulcher*, 184 N. C., p. 665, it was said: "The motion we are now considering was made under C. S., 4643, a statute which serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by C. S., 567, in civil actions. Originally, under this later section, in cases to which it was applicable, there was considerable doubt as to whether a plea of contributory negligence—the burden of such issue being on the defendant—could be taken advantage of on a motion to nonsuit, but it is now well settled that such may be done when the contributory negligence of the plaintiff is established by his own evidence, as he thus proves himself out of court. *Wright v. R. R.*, 155 N. C., 329; *Horne v. R. R.*, 170 N. C., 660, and cases there cited."

In *Moore v. Iron Works*, 183 N. C., 438, *Stacy, J.*, said: "Contributory negligence, such as will defeat a recovery in a case like the one at bar, is the negligent act of the plaintiff, which, concurring and co-operating with the negligent act of the defendant, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. Negligence is doing other than, or failing to do, what a reasonably prudent man would have done under the same or similar circumstances. In short, it is a want of due care; and there is really no distinction or essential difference between negligence in the plaintiff and negligence in the defendant, except the plaintiff's negligence is called contributory negligence. The same rule of due care, which the defendant is bound to observe, applies equally to the plaintiff; and due care means commensurate care, under the circumstances, when tested by the standard of reasonable prudence and foresight. The law recognizes that contributory negligence may be due either

to acts of omission or to acts of commission. In other words, the lack of diligence, or want of care, on the part of the plaintiff, may consist in doing the wrong thing at the time and place in question, or it may arise from inaction or from doing nothing when something should have been done. The test is: Did the plaintiff fail to exercise that degree of care which an ordinarily prudent man would have exercised or employed, under the same or similar circumstances, and was his failure to do so the proximate cause of his injury? If this be answered in the affirmative, the plaintiff cannot recover in a case like the one at bar."

The plaintiff, a minor 16 years old, was not warned as to the risk or danger of the unprotected revolving shafting. The defendant had arranged a water cooler or spigot in the corner of the mill for the employees for drinking purposes. It was the custom of the employees to take a short cut to the water cooler and step over the revolving shafting, waste had accumulated on the shafting. The plaintiff, instead of going around a safer way some distance further, went the near way to the water cooler and stepped over the revolving shafting, unprotected and about a foot in height from the floor. The superintendent knew, or ought to have known, that this short cut was being used habitually by the employees in the mill. The boy, in returning to his machine from the water cooler, stepped over the uncovered shafting and his overalls caught by the waste on the revolving unprotected shafting, he was carried over and under the revolving shafting until the superintendent stopped the machine. From the testimony of the physician, he was permanently injured. Ordinarily, it is not necessary for a boy of the age of 16 to be warned of the risk and danger incident in coming in contact with dangerous machinery if he knows the risks and appreciates the danger. It was the duty of defendant to use due care to provide a safe place for plaintiff to work, and this included the place to and from the water cooler. The defendant, through its superintendent, had left exposed the revolving shafting and permitted the workers to take a short cut to get water by stepping over the revolving shafting with waste on it, without stopping them or warning them of the risk or danger. The superintendent was in the room, as he stopped the machine. The custom was carried on for some time and he knew, or ought to have known in the exercise of ordinary care, that the employees used the short cut.

Under all the facts and circumstances of this case, we think it a matter for the jury to determine if the defendant was negligent and its negligence was the proximate cause of the injury and if the plaintiff was guilty of contributory negligence, which was the proximate cause of the injury.

For the reasons given, the judgment below is

Reversed.

SALLIE S. STRICKLAND IN HER OWN RIGHT; VELMA STRICKLAND, FOREST STRICKLAND, RUTH STRICKLAND, ALBERTINE STRICKLAND, PERRY STRICKLAND AND MARGARET STRICKLAND, THE LAST SIX BEING MINORS AND APPEARING HEREIN BY THEIR GUARDIAN, SALLIE S. STRICKLAND, v. R. N. SHEARON, W. H. FULLER AND B. S. ALFORD.

(Filed 7 April, 1926.)

1. Reformation of Deeds—Equity—Deeds and Conveyances—Mistake.

In order to reform a deed in equity for mutual mistake of the parties in including lands not intended, without allegation of fraud, it is necessary for the plaintiff to show, not only that she had not intended to convey the *locus in quo*, but that it was not so intended by her grantee.

2. Same—Draftsman.

To correct a deed in equity for the mistake of the draftsman, it is necessary for the plaintiff to show that the draftsman had not followed the instructions of the parties in giving the description of the lands conveyed.

3. Same—Evidence—Mutual Mistake.

Where the grantor and grantee in a deed have agreed upon the description of timber growing upon lands to be conveyed, and have instructed the draftsman as to the description, equity will not reform the deed solely upon the ground that the grantor had intended to exclude certain of her timber that was included in the description agreed upon.

APPEAL by defendants, W. H. Fuller and B. S. Alford, from *Midyette, J.*, at August Term, 1925, of FRANKLIN. Reversed.

A. P. Strickland died on 15 July, 1920, seized in fee and in the possession of a tract of land, situate in Franklin County, containing 127 acres more or less. He left surviving plaintiff, Sallie S. Strickland, his widow, and her coplaintiffs, his heirs at law, each of whom is a minor. Sallie S. Strickland has been duly appointed and has duly qualified as guardian of said minors.

On 17 March, 1924, plaintiffs herein commenced a special proceeding *ex parte* before the clerk of the Superior Court of Franklin County, by filing a verified petition in which they alleged that they were the owners of a certain tract of land, in said county, containing 135 acres, more or less, being the tract of land conveyed to A. P. Strickland by S. W. Fuller and wife by deed, dated 20 August, 1906, duly recorded in Book 158, at page 48, public registry of Franklin County, less 7⅞ acres subsequently conveyed by A. P. Strickland and wife to Henry Crudup; that upon the said tract of land is situate certain timber, to wit: "All the pine and poplar timber situate upon the above described tract, situate, lying and being east of the branch known as the Fish Pond Branch, also all the pine and poplar timber situate upon said tract lying

north of a hedgerow running from the aforesaid Fish Pond Branch in a southwesterly direction to the Louisburg and Tarboro road, which according to the best information of your petitioners has reached its maturity and at present is in its best salable condition." It is further alleged in said petition that the petitioners have been offered "for all of the above described pine and poplar timber measuring 8 inches or over at the stump, when cut 8 inches above the ground, by Messrs. B. S. Alford and W. H. Fuller, the sum of $850 cash, the said timber to be cut and removed within two years from the date of the delivery of deed" therefor. The petitioners pray that an order be made by the court authorizing and directing the sale of said timber to said B. S. Alford and W. H. Fuller in accordance with their offer and that a commissioner be appointed to convey said timber to the purchasers upon their compliance with their offer.

An affidavit, signed by three residents and freeholders of Franklin County, was filed with said petition, in which each stated that he was familiar with the timber on the lands described in the petition, and was of opinion that $850 was a full and fair price for the same, and that a sale of the said timber at said price would best serve the interests of the infant petitioners.

On 20 March, 1924, an order was made by the clerk of the Superior Court of Franklin County, in which it is recited that the court finds as a fact that a sale of the timber described in the petition will best serve the interests of all the petitioners and that $850, offered for same, is a full and fair price for the said timber. E. H. Malone was appointed commissioner for the purpose of conveying said timber; he was authorized, empowered and directed to execute and deliver to the said B. S. Alford and W. H. Fuller, upon their compliance with the terms of their offer, a deed conveying to them all the standing pine and poplar timber described in said petition. The order and judgment of the clerk was examined and approved by Hon. Henry A. Grady, judge Superior Court, holding the courts of the Seventh Judicial District, on 22 March, 1924.

Thereafter, on 26 March, 1924, E. H. Malone, commissioner, pursuant to the judgment therein, in consideration of the payment to him of the sum of $850, conveyed by deed to B. S. Alford and W. H. Fuller, "all the standing pine and poplar timber measuring 8 inches or over in diameter, at the stump 8 inches from the ground, when cut, lying and being east of the Fish Pond Branch, and all of the standing pine and poplar timber of the above mentioned size and dimensions lying and being north of a hedgerow running from the aforesaid Fish Pond Branch in a southwesterly direction to the Louisburg-Tarboro road, being that certain parcel of land in Franklin County, North Carolina, owned by A. P. Strickland at the time of his death, containing about 135

acres." Subsequently, defendants, B. S. Alford and W. H. Fuller, conveyed the said timber by deed to their codefendant, R. N. Shearon, who was cutting and removing the same at the date of the commencement of this action, on 24 January, 1925.

Plaintiffs allege in their complaint herein that at the date of the filing of their petition for the sale of the timber described therein, there were situate upon said land "two blocks or parcels of timber that had attained its full growth; one of said blocks consisted of about fifteen acres and growing within the pasture, and the other block consisting of three or four acres, and lying outside the pasture; besides this old and fully grown timber, there is upon said tract of land 35 or 40 acres of thrifty growing pines, with a few poplars, not yet of a size suitable for saw-mill purposes, but which promise to grow into timber of much value. This young growth lies wholly outside of the pasture and on the east end of the plantation."

Plaintiffs allege that defendants, Alford and Fuller, offered for the timber on said two blocks the sum of $850, in cash, and that plaintiff, Sallie S. Strickland, acting in her own right as widow, and as guardian, agreed to report said offer to the court, and to ask for an order for the sale of said timber to said defendants for said sum. It is alleged that in the negotiations for the purchase of said timber, "there was a perfect understanding and agreement between her (the said Sallie S. Strickland) and the defendants, Fuller and Alford, that she was selling and they were buying only the two blocks of old timber which was fully grown; that the language used in the petition, and in the commissioner's deed did not and does not express the real contract and intention of the parties, but was inserted in said petition and deed by the mutual mistake of the parties, or by the mistake of the draftsman."

Plaintiffs pray that the petition, and order of sale in the special proceedings, and the deed of the commissioner be reformed to the end that the timber authorized to be sold in the order pursuant to the petition, and conveyed by the deed, shall be described and designated therein as the old timber on the two blocks, in accordance with the true intention of the parties.

Defendants deny in their answer the allegations as to mutual mistake or mistake of the draftsman; they allege that the timber described in the petition, order and deed is the identical timber for which they offered to pay and did pay the sum of $850.

Issues submitted to the jury were answered as follows:

1. Was the true agreement between Mrs. Sallie S. Strickland and the defendants, Alford and Fuller, that there was being sold only the timbers within the pasture and four or five acres of old timber outside and adjoining the timber within the pasture? Answer: Yes.

2. Was there by mutual mistake of the parties, or the mistake of the draftsman included in the petition, order and commissioner's deed other timbers not intended to be sold or to be included in said petition, order or deed? Answer: Yes.

From judgment upon this verdict, defendants, Alford and Fuller, appealed.

Ben T. Holden, W. H. Yarborough and E. F. Griffin for plaintiffs.
Wm. H. Ruffin and W. M. Person for defendants.

CONNOR, J. We need not consider or pass upon defendants' first assignment of error based upon their exception to the refusal of the court to submit the issues tendered by them and also to the issues as submitted to the jury. Nor is it necessary to consider or pass upon the numerous exceptions to the overruling of defendants' objections to the admission of testimony. The assignment of error upon which defendants chiefly rely upon their appeal from the judgment rendered by the court below, is based upon their exception to the refusal of the court to allow their motion, first made at the conclusion of plaintiff's evidence and renewed at the close of all the evidence, for judgment as of nonsuit. If there was no evidence of a mutual mistake of the parties or of a mistake of the draftsman with reference to the description of the timber as contained in the petition, order of sale or deed, plaintiffs are not entitled, in any event, to the relief which they seek in this action. They concede that the timber claimed by the defendant, R. N. Shearon, and conveyed to him by his codefendants, W. H. Fuller and B. S. Alford, is included within the description contained in the petition, order of sale and deed; they contend that said description includes timber which it was not the intention of plaintiff to sell or of defendants to purchase; that the error was due to the mutual mistake of the parties or to the mistake of the draftsman of the petition, order of sale and deed. Upon these grounds alone plaintiffs pray for reformation to the end that the timber conveyed by the commissioner's deed may be described therein in accordance with the true intention and agreement of the parties as alleged in the complaint. There is no allegation or contention that the erroneous description was due to or caused by any fraud on the part of the defendants.

The evidence tends to show that the land on which the timber was located descended to the heirs at law of A. P. Strickland, deceased, subject to the right of dower of his widow; that the dower had not been allotted to the widow and that there had been no partition among the heirs at law, all of whom are minors residing with the widow, who is their mother and guardian. Early in 1924 there were negotiations be-

tween the Messrs. White and Mrs. Strickland for the purchase by them of certain timber located on said land. This timber, was described by Mrs. Strickland in her testimony as the "old timber, situate partly on the north of the hedgerow beginning at the north of Fish Pond Branch and running out to the Louisburg-Tarboro road and partly east of the Fish Pond Branch lying up and down the branch. All of this timber was in the pasture except that on a few acres on the lower end of the branch." These negotiations did not result in an agreement by Mrs. Strickland to sell to the Whites because defendants offered a larger sum for the timber than that offered by them. In the negotiations with defendants, Mrs. Strickland testified that she told them "the best she could what timber she had shown Mr. White." Defendants looked over the timber in which they were interested and told Mrs. Strickland that they wanted the same timber which the Whites wanted. Mrs. Strickland did not go upon the land with defendants at the time they examined the timber; nor did she show them the timber which was the subject of her negotiations with the Whites; or the boundaries of the land on which the timber was located.

After the purchase price of the timber had been agreed upon by Mrs. Strickland and defendants, Mrs. Strickland went with the defendants to the office of her attorney, Mr. E. H. Malone, in Louisburg, to consult with him as to the conveyance of the timber to defendants. As the result of this consultation, Mr. Malone prepared the papers in the special proceedings instituted by plaintiffs for the sale of timber. The description of the timber to be sold and conveyed as contained in the petition was given to Mr. Malone by Mrs. Strickland and defendants during a conference in his office at which all three were present. After Mr. Malone had prepared the petition it was read by him to Mrs. Strickland, who thereupon signed and verified it. Mr. Malone also prepared an affidavit to be signed by three freeholders; this affidavit was delivered to Mrs. Strickland and was subsequently signed by three residents and freeholders of Franklin County at her request. The affidavit recites that "we are familiar with the timber described in the petition herein attached." The description of the timber in the order of sale and in the deed of the commissioner conveying same to defendants, is identical with that in the petition.

Mrs. Strickland testified as follows: "I was absent from the office for one hour. Mr. Malone fixed up the paper while I was gone. When I got back the deed was fixed and the way I understood it was that I included the timber on the north side of the hedgerow from the Fish Pond Branch and running out to the Louisburg-Tarboro road and the old timber east of the Fish Pond Branch. This piece of timber I thought I had sold was in the cow pasture and east of the Fish Pond Branch. I

had no idea it included any but the old timber east of the Fish Pond Branch. I have never contended that I only sold the timber inside the pasture."

Mr. Malone testified as follows: "I could not tell to save my life which of the three stated the terms of the contract, but it was stated in the presence of all three and all three acquiesced in the terms. When I came to draw the petition and they were trying to describe the timber, I advised a survey as I knew nothing about the timber. They wanted to avoid any expense that they could. I told them that if they wanted to sell all the timber on one side or another to a given line between two points and could give me the boundaries, I could do without a survey. I dictated the description and all agreed that it was a proper and accurate description of the property. The description was read and it was agreed that that was what they wanted to do. I read the description after it was embodied in the petition to Mrs. Strickland but I could not say whether or not she understood it. I consider Mrs. Strickland of more than average intelligence. She has shown considerable ability to take care of business. She is a very satisfactory client and a perfect lady."

J. E. Malone, Jr., testified that he is an attorney at law, and a member of the firm of White & Malone. He was present at the conference between Mrs. Strickland and defendants, at the time of the preparation of the papers in the special proceeding for the sale of the timber. "When we got to the description, we suggested that it would be advisable to have the timber surveyed. They did not want to have the survey, if it was possible to get along without it. We made some rough drawings, and dismissed that phase of the matter for a half-hour. My brother, E. H. Malone, dictated the description. I took it down in shorthand. After he dictated he asked what each thought of it. They all agreed or acquiesced that that was what they wanted in the deed. Thereupon, I finished drawing the papers for the proceeding. All three of the parties helped to arrive at the description. It was read in the presence of all three and they assented to it. Mrs. Strickland seemed to be entirely satisfied with the description."

Both the defendants testified that after agreeing with Mrs. Strickland upon the timber which they were to purchase and upon the price which they were to pay, at her request, they went with her to the office of her attorney, Mr. Malone. After stating to Mr. Malone the terms of the bargain, Mrs. Strickland and defendants agreed upon the description of the timber to be embodied in the papers. The description as contained in the petition, order of sale, and deed is the same as they agreed upon; the timber described in the deed is the identical timber which Mrs. Strickland agreed to sell and which they agreed to buy.

There is no evidence set out in the case on appeal in this record from which the jury could find that Mr. Malone, the draftsman who prepared the petition, order of sale, and deed made any mistake in describing therein the timber which he was informed by both Mrs. Strickland and the defendants, plaintiffs wished to sell and defendants had offered to buy. This description was inserted in the petition by him under instructions of all three interested parties, after a full discussion, extending through a half-hour, at a conference in his office; it was read to and approved by them as a true and accurate description of the timber, which was the subject of their negotiations. Mrs. Strickland signed and verified the petition, after it had been read to her by Mr. Malone. If the timber described in the petition, order of sale, and deed is not the timber which Mrs. Strickland, acting for the plaintiffs, intended to sell and defendants intended to buy, this cannot be attributed to any mistake made by Mr. Malone, the draftsman. The principle that a court of equity will order a written instrument, purporting to contain the agreement of the parties thereto, reformed, if the instrument, as written, is not in accord, as to some material matter, with the true intention of the parties, because of a mistake of the draftsman, cannot be applied upon this record. The principle is well established, but obviously cannot be applied in this action unless a mistake was made by the draftsman with the result that the instrument as drawn by him does not express the true agreement or intention of the parties to be bound thereby. *Maxwell v. Bank,* 175 N. C., 180; *Sills v. Ford,* 171 N. C., 733; *Shook v. Love,* 170 N. C., 99.

The evidence relied upon by plaintiffs to support their allegation of mutual mistake of both parties is not sufficient to establish more than that Mrs. Strickland understood, when the description was given by her or by defendants, in her presence, to her attorney to be inserted by him in the petition as the correct description of the timber which was the subject-matter of the agreement, that it covered only the old timber on the two blocks, as described by her in her testimony; there is no evidence that the defendants understood that the description given to the attorney in their presence and acquiesced in by both Mrs. Strickland and themselves, was limited as contended by plaintiffs. When parties to a contract have expressed their agreement in terms that are explicit and plain of meaning—that is, when their minds have met on the terms of the contract—it may not be revoked or altered by reason of the mistake of one of the parties alone, resting wholly in his own mind, there being no fraud or misrepresentation by the other. *Lumber Co. v. Boushall,* 168 N. C., 501.

We must hold that it was error to refuse defendants' motion for judgment as of nonsuit. Conceding, for the purpose of disposing of this ap-

peal, that if the timber for the sale of which the special proceeding was instituted, was incorrectly or inaccurately described in the petition by reason of the mutual mistake of the petitioners and of the proposed purchaser, the said petition, order of sale and deed could be reformed in an independent action brought by the plaintiffs against the grantees in the deed who were the proposed purchasers, plaintiffs cannot recover in this action for that the evidence offered by them is not sufficient to sustain their allegation. We do not therefore consider the assignment of error presenting defendants' contention that in no event could plaintiffs have the relief sought in this action.

It may be noted that defendant, Shearon, to whom his codefendants have conveyed the timber, filed no answer to the complaint herein. Judgment by default was rendered against him. He has not appealed. The judgment rendered upon the verdict in favor of plaintiffs and against defendants, W. H. Fuller and B. S. Alford, must, in accordance with this opinion, be

Reversed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF P. B. CAMPBELL.

(Filed 7 April, 1926.)

Wills—Caveat—Issues—Devisavit Vel Non—Interpretation.

A caveat to a will does not present the determination as to the sufficiency of any clause of the paper-writing, or whether a trust therein imposed is sufficiently definite, but only whether it was or was not the will of the testator, or whether it was witnessed or probated as the statute requires, etc.

APPEAL by caveator from *Webb, J.*, at February Term, 1926, of FORSYTH. Affirmed.

Mary Crutchfield, sister of P. B. Campbell, filed a caveat to his will alleging want of mental capacity, undue influence and interested parties who witnessed the will. The record shows:

"Monday, 8 February, 1926, the caveator moved the court to be allowed to amend her pleadings, as appears in the written amendment. The court in its discretion allows the amendment, and the defendants except:

AMENDMENT TO CAVEAT.

(d) That the purported granting clause of said paper-writing in the second paragraph of the second article is void for indefiniteness, in that there is nothing provided to guide, check or control an unbridled discretion of the trustees. WALTER E. BROCK, *Attorney for Caveator.*

Mr. Brock—I shall abandon the claim of undue influence and mental capacity. The only two grounds that I think we can ask to be heard on with any degree of success are the allegations of interested parties who witnessed the instrument, and of the last amendment which I have offered.

ISSUE AND VERDICT.

1. Is the paper-writing offered in evidence, and every part thereof, the last will and testament of P. B. Campbell, deceased? Answer: Yes.

JUDGMENT.

This cause coming on to be heard and being heard before his Honor, James L. Webb, judge presiding, and a jury, at the February Term, 1926, of the Superior Court of Forsyth County, on the caveat filed by Mary Crutchfield in the above entitled action, and it appearing to the court that the issue was submitted to the jury and answered as indicated. It is, therefore, ordered and adjudged that the said will referred to in the said caveat is the valid will of P. B. Campbell, deceased; that the said caveat be dismissed and the caveator taxed with the cost.

JAS. L. WEBB, *Judge Presiding.*

ENTRIES ON APPEAL.

The court: The issue was submitted to the jury which was answered 'Yes,' and the caveator excepted. Judgment—exception. The caveator appeals to the Supreme Court. Notice of appeal given in open court, and further notice waived. Appeal bond fixed at $50.00. The caveator permitted to file prayer asking the court to hold as a matter of law that the will invalid on account of the witnesses thereto being interested in the property willed and furthermore that the will is void for uncertainty, and asking the court to direct a verdict accordingly. This prayer was refused by the court and exception. It is agreed that the record and the evidence in this case shall constitute the case on appeal to the Supreme Court.

CASE ON APPEAL.

This was a caveat tried at February Term, 1926, of the Superior Court of Forsyth County, before Honorable Jas. L. Webb, judge presiding and a jury.

The propounder offers in evidence the will. Objection by the caveator is overruled. The propounder rests.

At the close of the propounder's evidence the counsel for the caveator moved the court to direct a verdict that the will was invalid for uncertainty. Motion overruled, and caveator excepts.

JUDGE'S CHARGE.

The court charged the jury as follows:

Gentlemen of the jury: A caveat was filed to the will of P. B. Campbell, and in that caveat they alleged that he had not sufficient mental capacity to make a will, and another reason that there was undue influence used in procuring the making of the will. The caveator before the court, abandons these two suggestions.

The will has been introduced and the witnesses to the will, and the witnesses to the will who have been introduced testified that they signed the will that has been introduced at the request of the maker of the will, Campbell, signed it in his presence and in the presence of each other, and at his request, and testified that he was a man capable of making a will, knew what he was about, and of sufficient mental capacity to make it. So the court charges you if you believe all this evidence, you will answer this issue 'Yes,' 'Is the paper-writing offered in evidence, and every part thereof, the last will and testament of P. B. Campbell, deceased?' If you believe it, you will answer that 'Yes,' under the instructions of the court."

The caveator assigned the following errors:

(1) The court erred in overruling the caveator's motion for a directed verdict.

(2) To the charge of the court below commencing with "the will has been introduced," etc.

The caveator assigned error and duly appealed to the Supreme Court.

Walter E. Brock and Richmond Rucker for caveator.
Manly, Hendren & Womble for propounders.

CLARKSON, J. The question for us is caveator's present contention: "That the purported granting clause of said paper-writing in the second paragraph of the second article is void for indefiniteness, and there is nothing provided to guide, check or control an unbridled discretion of the trustees." All other assignments of error are deemed abandoned. Rules of Practice in the Supreme Court, 28. 185 N. C., p. 798. This contention of caveator we cannot consider. The only issue is *devisavit vel non.*

Mary Crutchfield filed a caveat to the will of P. B. Campbell—this was a proceeding *in rem* to determine the testacy or intestacy of the deceased. *In re Westfeldt,* 188 N. C., p. 705. The only issue: "Is the paper-writing offered in evidence and every part thereof, the last will and testament of P. B. Campbell, deceased?"

40 Cyc., p. 1231, states it thus: "In proceedings to probate a will, the only proper and necessary matters for consideration and determina-

tion are the testamentary capacity of the testator, the due execution of the will in accordance with the statutory requirements, and the presence or absence of fraud, mistake, or undue influence; matters of interpretation and construction, as well as the validity of particular bequests and devises, are not involved and are without the power of the court to consider and determine, unless express authority to determine such questions is given by statute."

In *Wood v. Sawyer,* 61 N. C., p. 268, *Reade, J.,* said: "The uniform practice, when a paper-writing is offered for probate as a will, has been to prove the execution of the paper and obtain an order that it be recorded, without consideration of its contents, except so far as to see that it *purports* to be a will. And where the validity of the will is questioned, and it is submitted to a jury, the jury is restricted to the same inquiries. Where there is no objection, the court passes upon the validity of the paper, and where there is objection, the jury passes upon it; and, in either case, the proceeding is *in rem.* The probate passes upon the rights of no one under the will, but only establishes it as a will, leaving the rights of parties to be ascertained thereafter."

H. G. Connor, J., In re Murray, 141 N. C., 591, says: "We cannot perceive how the construction of the will was presented or could have been passed upon in this proceeding. The courts of probate have no other jurisdiction than to inquire into the execution of the will. The fact that an executor is appointed is sufficient to entitle the will to be admitted to probate, if properly executed. We are not favored with any authorities tending to sustain this exception. The supplementary brief filed by the caveators cited a number of authorities which it is insisted tend to show that the trust undertaken to be set up and the charity established by the will is void. These are interesting questions, but in no proper sense now before the court."

In *Phifer v. Mullis,* 167 N. C., 410, the late lamented *Geo. H. Brown, J.,* said: "The paper was proved in common form before the clerk as a will. The effect of the caveat is to require the paper-writing to be proved again in solemn form in term-time and before a jury of the Superior Court, and no other issues are raised or is appropriate in such proceeding except that of *devisavit vel non.*" See *In re Harrison,* 183 N. C., 457; *In re Southerland,* 188 N. C., 325.

The question presented by caveator as to the construction of the clause in the will cannot be determined on this record.

For the reasons given, the judgment below is

Affirmed.

STATE v. C. A. LAKEY AND MRS. C. A. LAKEY.

(Filed 7 April, 1926.)

1. Courts—Municipal Courts—Criminal Law—Misdemeanors—Judgments—Waiver—Constitutional Law.

A person on trial for a misdemeanor (a disorderly house) in a municipal court with right of appeal to the Superior Court, may waive his constitutional right to a trial by jury by consenting to the judgment therein entered, or by not appealing therefrom, and his afterwards employing an attorney and moving for the appeal within the time allowed by the statute applicable will not affect the fact that he had personally acquiesced in the judgment entered. Const., Art. I, sec. 13; C. S., 1528, 1529, 1530, 1531.

APPEAL by defendants from *Wade H. Phillips, Emergency Judge,* at October Criminal Term, 1925, of FORSYTH. Affirmed.

A warrant was duly issued by the proper officer of the municipal court of the city of Winston-Salem, against defendants *for keeping a disorderly house.* Upon a plea by defendants of not guilty, and after hearing, Hon. T. W. Watson, judge presiding, the following judgment was rendered:

"North Carolina—Forsyth County.

"In the Municipal Court of the city of Winston-Salem, N. C., September 30, 1925.

State v. C. A. Lakey and Mrs. C. A. Lakey.

"After hearing the evidence in this case the defendants are adjudged guilty. Judgment suspended, upon payment of costs, conditioned upon the defendants moving from No. 621 North Liberty Street, on or before 2 October, 1925, at twelve o'clock noon. The defendants consenting to this judgment."

The defendants paid the costs. On 2 October, 1925, "three days after the trial in the municipal court, gave notice of appeal in open court, the judge of this municipal court refused to recognize the notice of appeal, but stated that there was no appeal as the case then stood, and that defendants must vacate the house according to the judgment."

Thereafter, on 5 October, 1925, defendants applied to the emergency judge, Wade H. Phillips, holding the criminal term of Forsyth County Superior Court commencing on that date, for a writ of *certiorari.* C. S., 630. The clerk of the municipal court made affidavit and testified to the judgment as rendered by Watson, judge. C. A. Lakey made affidavit as follows: "That when he was tried in the municipal court on 30 September, 1925, and adjudged guilty; that he felt that he did not

get justice; that he was not represented by counsel; that he desired to appeal; that at all times since the judgment he has desired to appeal the matter to the Superior Court; that on 2 October, 1925, he employed counsel who advised him of his right of appeal; that he employed counsel, who gave notice of appeal in open court, whereupon the judge in the lower court refused to recognize such action, failing to make a bond; that such motion was made before the expiration of the time that the judgment allowed me to vacate the house where I lived. That when the costs were paid that I might be released from jail, where me and my wife, Mrs. C. A. Lakey, were being held, I was still dissatisfied with the judgment, and therefore, employed counsel before the time elapsed for moving. That the deponent still stands on his constitutional rights and desires that the case be heard before a jury in the Superior Court."

The court below rendered the following judgment:

"Now, therefore, upon consideration of the affidavits from the record, in the municipal court, as transmitted and the argument of counsel, the court finds as a fact that the defendants C. A. Lakey and Mrs. C. A. Lakey, both being over twenty-one years of age, submitted to and agreed to judgment of the court below. That in said court they agreed to waive trial by jury. The court finds further as a fact, that they had ample time to employ counsel in said court. The court finds that they partly complied with the judgment in said municipal court by paying the costs in the case, and that they both agreed to the further conditions in the judgment to wit: that they would move from 621 Liberty Street, on or before twelve o'clock, 2 October, 1925. It is therefore, on motion of the solicitor, ordered that the *certiorari* and the appeal be dismissed and the case is remanded to the municipal court of the city of Winston-Salem, to be there proceeded with, according to terms of said judgment."

The following exceptions and assignments of error were made by defendants and an appeal taken to the Supreme Court:

"1. That his Honor erred in dismissing the writ.

"2. Erred in not ordering the case docketed for a hearing as on appeal in the Superior Court.

"3. Erred in that he remanded the case to the municipal court, city of Winston-Salem, for execution on the judgment in that court."

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

Z. C. Camp for defendants.

CLARKSON, J. The merits of the case are not before us. The assignments of errors will be considered together.

The Constitution of North Carolina, Art. I, sec. 13, says: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors, with the right of appeal."

Private Laws 1915, chapter 180, established the "Municipal Court of the city of Winston-Salem"—a special court for the trial of petty misdemeanors.

Section 70, is as follows: "Warrants or other process may be issued by the judge or clerk of said court for any person charged with the commission of any offense of which said court has jurisdiction, or any person convicted in said court shall have the right of appeal to the Superior Court of Forsyth County, and upon such appeal the trial in the Superior Court shall be *de novo.*"

Section 77, is as follows: "All judgments and orders of the judge shall remain *in fieri* for thirty days next after the day upon which said judgment or order is announced, and during that period the judge shall have the power and authority to make such changes and modifications in said judgment or order as in his judgment are necessary or just, and with like effect as if made at the time of announcement of the original judgment or order."

Section 78, is as follows: "The judge shall preside over said court and try and determine all actions coming before him, the jurisdiction of which is conferred by this act, *and the proceedings of the said court shall be the same as are now prescribed for courts of justices of the peace,* and in all cases there shall be a right of appeal on the part of the defendant adjudged guilty to an ensuing term of the Superior Court for the trial of criminal cases; and in all such cases of appeal the defendant shall be required to give bond with sufficient surety to insure the defendant's appearance, and in default thereof the judge shall commit such defendant to the common jail of Forsyth County until such defendant shall give bond or be otherwise discharged according to law."

Under C. S., chapter 27, Courts, Art. 16, Appeal, we find:

"1528. A new trial is not allowed in a justice's court in any case whatever; but either party dissatisfied with the judgment in such court may appeal therefrom to the Superior Court, as hereinafter prescribed."

"1529. No appeal shall prevent the issuing of an execution on a judgment, or work a stay thereof, except as provided for by giving an undertaking and obtaining an order to stay execution."

"1530. The appellant shall, within ten days after judgment, serve a notice of appeal, stating the grounds upon which the appeal is founded. If the judgment is rendered upon process not personally served, and the

defendant did not appear and answer, he shall have fifteen days, after personal notice of the rendition of the judgment, to serve the notice of appeal herein provided for."

"1531. Where any party prays an appeal from a judgment rendered in a justice's court, and the adverse party is present in person or by attorney at the time of the prayer, the appellant shall not be compelled to give any written notice of appeal either to the justice or to the adverse party."

In *S. v. Johnson,* 109 N. C., p. 852, it is decided: "In an appeal from a justice of the peace to the Superior Court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days both upon the justice who tried the case and upon the appellee, and upon failure to give such notice, unless the judge, in his discretion, permits the notice to be given at the trial, the appeal should be dismissed." *Hunter v. R. R.,* 161 N. C., 503; *Tedder v. Deaton,* 167 N. C., 479.

We think, like the able attorney for defendants, that the defendants, under the statute, had within ten days after judgment to serve notice of appeal, but this does not avail them here. They did not appeal when judgment was rendered. After the defendants were convicted, and no doubt a plea by them to the court was made for leniency, the defendants paid the cost and agreed to move from the house where they were charged and convicted of keeping a disorderly house. The judgment reads: "The defendants consenting to this judgment." Defendants upon conviction had a right to appeal by giving notice in open court, if that was not done to serve written notice on the solicitor and the court, within ten days after the judgment. They would have then protected their constitutional rights of trial by jury in the Superior Court. They were charged with a misdemeanor and had a right to waive a trial by jury and consent to the judgment—this they did and cannot now be heard to complain.

In *S. v. Hartsfield,* 188 N. C., p. 360, it is said: "It is the general rule, subject to certain exceptions, that a defendant may waive the benefit of a constitutional as well as a statutory provision. Sedgwick Stat. and Const. Law, p. 111. And this may be done by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it. *S. v. Mitchell,* 119 N. C., 784." *S. v. Berry,* 190 N. C., 363.

In *S. v. Everitt,* 164 N. C., 399, this Court said: "Where a defendant submits or is convicted of a criminal offense and is present when the judge, in the exercise of his reasonable discretion, suspends judgment upon certain terms, and does not object thereto, he is deemed to have acquiesced therein, and may not subsequently be heard to complain

thereof; and in proper instances it will be presumed that the court exercised such discretion." *S. v. Tripp,* 168 N. C., 153; *S. v. Hardin,* 183 N. C., p. 815.

Whatever may be the decisions of other states, the law is well settled by this Court against the contentions of defendants. It will be noted that in the affidavit of C. A. Lakey he did not controvert the fact that he consented to the judgment. It is to his credit that he kept the "whiteness of his soul."

The judgment of the court below is

Affirmed.

J. H. WEARN AND W. R. WEARN v. NORTH CAROLINA RAILROAD COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 14 April, 1926.)

1. Railroads—Right of Way—Statutes—Width—Presumptions — Deeds and Conveyances.

The statutory presumption of the width of a right of way acquired by grant or deed to a railroad company, cannot apply when the company has entered upon the land and constructed its roadway under a description limiting the width to that of its present use, or otherwise limiting it to less than the statutory provision respecting it.

2. Same—Adjoining Lands.

The presumption that a railroad company acquires by grant or deed a full right of way in accordance with the width prescribed by statute, when the conveyance is silent thereon, cannot extend to lands adjoining those of the grantor whose owners are not parties to the conveyance.

3. Same—Evidence—Conduct or Acts of Parties—Intent.

Where a railroad company has acquired a right of way by deed or grant, and the width thereof is left in doubt under the terms or expression of the conveyance, the acts of the parties appearing from other conveyances and records of court proceedings, etc., may be received in evidence to show the intent of the parties in respect to the width conveyed, which may only be done in case of ambiguity.

4. Same—Location of Road.

Where a railroad company has entered upon lands and constructed its right of way under an indefinite power to do so in a grant or deed, with restrictions as to the width or occupancy, the location thus determined upon by the defendant will afterwards control the question of its permanent location, and the extent of its width under the restrictive terms of the conveyance.

CLARKSON, J., not sitting.

WEARN *v.* R. R.

Before *Lane, J.,* at May Term, 1925, of MECKLENBURG.

In 1844 Peter M. Brown purchased lots 239, 240, 241, and 242, in Square 37, Ward 2, of the town of Charlotte, and also lots 237, 238, 248, 249, 260, and 261, in Square 36 of said town. Brown also owned lots 271, 272, 282, and 283, in Block 37. Square 37 was situated on the east side of "A" Street, and Square 36 was situated on the west side of "A" Street. "A" Street was a public street of the town of Charlotte, extending from the corporate limits as defined at that time, in a westerly direction through the town. "A" Street was situated between College Street on the west and B Street or Brevard Street on the east, and was therefore the first street east of College Street and parallel therewith. At the time of the transaction referred to in the complaint "A" Street was a part of a wheat field and not actually located. The map of the town of Charlotte did not show the width of the street, but at the trial there was evidence tending to show that it was approximately 22 feet wide.

Fourth Street ran approximately east and west, parallel to Trade Street, being one block south of Trade Street, and intersected "A" Street. On 14 January, 1852, the Common Council of the town of Charlotte conveyed to the North Carolina Railroad "all that piece or parcel of land situated, lying and being in the town of Charlotte and known in the plan of said town by 'A' Street from the point from which said railroad enters the town of Charlotte on the northeast and through to the depot lots of said railroad, and also so much of lots 748, 749 as described on the plot of said town as is necessary for the track of said road, it being understood and agreed on the part of said railroad company that the crossing of said 'A' Street by the intersection of 3rd, 4th, 5th, 6th, 7th, 8th, 9th, and also Trade streets shall not be obstructed, etc."

Thereafter, on 8 April, 1852, at a meeting of the board of commissioners of the town of Charlotte, "it was resolved unanimously that 'A' Street from the corporate limits of said town on the east to the depot lots, formerly the Asbury property, be appropriated to the use of the North Carolina Central Railroad Company, together with so much of any of the lots as now belong to said commissioners . . . as may be necessary for the construction of said railroad on condition that crossing said 'A' Street by the intersections of 3rd, 4th, 5th, 6th, 7th, 8th, and 9th streets, shall not be obstructed so as to prevent or hinder free passage of all persons who may desire to pass *over said 'A' Street or railroad, etc.*"

On 22 January, 1852, Peter M. Brown, Thomas Trotter, Thomas J. Holton and other property owners owning property abutting said "A" Street executed and delivered to the North Carolina Railroad a deed

as follows, to wit: "Know all men by these presents, that we, who have hereunto subscribed our names and affixed our seals, all of the county of Mecklenburg and State of North Carolina, for and in consideration of the sum of one dollar to each one of us severally and respectively in hand, paid by the North Carolina Railroad Company, the receipt whereof is hereby acknowledged, and for the further consideration of the benefits and advantages which each one of us will severally and respectively derive from the construction of said railroad, have given, granted and surrendered, and by these presents do give, grant and surrender unto the said North Carolina Railroad Company the right, power and privilege by themselves their every tract or lot of land belonging to or owned by and held by us severally and respectively in the town of Charlotte, in said county, adjoining the next street lying to the east of College Street and running parallel therewith through and over which said lots and lands they may desire to construct their contemplated railroad, and to lay out and construct their said railroad on said lots and lands at their will and pleasure, and to use same so long as said company shall have the same use for the purposes of a railroad, and the said railroad shall continue, or the said company may have a corporate existence, and should said road cease to exist or said corporation dissolve and discontinue their operations, then the right, power and privilege hereby granted shall cease and discontinue and the lands hereby granted shall revert.

"It is further expressly understood that so much of said lots and lands on their eastern limits is hereby granted as the said company may deem necessary, together with said street east to construct the necessary track of their said railroad, with its appropriate and necessary excavations, embankments and culverts.

"Witness our hands and seals this 22 January, 1852."

Thereafter, on 3 April, 1852, Peter M. Brown conveyed to North Carolina Railroad Company in fee lots 260 and 261, in Square 36, and lots 271, 282, and 283, in Square 37, said lots being further designated as follows: Bounded by Third Street, B Street, "A" Street, and the lots of the said P. M. Brown.

Thereafter, a partition proceeding was instituted by the heirs at law of P. M. Brown for the sale of lots 239, 240, 241, and 242, which is the property now in controversy, and on 29 September, 1876, deed was made by F. S. DeWolf, commissioner, to John L. Brown "conveying lots 240, 241, 242, and a fraction of lot 239, in Square 37, fronting 357 feet on Fourth Street, and bounded by B Street on the east and the North Carolina Railroad on the west.

Thereafter the title to said land became vested in L. W. Crawford, who conveyed to the plaintiffs J. H. and W. R. Wearn, on 16 January,

1895, by the following description: "All those certain lots or parcels of land in the city of Charlotte and known as lots numbers 242, 241, 240, and all of lot 239 in Square 37, except so much of lot 239 as is owned by the North Carolina Railroad, it being the intention to convey the three lots and fraction of another lot mentioned in the deed made by John L. Brown to the said Christiana E. Brown, dated 3 October, 1876, and recorded in the register's office in Mecklenburg County in Book 15, page 233."

The plaintiffs under their said deed entered into the possession of said land and have erected structures thereon.

The plaintiffs allege: "That recently a controversy has arisen between the plaintiffs and the defendants as to the right of way which said defendants acquired under and by virtue of the right of way deed from Peter M. Brown and others hereinbefore referred to, the plaintiffs claiming and contending that the defendants' right of way is and was confined by the terms of said deed to the location and maintenance of a single track in, along and over 'A' Street, and the defendants claiming and contending that they acquired by virtue of said right of way deed a right of way of the width of 100 feet on each side of the center line of its railroad as originally located on 'A' Street, between Third and Fourth streets in said city."

This suit, therefore, was brought by plaintiffs to remove a cloud from their said title arising from the claim of defendants of a right of way over said lots 239 and 240 abutting "A" Street. The defendants offered evidence tending to show that its track was originally laid east of "A" Street over and along lot 239 claimed by the plaintiffs, and that said main line track is now 18.76 feet east of "A" Street and upon said lot 239, and introduced in support of said claim the testimony of old men to the effect that the main line track was now in the same location as it was originally laid in 1853 or 1854.

The issues and answers of the jury thereto were as follows: (1) Are the plaintiffs the owners in fee simple of lots Nos. 240, 241, 242, and 239, Square 37, of the city of Charlotte, and bounded by Brevard Street on the east and the North Carolina railroad on the west? A. Yes. (2) If so, have the defendants any right or easement over said lots or any of them? A. Yes. (3) If so, how far east of the easterly limits of "A" Street does such right or easement extend over and upon the said lots or any part of them? A. 39 feet.

The defendants objected to the issues so submitted to the jury, and tendered the following issues: (1) Were any of the tracks or necessary fills connected therewith originally located on the lots Nos. 239, 240, 241, and 242, in Square 37, of Charlotte at the southeast corner of intersection of south "A" Street and east Fourth Street? (2) If so,

where was the center line of main line track as originally located at said points? (3) Where was the center line of main line track of said land located on 3 October, 1876?

Judgment was entered upon the verdict as rendered by the jury, and defendants appealed.

Cansler & Cansler and John M. Robinson for plaintiffs.
W. C. Davis and Manly, Hendren & Womble for defendants.

BROGDEN, J. The question presented by the record is whether or not the defendants have an easement or right of way over the lands of plaintiffs; and, if so, the extent of such easement or right of way?

An easement or right of way, under the law, is acquired by three methods, to wit: (1) Purchase or grant; (2) condemnation; (3) statutory presumption. *Barker v. R. R.*, 137 N. C., 214; *Griffith v. R. R., ante,* 84.

The defendants claim an easement by virtue of grant from the town of Charlotte and from Peter M. Brown, plaintiffs' predecessor in title, and also by virtue of section 29 of charter of the North Carolina Railroad providing "that in the absence of any contract or contracts with said company in relation to lands through which the said road or its branches may pass signed by the owner thereof, . . . it shall be presumed that the land upon which the road or any of its branches may be constructed, together with a space of 100 feet on each side of the center of said road has been granted to the said company, by the owner or owners thereof, . . . unless the person or persons owning the said land . . . shall apply for an assessment of the value of said land . . . within two years next after that part of said road which may be on said land was finished."

The law of North Carolina as declared in many decisions is to the effect that if a railroad company enters upon land under a deed or grant from the owner which purports to convey an unrestricted right of way and no definite quantity or width of land is specified, and thereafter constructs its road thereon, then it is presumed that the owner has granted to the company the width designated in the charter or in the general statute. This statutory presumption therefore applies: (1) In the absence of a contract between the parties; (2) where the contract purports to convey an unrestricted right of way and no definite quantity or width is specified; (3) only against owner across or over whose land the track is constructed. *R. R. v. Olive,* 142 N. C., 257; *Earnhardt v. R. R.,* 157 N. C., 358; *Hendrix v. R. R.,* 162 N. C., 9; *R. R. v. Bunting,* 168 N. C., 580; *Tighe v. R. R.,* 176 N. C., 239. It

has also been determined that a railroad company cannot claim under a deed and also under a statutory presumption. *Hickory v. R. R.,* 137 N. C., 189.

Applying these principles of law, it is obvious that if the North Carolina Railroad actually built and constructed its tracks in "A" Street that it can claim no easement by virtue of presumption in the lands of the plaintiffs because the presumption applies only against the owner across whose land the track is built.

The vital and determinative proposition, therefore, is to determine whether or not the railroad was originally constructed in "A" Street or east of "A" Street across the Brown land.

The plaintiffs assert that the track was so constructed in "A" Street, and the defendants assert that the track was constructed 18.76 feet east of "A" Street and on lot 239.

In order to arrive at the merit of this proposition it will not be amiss to consider the construction placed by the parties upon the contract before the controversy arose. Williston on Contracts, vol. 2, sec. 623, states: "The interpretation given by the parties themselves to the contract as shown by their acts will be adopted by the court, and to this end not only the acts, but the declarations of the parties may be considered. But if the meaning of the contract is plain, the acts of the parties cannot prove a construction contrary to the plain meaning. Such conduct of the parties, however, may be evidence of a subsequent modification of their contract." The principle thus announced is reinforced by the following language from *Lewis v. Nunn,* 180 N. C., 164: "There can be no doubt that in determining the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the court. . . . In fact, where, from the terms of the contract or the language employed, a question of doubtful construction arises, and it appears that the parties themselves have practically interpreted their contract, the courts will generally follow that practical construction. It is to be assumed that parties to a contract know best what was meant by its terms, and are the least liable to be mistaken as to its intention." *Guy v. Bullard,* 178 N. C., 228; *Plumbing Co. v. Hall,* 136 N. C., 530; 13 C. J., 546; 6 R. C. L., 852.

So that, we are led to inquire as to whether or not the railroad company contended in the beginning that it had a right of way of 100 feet over the land of Brown, plaintiffs' predecessor in title. The plaintiffs assert that the defendant never contended it had any easement or right of way east of "A" Street until recently, and that the defendant recognized that its right of way was confined to "A" Street. In support of this contention the plaintiffs refer to the fact that in April, 1852, the North

Carolina Railroad Company purchased from Brown four lots in the same square with lot 239, now in controversy, and that said deed described the land therein conveyed as follows: "Bounded by Third Street, B Street, and 'A' Street," thereby recognizing that Brown's land extended to "A" Street for the reason that this deed was some months subsequent to the alleged right-of-way deed from Brown to the defendants. Further reference is made to the fact that the defendant purchased from one Trotter, who signed the alleged right-of-way deed with Brown, a strip of land described as follows: "Beginning at the intersection of Sixth Street with 'A' Street on the southeast side of 'A' Street; thence along the line of Sixth Street 42 feet to a stake; thence southwest 42 feet from 'A' Street and parallel with the same to a stake in the lots owned by said company; thence at right angles with the said line 42 feet to 'A' Street; thence to the beginning, being 42 feet off of the end of lots Nos. 384 and 385 in Square 55 in the plan of the town of Charlotte, and extending from Sixth Street along 'A' Street the whole width of said lots, and 42 feet wide." This deed was made in 1855 after the Brown and Trotter deed above referred to. Plaintiffs assert that the very fact that the defendants were purchasing 42 feet of land on "A" Street from Trotter, if they already had a right of way from Trotter on "A" Street, would be unreasonable, and that this fact shows that at that time the defendants did not interpret the Brown and Trotter deed as conferring any easement or right of way east of "A" Street. In further support of this contention, the record discloses that on 13 May, 1880, the North Carolina Railroad and the Richmond & Danville Railroad, its lessee, instituted a suit in Mecklenburg County against the Carolina Central Railroad and others. In the complaint filed by the North Carolina Railroad in that action are the following allegations:

"That the North Carolina Railway Company was and is the exclusive owner in fee of the right of way extending 100 feet on each side of its track, measuring from the center of all the lands lying between the point of intersection and the tracks of the said Carolina Central Railway Company and the North Carolina Railway Company and the old boundary line of the town of Charlotte at the foot of 'A' Street, a distance of about 1,200 feet, and *also is the owner in fee of the exclusive right of way along 'A' Street in said city from the said old boundary line to Second Street where its depot is located. The exclusive right of way of 'A' Street in the city of Charlotte was obtained by grant from the town of Charlotte and the right of way over the residue of its line was obtained by grants from the owners in fee of the lands over which its line is located.*

"That the North Carolina Railway Company and its lessee or co-plaintiff have been using and occupying as a portion of the main road a track over this said right of way continuously since the year 1853, and have also used and occupied one side track on each side of the main track over a portion thereof for said period.

"That in order to bring about prompt and efficient transportation of said freight and passage to provide for the constantly increasing volume of business, it has become necessary, as plaintiff believes, *to use the entire right of way along 'A' Street to the old boundary line and to construct additional tracks thereon to the junction of the Atlanta and Charlotte Airline Railway which said tracks will require the entire right of way along said street for its construction and the plaintiffs are, accordingly, about to commence the construction of such additional track along 'A' Street.*

"That the defendants, in violation of the rights of the plaintiffs and in defiance of law, and without having had the said right of way condemned or without any other colorable right so to do, have entered, with a large body of men thereon and, although forbidden by plaintiff so to do, are proceeding to take up and remove the earth along the *plaintiffs' said right of way on 'A' Street and beyond,* and are threatening to occupy plaintiffs' entire right of way by constructing a track or tracks thereon for its own use for the entire distance from the point of intersection of plaintiffs' and defendants' road to the defendants' said depot on Trade Street.

"That unless defendants are restrained by an order of this honorable court from thus interfering with plaintiffs in the construction of their said tracks and the use and occupation of their said right of way, *there will not be remaining a sufficient space over the said right of way for the construction of the tracks now necessary for the plaintiffs' use.*"

These allegations, by a fair interpretation, practically compel the conclusion that the defendant claimed "A" Street as a right of way, and that they were resisting the use of "A" Street as a right of way by the Carolina Central Railroad Company for the reason that the said "A" Street was not wide enough to accommodate both railroad tracks as set out in paragraph 23 of their complaint. Therefore, if the right of way of the defendant was in "A" Street and its tracks laid therein, then there would be no presumption of any easement or right of way in the Brown land for the obvious reason that the track was not laid over or across his land.

It must also be observed that the Brown and Trotter deed does not, upon its face, purport to be a full right-of-way deed. The restrictive clause in the deed is as follows: "It is further expressly understood that *so much of said lots and lands on their eastern limits is hereby granted*

as the said company may deem necessary, together with said street east ('A' Street), to construct the necessary track of their said railroad with its appropriate and necessary excavations, embankments and culverts."

It would therefore appear from this language that the land granted in the Brown deed was for only so much of the land, which added to the right of way in the "street east" (or "A" Street) as was necessary for the construction of a track, excavations, embankments and culverts. This restrictive clause is in the nature of a particular description, the function of which is to abridge and limit, but not to enlarge the general description. *Carter v. White,* 101 N. C., 30; *Cox v. McGowan,* 116 N. C., 131; *Potter v. Bonner,* 174 N. C., 20.

The necessary conclusion, therefore, is that the deed in controversy is not and was not intended to be a full right of way deed, but rather a deed for a restricted area to be used with other land. So that, it would be immaterial as to whether the track of defendant was actually laid in "A" Street or upon the Brown land, for the controlling reason that when the defendant accepted the deed restricting and limiting the amount of land to be used for railroad purposes, it cannot be permitted to extend its user or easement beyond that portion of said land actually used and occupied. This construction of the deed in question and the effect of the restrictive clause referred to is established in the decision of *Tighe v. R. R.,* 176 N. C., p. 239. In the *Tighe case* there was a restrictive clause and evidence to show that only a portion of the land was used and occupied by the railroad company under said restrictive clause, and the finding of the jury as to the extent of the easement and judgment thereon was upheld.

The record in this case and the principles of law involved lead unerringly to the conclusion that, whether the tracks of defendants were originally laid in "A" Street or not, neither the presumption contained in defendants' charter nor in the statute applies in this case. Therefore, the rights of the defendants are confined to the Brown and Trotter deed referred to. As this deed grants only a limited or restricted right of way, the defendants are confined to that portion of the land used and occupied by them.

The conclusion of the whole matter resolves itself into four clear cut propositions, as follows: (1) All claim or right to an easement east of East Street over the lands of plaintiffs flows from (a) a statutory presumption, or (b) the deed from Brown and others to the defendants' predecessor in title. (2) If the road was contracted and built in "A" Street, the statutory presumption cannot apply for the reasons given herein. (3) If the road was actually constructed east of "A" Street, the statutory presumption cannot apply because the Brown deed, by its plain terms, is not, and does not purport to be a full or unrestricted

right-of-way deed. (4) As the Brown deed conveys only a portion of a right of way or a restricted easement, the defendants are limited to the easement granted, and the jury has found that the extent of the easement east of "A" Street is 39 feet.

There are serious exceptions in the record, but these exceptions in the main grow out of evidence and principles of law relating to contentions as to whether the road was constructed in "A" Street or east of "A" Street. Under the construction of the deed and the interpretation of the principles of law applicable to the merits of the controversy given by us, these exceptions become immaterial.

The importance to the parties of the questions involved has required a diligent and careful examination of the principles of law involved in the case. In this investigation the accurate and comprehensive briefs filed by counsel have been of great service.

Upon a consideration of the whole record, we are constrained to hold that the cause has been properly tried, and that a just judgment has been rendered.

No error.

CLARKSON, J., not sitting.

CITY OF GREENSBORO v. COUNTY OF GUILFORD.

(Filed 14 April, 1926.)

1. Statutes—Interpretation—Repugnancy.

A later statute repeals a prior one on the same subject-matter when irreconcilable therewith, or to the extent of the provisions that are repugnant.

2. Same—In Pari Materia.

A public-local law allowing a city or municipal court to recover against a county the costs in certain criminal convictions where the prisoner is sentenced to be worked on the public roads of the county, and a general statute then upon the same subject, are to be construed in *pari materia.*

3. Same—Costs—Courts.

Where a public-local law permits the costs of a municipal court to be recovered from a county upon conviction of a criminal offense in certain instances, and a general statute in existence at the time of the enactment of the local statute provides specifically for one-half of the costs, this provision will be construed in *pari materia* with the general law, and the intent and meaning of the local law will be to permit a recovery of one-half the costs only. C. S., 1259.

GREENSBORO *v.* GUILFORD.

APPEAL by plaintiff from *Schenck, J.*, at October Term, 1925, of GUILFORD. Affirmed.

AGREED STATEMENT OF FACTS.

The plaintiff and the defendant have agreed to the following statement of facts:

"1. That the plaintiff is a municipal corporation created and existing under and by virtue of the laws of the State of North Carolina.

"2. That the defendant is a *quasi*-municipal corporation created and existing under and by virtue of the laws of the State of North Carolina.

"3. That chapter 651 of the Public Laws of North Carolina for 1909, is the act creating the municipal court of the city of Greensboro, and said act is hereby made a part of this agreed case; and that C. S., 1259, is hereby referred to as part of this agreed case.

"4. That during the months of July, August, September, October, November and December, 1924, the follows cases, among others, were heard and disposed of in said court: Nos. 5619, 5620, 5404, 5790, 5945, 5949, 5978, 5011, 6078, 6075, 6045, 6178, 6432, 6576, 6571, 6668, 6780, 5377, 6891, 6859 and 6897; that in none of said cases was the defendant therein charged with any capital crime, or with forgery, perjury or conspiracy; that in each of said cases the defendant plead guilty or was convicted and was sentenced to serve a specified term either on the county roads or in the county workhouse of the county of Guilford; that fine and costs were not imposed and the defendants thereafter not sentenced to work out said fine and costs upon failure to pay the same; and that each judgment and sentence has been carried into effect.

"5. That the total costs taxed in said cases by the said court amounted to $245.70.

"6. That in each of the cases mentioned in paragraph 4 above, there were taxed in the bill of costs, in addition to the patrol wagon costs and the costs of board hereinafter mentioned, the following costs: Judge, $2.00; city attorney, $2.00; clerk, $3.00; police for making arrest, $1.50; police for subpœnaing witnesses, $0.50; jail fee, $1.00; that the said costs were those allowed by law in said cases to be taxed against the defendants therein by the said municipal court; that the total of the costs thus taxed in each of the said cases amounted to $10.00; and that the total of said costs thus taxed in all the cases mentioned in paragraph 4 above amounted to $210.00.

"7. That in said cases in addition to other costs taxed, costs for meals were taxed in certain cases as follows: 5619, $0.35; 5404, $0.35; 5790, $0.35; 5945, $1.40; 5949, $1.05; 5011, $1.05; 6078, $1.05; 6178, $0.35; 6432, $0.55; 6576, $0.35; 6668, $1.40; 6780, $1.40; 5377, $2.80; 6891, $1.05; 6859, $1.05; 6897, $0.35; that such costs were allowed by law and

were properly taxed against the defendants; and that the total costs thus taxed is $14.70.

"8. That in each of the cases specified in paragraph 4 above there was taxed in the bill of costs a patrol wagon cost of $1.00; that in each of said cases the patrol wagon was used in conveying the prisoner at the time of his arrest to the city jail; that such cost was reasonable in amount if it was allowed by law and properly taxed in the bill of costs; that the total costs thus taxed in the cases mentioned in paragraph 4 amounted to $210.00.

"9. That cases 5619 and 5620, mentioned in paragraph 4 above, were against the same defendant and were tried and disposed of the same day; that in 5619 the defendant was charged with having whiskey for sale, that she was found guilty on said charge, and was sentenced to serve three months in the county workhouse; that in 5620 the same defendant was charged with prostitution, that she was found guilty on said charge, and was sentenced to serve sixty days in the county workhouse; that the bill of costs in each case was the same; and that in the second of said cases no jail fee or patrol wagon fee should have been taxed in the costs, such fees having been already taxed in the first of said cases.

"10. That the defendant has waived notice of claim and all other formalities and prerequisites to the bringing of a suit against the county of Guilford in order that the matters in controversy between the plaintiff and the defendant may be speedily settled.

"11. That upon the foregoing statement of facts the plaintiff contends that it is entitled to recover of the defendant the full amount of costs taxed in the cases mentioned in paragraph 4 above, including the cost of $1.00 for patrol wagon taxed in each of said cases and the costs taxed in both of the cases numbered 5619 and 5620, with the exception of $1.00 jail fee and $1.00 patrol wagon fee taxed in case No. 5620, the total costs which plaintiff contends it is entitled to recover of the defendant, being $243.70; while the defendant contends that upon the foregoing statement of facts the plaintiff is not entitled to recover of the defendant any of the costs taxed for the patrol wagon in the cases mentioned in paragraph 4 above, that the plaintiff is entitled to recover of the defendant costs in only one of the cases numbered 5619 and 5620, and that of the costs properly taxed in the cases mentioned in paragraph 4 above the plaintiff is entitled to recover of the defendant only one-half of said costs and not the whole amount thereof.

"12. That this matter is submitted to the court in order that the following matters in controversy between the plaintiff and the defendant may be determined:

"(a) Was a patrol wagon fee properly taxed in the bill of costs in the cases mentioned in paragraph 4 of the agreed statement of facts?

"(b) Is the defendant liable to the plaintiff for the costs taxed in both of the cases numbered 5619 and 5620, with the exception of the jail fee and patrol wagon fee taxed in 5620?

"(c) In the cases mentioned in paragraph 4 of the agreed statement of facts, is the defendant liable to the plaintiff for the full amount of the costs taxed in said cases or for only one-half thereof?"

On the agreed statement of facts, the following judgment was rendered:

"This cause coming on to be heard before the Honorable Michael Schenck, judge of the Superior Court, upon the agreed statement of facts submitted by plaintiff and defendant; and after argument of counsel for both parties in said cause: It is ordered, adjudged and decreed:

First. That the patrol wagon fee is a proper fee to be taxed in the bill of costs in the cases against the defendants mentioned in paragraph four of the agreed statement of facts, and the county of Guilford is liable to the city of Greensboro for one-half of said patrol wagon fee in said cases.

Second. That the county of Guilford is liable for one-half of the cost of both of the cases numbered 5619 and 5620, with the exception of the jail fee and patrol wagon fee taxed in No. 5620.

"Third. That the county of Guilford is liable to the plaintiff for only one-half the full amount of costs taxed in the cases mentioned in paragraph four of said agreed case.

"Fourth. That the defendant recover of the plaintiff the costs of the action to be taxed by the clerk."

To the action of the court in signing the foregoing judgment, the plaintiff excepted, assigned error and appealed to the Supreme Court.

Robt. Moseley for plaintiff.
John N. Wilson for defendant.

CLARKSON, J. The first two questions presented to the court below are the question as to the patrol wagon fee and the question as to the costs taxed in cases 5619 and 5620, having been decided in favor of plaintiff, and the defendant having neither excepted to the judgment nor appealed therefrom, neither of these matters is now presented to this Court for review. And it having been agreed that all other items entering into the bills of costs were properly taxed, there is no question presented to this Court, as to the validity of any individual item of costs. The sole question, therefore, presented by this appeal is whether of the whole costs taxed in the 21 cases (exclusive of the two items amounting to $2, which it is agreed were not properly taxed in No. 5620), the county is liable for the whole, $243.70, or for only one-half, $121.85. The plaintiff bases its contention that the county of Guilford is

liable for the whole of said costs on the provisions of the act creating the municipal court—chapter 651 of the Public Laws of 1909. The defendant bases its contention that the county of Guilford is liable for only one-half of said costs on the provisions of C. S., 1259.

We quote the general principles of law bearing on the subject: In 25 R. C. L., p. 929, sec. 178, it is said: "It is well settled that a special or local law repeals an earlier general law to the extent of any irreconcilable conflict between their provisions, or speaking more accurately, it operates to engraft on the general statute an exception to the extent of the conflict.

In *S. v. Kelly,* 186 N. C., p. 371, it is said: " 'Where two statutes are thus in conflict and cannot reasonably be reconciled, the latter one repeals the one of earlier date to the extent of the repugnance.' *Comrs. v. Henderson,* 163 N. C., 120; *Road Comrs. v. Comrs.,* 186 N. C., 202. 'Between the two acts there must be plain, unavoidable and irreconcilable repugnancy, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy.' 36 C. L. P., p. 1047. Every affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary to it, for the maxim is *leges posteriores priores contraries abrogant* (later laws abrogate prior laws that are contrary to them). *S. v. Woodside,* 31 N. C., 500; Black's Law Dictionary." *Felmet v. Comrs.,* 186 N. C., 252; *Waters v. Comrs., ibid.,* 721; *Blair v. Comrs.,* 187 N. C., 489; *Carr v. Little,* 188 N. C., 111; *Asheville v. Herbert,* 190 N. C., 732.

C. S., 1259, is as follows: "If there is no prosecutor in a criminal action, and the defendant is acquitted, or convicted and unable to pay the costs, or a *nolle prosequi* is entered, or judgment arrested, the county shall pay the clerks, sheriffs, constables, justices and witnesses one-half their lawful fees; except in capital cases and in prosecutions for forgery, perjury, or conspiracy, when they shall receive full fees. No county shall pay any such costs unless the same is approved, audited and adjudged against the county as provided in this chapter."

This payment by the county of half fees has been the general policy of the State for long years. In *Guilford v. Comrs.,* 120 N. C., p. 23, decided as far back as 1897, this act was construed and it is there said: "At common law the sovereign never paid or recovered costs."

The municipal court of the city of Greensboro was established by chap. 651, Public Laws 1909. Sec. 23 is as follows: "That whenever under a judgment of the said court any defendant is sentenced to the common jail of the county of Guilford to work on the public roads or in the county workhouse of said county, or to pay a fine and the costs of the action, or the costs only, as provided in this act, and said defendant is imprisoned in the common jail aforesaid, and assigned to the public

roads or the county workhouse of said county as aforesaid, for the purpose of working out said fine and costs, or the costs only, as the case may be, and such judgment is carried into effect, the said county of Guilford shall be liable for and shall pay to the treasurer of the city of Greensboro the amount of the costs taxed in said case." The other sections of the act we do not think throw light on the subject and need not be considered.

When this section of the Municipal Court Act was enacted the general State law was to the effect that counties in criminal actions were only liable for "one-half their lawful fees," except in certain cases not material here. With this public act in force applicable to the whole State,—the Municipal Court Act—a special act was passed "the said county of Guilford shall be liable for and shall pay to the treasurer of the city of Greensboro the amount of the costs taxed in said case." Does this language make an irreconcilable conflict with the general State act? If it does, under the decisions of this State, it is an exception, and the county would be liable for full costs. But we cannot so hold. If the Legislature had intended that the county pay full fees, it could have said so and clearly made an exception. The general law in existence was that a county was liable to pay only "one-half their lawful fees," and that was all that could be taxed against a county. Between the two acts there must be plain, unavoidable and irreconcilable repugnancy. It is apparent that there is not such a conflict and the two acts should be construed in *pari materia*. *Asheville v. Herbert, supra,* p. 732. "The amount of the cost taxed" means the costs the law allows to be taxed against a county, which is one-half. To make an exception, the language should be clear and not ambiguous. If it was the intention of the Legislature to make an exception from the general statute, it could have easily said that the county should be liable for full fees or used other appropriate language showing an unmistakable intent.

The judgment of the court below is

Affirmed.

FINLEY SMITH v. THE SAFETY COACH LINE, INC.

(Filed 14 April, 1926.)

Evidence—Questions for Jury—Nonsuit.

Where the plaintiff in an action to recover damages from a collision caused by the negligence of the defendant in operating one of its auto busses carrying passengers for hire, with the automobile which he was driving, the plaintiff has testified of his own knowledge that the bus

which struck his automobile was owned by defendant, the fact that he has also testified that the name of the bus was that of one not owned by the defendant, and later that it was the name of a bus owned by it, and being the only evidence on this point, raises a question for the jury, the weight and credibility of the evidence being a question of fact for the jury, and not one of law, and a motion as of nonsuit is properly denied.

CIVIL ACTION, tried before *Carlton, Emergency Judge,* and a jury at December Special Term, 1925, of ALAMANCE.

The plaintiff alleged that about midnight on a certain night in October, 1924, at or near the village of Sedalia, his automobile collided with a bus owned and operated by the defendant; that at the time of the collision the said bus or safety coach was approaching him upon the highway with only one headlight burning and being driven on the wrong side of the road, and otherwise operated in a careless, reckless, unlawful, illegal and wanton manner. There was evidence tending to show that at the time of the collision the roads were wet and slippery and that the driver of the bus, after the collision, stated in substance that he knew he was going to hit plaintiff's car but was not taking any chances in running off the road; that the last time he ran off the road it took him six hours to get back, and that he was behind his schedule anyway. On direct examination the plaintiff testified that the bus that struck his car was named "The Sheik" and was driven by a man named Childress. There was also testimony tending to show that the defendant did not own a coach named "The Sheik" but did own at the time a bus named "Miss Burlington." There was also evidence tending to show that the plaintiff immediately after the collision stated that the name of the bus that struck him was "Miss Burlington." Graham Cates, witness for plaintiff, and who was in the car with plaintiff at the time of the collision, testified: "I have ridden on that car since then. Mr. Childress was operating it when I rode on it. I know the Safety Coach Company was operating it. Mr. Walker, an employee of the Safety Coach, told me he was working for the Safety Coach people. I bought a ticket from him to Greensboro. He told me it was the Safety Coach Bus that hit us."

This testimony was admitted without objection.

The judgment was as follows: "This cause coming on to be heard and being heard before his Honor, Luther M. Carlton, judge presiding and a jury, and issues having been submitted and answered as follows: First. Were the plaintiff and his car injured by the negligence of the defendant as alleged in the complaint? A. Yes. Second. What compensatory damage, if any, is the plaintiff entitled to recover of the defendant? A. $150.00. Third. What punitive damages, if any, is the plaintiff entitled to recover of the defendant? A. $200.00. It is there-

fore ordered, adjudged and decreed that the plaintiff have and recover of the defendant the sum of three hundred and fifty dollars together with the costs of this action, to be assessed by the clerk."

From the judgment as rendered the defendant appealed.

Carroll & Carroll for defendant.

BROGDEN, J. The controlling question presented by the record is whether or not there was sufficient evidence to take the case to the jury. The defendant contends that there is not such evidence by reason of the fact that the plaintiff testified that the name of the bus that struck him was "The Sheik," which was not owned by the defendant, and that thereafter during the trial the plaintiff testified that the name of the bus which caused the injury, was "Miss Burlington," said bus being owned by the defendant. Irrespective of the name of the bus, the witness Cates testified, without objection, that after the collision he had ridden in the same bus that caused the injury, and that he knew of his own knowledge that said bus was operated by the defendant. So that, the defendant's contention as to the insufficiency of the evidence rests upon the sole proposition that conflicting evidence ought not to be considered by a jury in the trial of causes. In *Shell v. Roseman,* 155 N. C., 90, this Court has held that conflicting statements of a witness in regard to or concerning a material or vital fact does not warrant a withdrawal of the case from the jury. It affects only the credibility of the witness, and therefore, where inconsistent and conflicting statements are made by a witness or a party, the judge has no power to determine which is correct. This function belongs exclusively to the jury. To the same effect is *Christman v. Hilliard,* 167 N. C., p. 5, where plaintiff testified on direct examination that he could not state whether the land in controversy was embraced in the deed or not. Thereafter on cross-examination he testified that the land was embraced in the deed. The trial judge thereupon nonsuited the plaintiff and under the principles of law heretofore established by the Court, the nonsuit was held to be error. *Ward v. Mfg. Co.,* 123 N. C., 248; *Barnett v. Smith,* 171 N. C., 535; *Evans v. Lumber Co.,* 174 N. C., 31; *Bank v. Brockett,* 174 N. C., 41; *Newby v. Realty Co.,* 182 N. C., 34; *Shaw v. Handle Co.,* 188 N. C., 236; *In re Fuller,* 189 N. C., 512; *Lee v. Brotherhood, ante,* 359.

The charge of the able trial judge covered every phase of the testimony and correctly applied the rules of law pertinent thereto, and the judgment as written must stand.

No error.

A. K. MOORE v. CITY OF GREENSBORO.

(Filed 14 April, 1926.)

Municipal Corporations—Cities and Towns—Taxation—Bonds—Abattoir—Police Powers—Health—Approval of Voters—Constitutional Law.

The erection of an abattoir by a city for the slaughter and inspection of cattle and beef for the consumption of its citizens, comes within the police power of the municipality for the preservation of the public health, and is for a governmental purpose, a necessary expense, not requiring the question of the issuance of bonds therefor to be submitted to the voters thereof for their approval. Const. of N. C., Art. VII, sec. 7.

APPEAL by plaintiff from *Finley, J.*, at February Term, 1926, of GUILFORD. Affirmed.

B. T. Ward for plaintiff.
Robert Moseley for defendant.

ADAMS, J. Pursuant to the Municipal Finance Act (C. S., ch. 56, Art. 23) the city council of the city of Greensboro passed an ordinance providing for the sale of bonds in an amount not exceeding $65,000 for the purpose of buying a site and erecting thereon and equipping an abattoir for the benefit of the city; providing also for the annual levy and collection of a tax to pay the interest as it accrues and the bonds as they mature. The ordinance has not been submitted to and approved by a majority of the qualified voters in the city, and it is the intention of the city council immediately to advertise and sell the bonds without calling an election. The suit was brought to enjoin the city from issuing the bonds on the ground that an abattoir is not a necessary municipal expense. His Honor adjudged that it is a necessary expense; so the only point for decision is the correctness of his judgment.

"No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Const., Art. VII, sec. 7. In *Henderson v. Wilmington, ante,* 269, we had occasion to say: "The decisions heretofore rendered by the Court make the test of a 'necessary expense' the purpose for which the expense is to be incurred. If the purpose is the maintenance of the public peace; if it partakes of a governmental nature or purports to be an exercise by the city of a portion of the State's delegated sovereignty; if, in brief, it involves a necessary governmental expense—in these cases the expense required to effect the purpose is 'necessary' within the meaning of Art. VII, sec. 7, and the power to incur such expense is not dependent on the will of the qualified voters." The immediate inquiry, therefore, is

whether the purchase of the site and the building of an abattoir is a governmental expense.

In his complaint the appellant says that the proposed abattoir is to be used as a place where animals may be inspected and slaughtered; also where meat may be inspected before it is exposed to sale on the market. Such inspection may be referred to the exercise by the city of the delegated police power of the State. That this power may be delegated to a municipal corporation is no longer to be questioned. *S. v. Austin,* 114 N. C., 855; *S. v. Vanhook,* 182 N. C., 831; *Gunter v. Sanford,* 186 N. C., 452; *S. v. Weddington,* 188 N. C., 643. The enforcement of police regulations is a governmental function, 19 R. C. L., 697(a), and it has been said that upon the exercise of this power depend the life, safety, health, morals, and the comfort of the citizen, the enjoyment of private and social life, the beneficial use of property, and the security of social order. *Slaughterhouse cases,* 16 Wall, 62. It is upon this principle that the expense of providing water, sewerage, a fire department, a markethouse, an incinerator, and similar improvements is deemed to be the necessary governmental expense of a city or town. We see no sound reason why the principle should not extend to and include an abattoir, which is intended as a protection against disease. *Henderson v. Wilmington, supra; Storm v. Wrightsville Beach,* 189 N. C., 679; *Scales v. Winston-Salem, ibid.,* 469; *Dayton v. Asheville,* 185 N. C., 12. We think the judgment should be

Affirmed.

E. T. KEARNS, L. P. KEARNS, M. B. SMITH, AND ELVIRA L. SMITH v. A. B. HUFF AND THE HIGH POINT AMUSEMENT COMPANY, INC.

(Filed 14 April, 1926.)

Reference—Statutes—View of Premises—Landlord and Tenant—Leases—Contracts.

Where the question involved in the action is the amount of rent due the lessor of a store or amusement house, under a contract placing the rental at not less than a certain monthly sum, with obligation of the lessee to pay more in accordance with what other tenants were paying in the locality for other stores, etc., of the same rental value, the question to be determined by the jury does not require a view of the premises, entitling the party requesting it to a compulsory reference under the provisions of our statute. C. S., 573.

APPEAL by plaintiff from *Schenck, J.,* at December Term, 1925, of GUILFORD. Affirmed.

This is an appeal from the refusal of the court below to grant an order for a compulsory reference. The motion for a reference was made by

plaintiffs for the reason that the case is "one which requires a personal view of the premises," within the meaning of the statute, C. S., 573, latter part of subsection 3.

The complaint alleges that plaintiffs and defendant, Huff, made a lease in 1920, by which the plaintiffs rented to Huff the Broadway Theatre Building, in High Point, for the term of five years from the first day of March, 1925; Huff promised to pay the plaintiffs as rent for the building:

"A sum which shall represent the highest price per month being paid on the said 1 March, 1925, by any tenant or lessee for property on the same side of the street and in the same locality, and of approximately the same size, frontage, number of stories, etc., not less than $200 per month, the said rent to be in monthly payments on the first of each month in advance beginning on 1 March, 1925, and a corresponding amount on the first day of each succeeding month thereafter during the life of this lease."

The complaint alleges "That there are two tenants or lessees for property on the same side of the street and in the same locality, and of approximately the same size, frontage, number of stories, etc., who were paying on 1 March, 1925, as rent for such premises the sum of $400 per month." The defendants deny this allegation. The plaintiffs claim $400 per month as rent under the lease, and the defendants tender $260.00.

Austin & Jerome for plaintiffs.
Gold & York for defendants.

PER CURIAM. C. S., 573 and subsection 3, are as follows: "Where the parties do not consent, the court may, upon the application, or of its own motion, direct a reference in the following cases: (3) Where the case involves a complicated question of boundary, or one which requires a personal view of the premises."

There is nothing in the facts of record "which requires a personal view of the premises."

The plaintiffs have the right to have the owners, or lessees, or occupants of the premises mentioned in their complaint as witnesses who can testify to a jury the same side of the street and in the same locality the buildings are on and the size, frontage, number of stories, and the amount of the rent that was being paid on 1 March, 1925.

The power of the court below to order a view by the jury is set forth in *S. v. Stewart,* 189 N. C., p. 345.

The judgment of the court below is

Affirmed.

STATE v. J. W. HOLLINGSWORTH.

(Filed 21 April, 1926.)

1. Constitutional Law—Common Law—Evidence—Letters and Papers Tending to Incriminate.

The protection afforded to defendants in criminal actions by our Constitution, Art. I, sec. 11, is a matter of absolute right to them, and extends to the forced production of letters and other papers in their possession that may tend to incriminate them upon the trial.

2. Same—Involuntary Production of Incriminating Evidence—Appeal and Error—Objections and Exceptions.

Where the solicitor in a criminal action, in the presence of the jury at the trial, makes demand upon the prisoner that he produce certain letters and papers relevant thereto, which the prisoner asserts tend to incriminate himself contrary to Article I, sec. 11 of the Constitution, and the trial judge orders their production, and the letters and papers were produced and introduced in evidence on behalf of the prosecution: *Held*, the production of the letters and papers was compulsory on the plaintiff, and under his exception to the order, constituted reversible error on appeal.

APPEAL by defendant from *Stack, J.*, at January Term, 1926, of FORSYTH.

The defendant was convicted of false pretense. C. S., 4277. The specific charge was that "unto Mary R. Craddock and W. G. Craddock he did falsely pretend that he represented clients who made loans on from two to twenty years terms on approved security and upon payment of the sum of $35.00, $15.00 of which had to be paid in advance, he would procure a loan for them or return the money thus advanced, less actual cost of appraisal"; whereas these representations were false; and by means thereof the defendant obtained from Mary R. Craddock and W. G. Craddock $15.00 in money, etc.

Judgment was pronounced upon the verdict and the defendant appealed, assigning error.

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

John D. Slawter and Fred M. Parrish for defendant.

ADAMS, J. After reading an advertisement purporting to have been authorized by the defendant, Mary R. Craddock wrote him a letter inquiring whether he could procure for her a loan of $1,200 on certain property situated in or near Wentworth. The defendant replied, and thereafter several other letters passed between them. Substantially the entire negotiation was in writing; besides the letters it included two

applications for the loan, the first dated 12 December, 1923, and the second 28 January, 1924. On the day set for the trial the State served on the defendant a notice to produce "all letters and other correspondence between him and Mary R. Craddock and W. G. Craddock," written between specified dates, and while the trial was in progress the prosecution made a request in the presence of the jury that the defendant produce one of the applications signed by Mrs. Craddock. The facts are thus given in the record: "The solicitor asked for the application for the loan referred to in one or more of the letters between the parties, and the defendant insisted that the notice to produce did not cover such a paper. Thereupon, the court permitted the solicitor to give notice then in open court in the presence of the jury to produce the application at the reconvening of court at 2:30, to which order the defendant excepted. In obedience to the order the defendant did produce the application, and upon objection over defendant's protest delivered it to the solicitor for the State, the defendant objecting to being required to produce it or any statement in regard to it being made in the presence of the jury."

Counsel for defendant: "Your Honor said it was because it was not provided for in the notice. We object, because in the opinion of the defendant the State is endeavoring to force him to produce evidence upon which to convict himself." The counsel also said, "Your Honor made an order that the defendant produce the application, which we do produce, and again object to being forced to produce it."

The same objection was interposed to the production of certain letters which were in the defendant's possession. To the order requiring the defendant to produce the application and the letters he duly objected and excepted. The letters and the application were then introduced in evidence by the State.

The Constitution provides: "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty." Art. I, sec. 11.

The object of the clause, "and not be compelled to give evidence against himself," is to secure a person who is or may be accused of a criminal offense against the compulsory disclosure of any fact or circumstance that could be used upon the trial as evidence tending to show his guilt. *La Fontaine v. Southern Underwriters,* 83 N. C., 133. This immunity extends, not only to one who actually testifies as a witness, but to the defendant in the trial, even though he decline to testify as a witness in his own behalf. It is intended to shield a person against the

involuntary production of his private papers in response to process or an order addressed to him as a witness and against the involuntary production of documentary evidence, which might be used as incriminating evidence. *S. v. Pence,* 25 L. R. A. (N. S.), 818 and note. If the proposed evidence is procured by such compulsion as is inconsistent with the exercise of volition it falls within the privilege and should not be admitted. *S. v. Turner,* 136 A. S. R. (Okla.), 129 and note. Very pertinent is the language used in *Gillespie v. State,* 35 L. R. A. (N. S.) (Okla.), 1171: "Section 21 of Art. II of the Constitution of this State provides that no one shall be compelled to give evidence which would tend to incriminate him. This is not merely a formal technical rule, which may be enforced or dispensed with at the discretion of the courts. It is a mandatory, constitutional provision, securing to every defendant a valuable and substantial right. If a county attorney can, in the presence of the jury, demand of the defendant, or his counsel, the production of any letters or papers which may be proven to be in the possession of the defendant, of what value is this constitutional provision? It is true that making a demand upon a defendant to produce such letters or papers is a different thing from forcing him to produce them; but the effect is the same, because if a defendant refuses to comply with such a demand it is equivalent to admitting that the evidence demanded would incriminate him, if it were produced. The observation and experience of all practicing attorneys will sustain the statement that such an inference is more damaging to a defendant than a proven fact would be. When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminate himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon."

The same conclusion was announced as to the Fifth Amendment to the Federal Constitution in *McKnight v. U. S.,* 115 Fed., 972: "A perusal of the decisions of the Supreme Court shows that no constitutional right has been the subject of more jealous care than that which protects one accused of crime from being compelled to give testimony against himself. The right to such protection existed at the common law, and was carried into the Constitution, that the citizen might be forever protected from inquisitorial proceedings compelling him to bear testimony against himself of acts which might subject him to punishment. In the present case the accused, in the presence of the jury, was, by direction of the court, called upon to produce the document which it was alleged contained the corrupt agreement which was the basis of the note given by irresponsible persons for the funds of the bank by McKnight's direction. The production of such a paper would have been

self-criminating to the defendant in the highest degree. It is true, the learned judge made no order requiring its production; but the accused, by the demand made upon him before the jury, after proof tending to show his possession of the document, was required either to produce it, deny or explain his want of possession of the writing, or by his very silence permit inferences to be drawn against him quite as prejudicial as positive testimony would be. Nor were the jury advised that the nonproduction of the writing afforded no ground for an inference of guilt. We think this procedure was an infraction of the constitutional rights of the accused, within the meaning of the Fifth Amendment to the Constitution."

Our own decisions are in accord with this principle. In *S. v. Jacobs,* 50 N. C., 259, it is said, "Nothing is better settled than that a defendant in a criminal charge cannot be compelled to produce a private paper which would be evidence against him on the trial. *Rex v. Worsenham,* 1 Ld. Raym. Rep., 705; *Rex v. Mead,* 2 Ld. Raym. Rep., 927; *Rex v. Shelly,* 3 Term R., 142. Courts of law would not compel a party to produce a deed or other private paper, even in a civil case, where it was intended to be used as evidence against him; *Huldane v. Harvey,* 4 Burr. Rep., 2489. So strong was this rule, and so much did it interfere with the ascertainment of the truth in trials at law, that our Legislature, in the year 1821, passed an act empowering the courts of law to require the parties under, certain circumstances, to produce books and papers in their possession, or power, which might contain evidence pertinent to the issue on the trial (see Rev. Code, ch. 31, sec. 82). This act does not extend to criminal prosecutions, and as to them, therefore, the law remains as it was before." It is not difficult to distinguish between the case just cited and *S. v. Johnson,* 67 N. C., 55; *S. v. Woodruff, ibid.,* 89; *S. v. Garrett,* 71 N. C., 85; *S. v. Graham,* 74 N. C., 646.

The State gave notice to the defendant to produce the papers therein described. In the brief for the State it is suggested that as the notice involved no compulsion the defendant should have refused to produce the papers on the ground that they would incriminate him; also that a mere objection to the evidence was not sufficient to raise the constitutional issue. *S. v. Mitchell,* 119 N. C., 784; *S. v. Morgan,* 133 N. C., 743; *Ivey v. Cotton Mills,* 143 N. C., 189. The defendant did object for the reason that the evidence would incriminate him. But he had the papers in his possession and his refusal to respect the order of the court would have invited the usual consequences of wilful disobedience. The circumstances exclude the idea of volition; on the contrary the order to produce the papers imported compulsion. He did all he could have done: he "protested" against being compelled to produce the papers

because of their incriminating character and excepted to the order compelling their production.

The reason for requiring notice is to enable the defendant to produce the document if he desires to do so, or if it be lost to have witnesses to meet such proof of its contents as may be offered by the adverse party. Whenever it becomes necessary in a criminal action to serve notice on the defendant to produce at the trial any paper, book or document in his possession to be used as evidence against him, he should be given an opportunity in the absence of the jury to bring it forward or to decline to do so; and if he refuse to produce it for the reason that it might tend to convict him, secondary evidence may then be offered. *Nalley v. State,* 74 S. E. (Ga.), 567; *Sellers v. State,* 78 S. E. (Ga.), 196; *Thomas v. State,* 91 S. E. (Ga.), 247; *Skidmore v. State,* 26 L. R. A. (N. S.) (Tex.), 466; *Knights v. State,* 76 A. S. R. (Neb.), 78.

The defendant is entitled to a

New trial.

A. E. BURTON v. S. R. SMITH ET AL.

(Filed 21 April, 1926.)

1. Actions—Appearance—Summons—Service—Irregularities.

By general appearance in a court of competent jurisdiction the defendant in the action waives all irregularities both as to the summons and service thereof. C. S., 490.

2. Removal of Causes—Judgments Set Aside—Appearance—Pleadings—Statutes—Waiver.

By appearing and moving to set aside a judgment by default rendered, a nonresident defendant upon whom summons by publication had been made, and who brings himself within the provisions of C. S., 492, by moving within a reasonable time after notice, has as a matter of right twenty days from the time such judgment had been set aside, in which to answer or demur, and only requesting or acquiescing in a longer time granted by the court is a waiver of his right to file a petition and bond for the removal of the cause to the United States Court, under the Federal Statute.

3. Removal of Causes—Courts—Jurisdiction — State Courts — Federal Courts.

The State and Federal Courts have concurrent jurisdiction in controversies between citizens of the State and nonresident defendants, when the amount involved is jurisdictional in the Federal Court, and the nonresident defendant has the election to remove the cause to the Federal Court by moving in apt time under the provisions of the statute, unless the defendant has previously waived his right.

4. Same—Waiver.

Where a nonresident defendant otherwise has the right to have a cause removed from the State to the Federal Court, he may waive it by failing to aptly file a proper petition and bond therefor, as the statute requires, or by his acts and conduct amounting to a recognition of the jurisdiction of the State court wherein the action has been brought.

5. Same—Pleadings.

Where a judgment by default in the State court in an action against a nonresident defendant by a resident plaintiff, wherein summons by publication has been made, has been set aside on defendant's motion, C. S., 492, the mere fact that the judge has allowed him the statutory time in which to answer or demur, without defendant's objection, does not call for the exercise of the court's discretion, and the defendant may therein aptly file his petition and bond for the removal of the cause to the Federal Court as a matter of his legal right.

6. Removal of Causes—Severable Causes.

Where a judgment by default for the want of an answer has been set aside as to a nonresident defendant among other defendants who are residents, against whom no judgment has been rendered, as in this case, the actions will be considered as severable within the meaning of the Federal Removal Act.

STACY, C. J., dissenting.

APPEAL by defendant, S. R. Smith, from order of *Daniels, J.*, at November Term, 1925, of NEW HANOVER. Reversed.

This action was begun in the Superior Court of New Hanover County on 8 December, 1924, against defendant, S. R. Smith, a nonresident, and his codefendants, some of whom are residents of the State of North Carolina. Summons, returnable to said court, was duly served on S. R. Smith by publication, as provided by C. S., 484; said service was completed on or before the return day, to wit, 19 January, 1925. At February Term, 1925, no answer having been filed to the complaint, filed on 8 December, 1924, judgment by default was duly rendered in favor of plaintiff and against said defendant, in accordance with the prayer of the complaint.

Thereafter, defendant appeared, and upon affidavit duly filed in the cause, moved that said judgment rendered by default, be vacated and set aside, and that he be allowed to file answer to the complaint and make defense in said action, according to the course and practice of the court. C. S., 492. This motion was heard on 28 September, 1925; the order made thereon is as follows:

"It is now ordered and adjudged by the court that said judgment entered at February Term, 1925, be and the same is hereby vacated and set aside, and that said defendant, S. R. Smith, be allowed to file his answer to the complaint in said action, and that he be allowed twenty days from this date to file same."

Thereafter, and within twenty days from the date of said order, to wit, on 17 October, 1925, defendant, having caused notice to be served on plaintiff, and having filed petition and bond as required by section 29 of U. S. Jud. Code, U. S. Comp. Stat., sec. 1011, moved before the clerk of the Superior Court of New Hanover County, C. S., vol. III, sec. 913(b), for an order of removal of this action from the Superior Court of New Hanover County to the District Court of the United States for the Eastern District of North Carolina for trial. Upon said motion the clerk made the following order:

"This cause coming on for hearing before W. N. Harris, clerk of the Superior Court of New Hanover County, on 17 October, A.D. 1925, on the petition of defendant, S. R. Smith, to remove this action as to said defendant to the United States District Court for and on the grounds recited in the petition, and being heard, and after hearing full argument of U. L. Spence, Esq., attorney for said defendant, S. R. Smith, in favor of granting said petition, and of A. G. Ricaud, Esq., attorney for plaintiff, against granting same, and it appearing to the court from the record in said cause and from the petition of removal, that said defendant appeared through his attorney, U. L. Spence, before his Honor Frank A. Daniels, judge of the Superior Court, holding the courts of the Eighth Judicial District at Burgaw on Monday, 28 September, 1925, and obtained a judgment vacating and setting aside the judgment by default against the said defendant, S. R. Smith, entered at February Term, 1925, of the Superior Court of New Hanover County, and also asked for and obtained an extension of time to file an answer to the complaint in said cause, all of which fully appears in the judgment rendered therein by Judge Daniels, on said 28 September, and that said defendant consented thereto and entered no exception or objection to the form thereof:

"The court now finds as a legal conclusion and decision that the appearance of said defendant, S. R. Smith, before his Honor, Judge Daniels, at Burgaw, on 28 September, was a general appearance and a voluntary submission to the jurisdiction of the court, and that he thereby waived and abandoned his right of removal to the U. S. District Court, if any such right he had. For the foregoing reasons, the petition of said defendant is denied."

From this order defendant appealed to the judge holding the next term of the Superior Court of New Hanover County. Upon the hearing of the appeal, the order was affirmed. From judgment affirming the order of the clerk, denying motion for removal, defendant appealed to the Supreme Court.

C. D. Weeks and A. G. Ricaud for plaintiff.
U. L. Spence and Thos. E. Bass for defendant.

CONNOR, J. At the expiration of the time prescribed in the order for the publication of summons in this action, the court having found from the affidavit of the printer (C. S., 489(2), that notice of the summons had been duly published as required by C. S., 485, the defendant, S. R. Smith, was then in court, the service of the summons was completed, and the Superior Court of New Hanover County had jurisdiction of defendant. C. S., 487. Before rendering judgment by default, at February Term, 1925, the court adjudged that the summons had been duly served. *Hyman v. Jarnigan,* 65 N. C., 96. The principle that a general appearance in an action or proceeding, pending in a court of competent jurisdiction, waives all defects or irregularities both as to summons and service, is well established, and has been consistently enforced. C. S., 490, and cases cited. It has no application, however, to the facts of this case, and affords no aid in the decision of the question presented by this appeal. The appearance of defendant to move, under C. S., 492, that the judgment rendered in this action against him be vacated and set aside, nothing else appearing, was an admission by him that the court had acquired jurisdiction by the publication of summons as provided by statute. The appearance of a defendant in a suit in a state court, whether general or special, does not operate as a waiver of his right to remove the action to the Federal Court for trial. *Goldey v. Morning News,* 156 U. S., 518, 39 L. Ed., 517; *Stevens v. Richardson,* 9 Fed., 191; *Grotor Bridge Co. v. American Bridge Co.,* 137 Fed., 284, 26 Ann. Cas., 1337, and note, 23 R. C. L., 739. Defendant in this action did not contend, at the time he made his motion, nor does he contend now, that there was any defect or irregularity in the summons or in its service upon him. *Motor Co. v. Reaves,* 184 N. C., 260; *Wooten v. Cunningham,* 171 N. C., 123; *Barnhardt v. Drug Co.,* 180 N. C., 436. He contends that under the Constitution of the United States, and the statute duly enacted by Congress, pursuant thereto, he has the right, at his election, to have this cause removed from the State to the Federal Court for trial; that he has neither lost nor waived this right.

The District Court of the United States for the Eastern District of North Carolina has jurisdiction of the action stated in the complaint, in favor of plaintiff, a citizen of the State of North Carolina, and against the defendant, a citizen of the State of New York, the amount involved being in excess of the jurisdictional sum of $3,000. *Swain v. Cooperage Co.,* 189 N. C., 528; U. S. Jud. Code, sec. 24; U. S. Comp. Stat., sec. 991. The jurisdiction of the Superior Court of this State is concurrent with that of the District Court of the United States; either court may try the action, and render judgment, finally determining the

rights of the parties. The State court has jurisdiction of the defendant and of the subject-matter of the action, but must yield the right to try the action to the Federal Court, at defendant's election, unless defendant has lost or waived his right of removal.

Defendant has the right to have the action, commenced in the State court by plaintiff, removed to the District Court for trial, provided the notice was given and the petition and bond were filed, as required by statute, prior to the expiration of the time within which he was required to file answer by statute of the State, or rule of the court in which the action was pending. U. S. Jud. Code, sec. 29; U. S. Comp. Stat., sec. 1011. The right of removal may be lost by failure of defendant to give notice, and to file petition and bond required, within the time prescribed; or it may be waived by any act of defendant, from which it clearly appears that he has elected, not to avail himself of the right of removal to the Federal Court, but to join issue with the plaintiff for trial in the State court. *Southern Pacific Co. v. Stewart,* U. S., 62 L. Ed., 345; *Murphy v. Stone, etc.,* Eng. Corp., 44 Mont., 146, 119 Pac., 717, 26 Ann. Cas., 1134, and note. If defendant in an action pending in a State court, which is removable to the Federal Court for trial, requests such court to grant an extension of time for filing his answer beyond the time prescribed by statute, or fixed by rule of court, and such request is granted, or if defendant accepts such extension of time, made upon motion of plaintiff, or by the court, upon its motion, he thereby waives his right of removal. 23 R. C. L., 514. A defendant who has invoked or who has acquiesced in the exercise by the State court of its discretionary power to grant him relief beyond his strict legal right, without objection and exception, is conclusively presumed to have elected not to avail himself of his legal right to the removal of the action to the Federal Court for trial; he has elected to try the issues in the State court. *Patterson v. Lumber Co.,* 175 N. C., 90; *Pruitt v. Power Co.,* 165 N. C., 416; *Ford v. Lumber Co.,* 155 N. C., 352; *Bryson v. R. R.,* 141 N. C., 594; *Howard v. R. R.,* 122 N. C., 944. The Superior Court of this State has the power, to be exercised by the judge in his discretion, to grant an extension of time, beyond that prescribed by statute, for the filing of an answer. C. S., 536; *McNair v. Yarboro,* 186 N. C., 111; *Howard v. Hinson, ante,* 366; *Greenville v. Munford, ante,* 373. It has no power, however, to extend the time within which a petition for removal to the Federal Court shall be filed. 3 R. C. L., 610.

In *Austin v. Gagan,* 39 Fed., 626, 5 L. R. A., 476, it is said, "The policy of the law is to require parties to take the first opportunity to change the forum, and in default thereof the right is waived." Failure

of defendant to demand change of venue, when the county designated by plaintiff in the summons and complaint is not the proper county, before the time for answering the complaint expires, is a waiver of the right. C. S., 467, and cases cited.

It has been held by this Court that the right of a defendant against whom a judgment has been rendered, in an action to which he has been made a party, by publication of summons, as provided by statute, to have said judgment vacated and set aside under C. S., 492, to the end that he may defend said action, is absolute and not within the discretion of the judge. In *Rhodes v. Rhodes,* 125 N. C., 191, it is said, "The object of this section is to enable a nonresident, who has not been personally served with summons, to come in, within the prescribed time after judgment, and assert his right as fully in every respect as he could have done before judgment had he been personally served." In *Page v. McDonald,* 159 N. C., 38, it is said, "The statute requires that a nonresident, upon good cause shown, *must* be allowed to defend after judgment, if his application to do so is made within one year after notice of judgment, or within five years after its rendition, preserving the rights of innocent purchasers. The right to be let in for the purpose of defending the action does not depend upon the exercise of the judge's discretion. The terms of the statute are mandatory, and the judge must set aside a judgment and permit a defense if good cause can be shown, and what is sufficient cause must be a question of law." See, also, *Moore v. Rankin,* 172 N. C., 599; *Foster v. Allison Corp., ante,* 166. Under the decisions of this Court, defendant, by his motion that the judgment rendered at February Term, 1925, be vacated and set aside, for that summons in this action had been served upon him by publication, and that he had had no actual knowledge of the pendency of the action, prior to its rendition, did not invoke the discretionary powers of the court, nor did he waive any right by his appearance to make said motion. In granting the motion, the court gave to defendant only the relief to which he was entitled as a matter of right. *Lumber Co. v. Arnold,* 179 N. C., 269. The decision of the question presented by this appeal, then, necessarily involves but one further inquiry, to wit, did the court allow defendant 20 days from the date on which the judgment was vacated and set aside, under C. S., 492, as a matter of right, or as a matter of discretion?

The language of the statute, pertinent to this question, is as follows: "The defendant against whom publication is ordered may in like manner (*i. e.,* by application to the court), upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms

as are just." The words "upon such terms as are just" ought not to be construed as limiting or modifying the right to defend, which this Court, in cases cited above, has held is an absolute, legal right of defendant. They should be construed as conferring upon the court, by whose order defendant obtains his legal right to defend, power, by the imposition of just terms, to put plaintiff and defendant, as near as may be, in the same relative position, with reference to the subject-matter of the litigation, as they were in at the time the action was begun, or at least at the time defendant would have been required to answer the complaint if the summons had been personally served upon him. The court has power to do this by orders with reference to the costs that have accrued, or by interlocutory orders, with respect to property within its jurisdiction, or by such orders, designed to protect plaintiff, who had recovered the judgment, set aside and vacated, upon motion of defendant, upon service of summons on defendant, as provided by the laws of this State, from loss which might result to him from the action of the court. It ought not to be held that the court has power to impose terms upon defendant which would result in depriving him of a right guaranteed to him by law. The right to defend an action necessarily involves the right to answer or demur to the complaint, in accordance with the provisions of the statute or general rule of court, and thus to raise issues of fact to be tried by a jury, or issues of law to be tried by the court. It cannot be said that although this right is absolute, a defendant can enjoy it, only at the discretion of the court. The time within which an answer or demurrer must be filed, in the Superior Courts of this State, is prescribed by statute, and not by rule of court. Such time may be extended by the judge, in his discretion, upon such terms as may be just. C. S., 536.

If it shall be held as law in this State that a citizen of another state, against whom a judgment has been recovered by a citizen of this State in a State court, upon summons served by publication, and who has as a matter of right, upon his application to said court obtained an order setting aside and vacating said judgment, to the end that he may defend the action, under C. S., 492, may file answer or demur to the complaint, only within time to be allowed by the court, in its discretion, then it must follow that, although the action is removable to the District Court of the United States, under the act of Congress, such defendant, by requesting or accepting any time within which to answer or plead to the complaint, waives his right of removal. Unless the time within which he may file answer or plead, after the judgment is vacated and set aside, is fixed by statute, he cannot assert his legal right to relief under C. S., 492, without waiving his right also under the Constitution and laws of the United States, to a removal of the cause from the State

to the Federal courts. These rights are not inconsistent, and a defendant ought not to be confronted with such a dilemma.

The statute, now in force, prescribing the time within which an answer must be filed to a complaint, in an action commenced in the Superior Court, is as follows:

"The defendant must appear and demur or answer within twenty days after the return day of the summons, or after service of the complaint upon each of the defendants, or within twenty days after the final determination of a motion to remove as a matter of right. If the time is extended for filing the complaint, then the defendant shall have twenty days after the final day for such extension in which to file the answer or demurrer, or after the service of the complaint upon each of the defendants (in which latter case, the clerk shall not extend the time for filing answer beyond twenty days after such service): *Provided,* in cases where the complaint is not served, for good cause shown, the clerk may extend the time to a day certain; otherwise the plaintiff may have judgment by default." C. S., vol. III, sec. 509.

When the judge in his order setting aside and vacating the judgment, provided that defendant was allowed twenty days within which to answer, he exercised no discretion in behalf of defendant; the provision is a recognition of defendant's right under the statute to twenty days from the date of the order, determining his right to defend, as the time prescribed by statute, within which he must answer or plead to the complaint of plaintiff.

Defendant did not waive his right to removal of the cause from the State court to the United States Court by his appearance in the action to move that the judgment be set aside and vacated under C. S., 492. He did not waive such right by his acceptance of the order, providing that he be allowed the statutory time of twenty days to answer. He filed his petition for removal within the time allowed by statute for answer, and we must hold that it was error to refuse his motion. See *Harter Township v. Kernochan,* 103 U. S., 562, 26 L. Ed., 411.

The action set out in the complaint in favor of plaintiff and against defendants, some of whom are citizens of this State, and some citizens of other states, is clearly separable, as to such defendants. The action as against each defendant may be prosecuted by plaintiff without regard to the rights of plaintiff to recover of the other defendants. This clearly appears from the fact that plaintiff sought and obtained a judgment against the defendant, S. R. Smith, alone, in the Superior Court of New Hanover County. The order of the clerk was erroneous, and upon defendant's appeal should be

Reversed.

STACY, C. J., dissenting: If the defendant, S. R. Smith, ever had any right to remove this suit to the Federal Court for trial after judgment by default was entered against him, which may be doubted, I think he has clearly waived it on the facts of the present record.

In the first place, the right of the nonresident defendant to have the default judgment set aside comes from C. S., 492, which provides that, where service is obtained by publication, the defendant may, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof and within five years after its rendition, on such terms as are just. There is nothing in this statute which allows the defendant twenty days to answer after the judgment is set aside; and he is not entitled, as a matter of right, to have the judgment vacated, except "upon good cause shown"; and then he is permitted to defend "on such terms as are just." *Page v. McDonald,* 159 N. C., 38; *Turner v. Machine Co.,* 133 N. C., 381.

The case of *Harter Township v. Kernochan,* 103 U. S., 562 (26 L. Ed., 411), is not a controlling authority for the defendant's position in the case at bar, for in the *Kernochan case* the Supreme Court of the United States was dealing with a statute of Illinois which is different from ours in that it provides: "The person so petitioning may appear and answer the complainant's bill; and, thereupon, such proceedings shall be had as if the defendants had appeared in due season and no decree had been entered." Thus the two statutes under consideration, the one in the *Kernochan case* and the one here, are quite dissimilar. There is no provision in our statute that when a default judgment is vacated, such proceedings shall then be had as if the defendant had appeared in due season before the judgment was taken. This distinguishes the two cases.

But conceding that the defendant's right to defend under our statute has been construed to be absolute, and not discretionary with the judge, still he may waive the right to have the cause removed to the Federal Court for trial by any act which clearly shows an election on his part not to avail himself of such right. *Dills v. Fiber Co.,* 175 N. C., 51; *Patterson v. Lumber Co., ibid.,* 92.

A defendant may by his conduct estop himself from contesting the jurisdiction of the State court. *Bank v. Lumber Co.,* 52 Fed., 897; *Guano Co. v. Ins. Co.,* 60 Fed., 929; *Schipper v. Cordage Co.,* 72 Fed., 803; Note, 26 Ann. Cas., 1337; 23 R. C. L., 614.

And this is but just, for "by the exercise of the right of removal, the petitioner refuses to permit the State court to deal with the case in any way, because he prefers another forum to which the law gives him the right to resort." *Wabash Western Ry. v. Brow,* 164 U. S., 271, 41 L. Ed., 431.

Animadverting on how the defendant may waive his right of removal, *Judge Rose,* in his valuable work on Federal Procedure, sec. 374, p. 325, says:

"On the other hand, as it is a mere right of the parties, and under the present statute, a right confined to the defendant, he can exercise it or not as he sees fit. He may so act as to show that he has elected not to do so. This election he will conclusively evidence by not making his motion within the time limited by law. It is easy to conceive of many other ways in which even before the expiration of the time in which he must exercise this right he may so act as to estop himself from so doing, upon the theory that what he has done shows that he has agreed not to avail himself of it."

The defendant made his initial appearance in the instant suit 27 April, 1925, by giving notice to the plaintiff and his counsel that on 11 May following he would lodge a motion before the judge holding the Superior Court of New Hanover County, in the courthouse at Wilmington, N. C., to set aside and vacate the default judgment taken against him at the February Term, 1925, of said court, "and for an order allowing said defendant to file answer to the complaint," upon the ground that the judgment was irregularly entered and taken without due process of service, "the facts with reference thereto being as set forth in the affidavit of the said S. R. Smith hereunto attached." Accompanying said affidavit, and as a part thereof, was the defendant's answer which he proposed to file so that he might "make defense in said action according to the course and practice of the court," as prayed for in his affidavit.

This motion was not heard in New Hanover County at all, but by consent (*Gaster v. Thomas,* 188 N. C., 346), the matter was continued to be heard in chambers at Burgaw, Pender County, 28 September, 1925, when and where the judge entered an order vacating the judgment and allowing the defendant, S. R. Smith, at his request, twenty days within which to file answer to the complaint; and it was further agreed at that time by counsel for plaintiff and defendant "that the court might enter its judgment on said motion without finding the facts thereon."

In *Case v. Olney,* 106 Fed., 433, the defendant filed a demurrer in the State court and made an agreement as to when it should be heard; later he sought to remove the cause to the Federal Court: *Held,* that the right to remove had been waived. Quoting from *Frink v. Blackinton,* 80 Fed., 307, the Court said: "Moreover, in view of the delays in litigation arising unavoidably from the right of removal, the construction of doubtful provisions should be in favor of requiring the greatest diligence from parties exercising that right."

In the judgment of the clerk, refusing the motion to remove, and which was affirmed by the judge of the Superior Court, it is found as a fact that the defendant "asked for and obtained an extension of time to file an answer to the complaint," which was allowed and "the defendant consented to the judgment and entered no exception or objection to the form thereof."

This was a voluntary submission by the defendant to the jurisdiction of the State court and a waiver of the right to remove. *Ford v. Lumber Co.*, 155 N. C., 352; *Bryson v. R. R.*, 141 N. C., 594; *Howard v. R. R.*, 122 N. C., 944.

Speaking to a similar situation in *Pruitt v. Power Co.*, 165 N. C., 416, *Clark, C. J.*, said: "The entering into the stipulation for an extension of time to file the answer, which was duly approved by the judge, was a general appearance in the State court and waived the right to remove. It was an acceptance of the jurisdiction of the State court."

I think the judgment of the Superior Court is correct and that it should be affirmed.

W. C. TISE v. MRS. JENNIE PALMER HICKS ET AL.

(Filed 21 April, 1926.)

1. Descent and Distribution—Contracts—Consideration—Estates.

The settlement of the estate of a deceased father by his children as heirs at law, upon written agreement as to their respective shares, and allowing to one of them moneys advanced to his father during the latter's lifetime, is upon a sufficient legal consideration, and in the absence of fraud, is enforceable in our courts.

2. Same—Principal and Agent—Acceptance of Benefits.

Where one of the heirs at law of a deceased person has not signed a written agreement purporting to be a settlement of the estate, and afterwards accepts from an agent appointed therein her proportionate part of the proceeds of the sale of certain lands therein provided for, with full knowledge of the facts, she is thereby bound by its terms.

3. Married Women—Contracts—Descent and Distribution—Executors and Administrators—Personalty—Deeds and Conveyances—Signature of Husband.

Where the agent has bargained to sell certain lands of the deceased under contract of settlement made between the heirs at law, as affecting their distributive shares, and thereafter the administrator by order of court has sold the lands to make assets, all the heirs at law being parties to the proceedings, it is not required that the husbands of such heirs

at law who were married should have signed the contract formerly made, in order to its valid enforcement, the proceeds for distribution being regarded as personalty and subject to the wife's executory contract made valid by our statute. C. S., 2507.

APPEAL by defendants from order of *Finley, J.*, at September Term, 1925, of FORSYTH. Affirmed.

This action was commenced in Forsyth County Court on 22 March, 1923. From judgment of nonsuit, rendered therein at close of plaintiff's evidence, plaintiff appealed to the Superior Court of said county, assigning said judgment as error. Upon the hearing of this appeal, the judge presiding, being of opinion that there was error in rendering said judgment, ordered that the action be remanded to Forsyth County Court for new trial. From this order defendants appealed to the Supreme Court.

Parish & Deal for plaintiff.
W. H. Beckerdite, Benbow, Hall & Benbow for defendants.

CONNOR, J. The sole question presented by this appeal, is whether there was error in allowing defendant's motion for judgment as of nonsuit, at the close of plaintiff's evidence, on the trial in Forsyth County Court. This evidence tended to show the facts to be as follows:

W. R. Tise died on 1 May, 1913, intestate, leaving, as his heirs at law five children, plaintiff and defendants. At the date of his death he was seized in fee and in possession of a house and lot on Patterson Avenue, in the city of Winston-Salem. On 30 March, 1918, defendants, Mrs. R. B. Brewer, Mrs. Ellen Sanders, and R. F. Tise, signed a paper-writing, in form an agreement with plaintiff, in which it is recited that the heirs at law desire to close the estate of their deceased father without the expense of an administration. Defendants therein appointed and designated plaintiff as agent to sell and dispose of said house and lot to the best advantage. They agree therein "that in consideration and by reason of advancements made to our father and mother during their life by W. C. Tise, to the amount of $2,076.96, which is not disputed by us as parties of the first part, and in consideration of $25.00 to each of us paid, the receipt of which is hereby acknowledged, upon the sale of said property, and when the funds are collected for same, W. C. Tise, party of the second part, shall deduct from the funds in hand the amount of $2,076.96, and the remainder, if any, of the funds thus received from said estate, after deducting the amount above, shall be divided equally among the heirs at law."

At the date of this agreement, both Mrs. Brewer and Mrs. Sanders were married; neither of their husbands signed the agreement. Mrs.

Hicks, who was then a widow, did not sign said paper, although her name is included therein as one of the parties of the first part. Two days thereafter she signed a paper in words as follows:

"Received of W. C. Tise twenty-five (25) dollars in full of my part in the house on Patterson Avenue."

Her signature on said paper was witnessed by defendant, R. F. Tise. Plaintiff paid to each of defendants, heirs at law, by check, which was subsequently collected by each, the sum of $25.00. Two or three days after these papers were signed, and after these payments were made, defendants notified plaintiff that they would not execute deed for said house and lot. Plaintiff made no effort thereafter as agent to sell or dispose of said house and lot. He has collected rents for said house, since the signing of the papers, and has paid taxes and repairs on same. He offers to account for the difference, to be applied as a credit upon his claim for advancements made by him to his father and mother.

On 31 January, 1920, defendant, W. V. Hartman, was appointed as administrator of W. R. Tise, deceased. It is admitted that, having duly qualified as such administrator, he has sold said house and lot, under an order made in a special proceeding to which the heirs at law were parties, to make assets. He now has in hand, as proceeds of said sale, the sum of $2,631 for distribution.

There was no evidence of any debts or claims against the estate of W. R. Tise; or of any claims against said fund, except those of the parties to this action. Plaintiff demands judgment that the administrator pay to him the amount advanced to his father and mother, in accordance with the agreement of the heirs at law, and that the balance be equally divided among them. He contends that he is entitled to receive two-fifths of said balance—one-fifth as heir at law, and one-fifth as assignee of Mrs. Palmer (now Hicks).

There was no allegation or contention that the signatures of defendants, brothers and sisters of plaintiff, to the paper-writings offered in evidence, were procured by fraud, or misrepresentation, or that there was any mistake of the parties or of the draftsman, with respect to said papers. Defendants offered no evidence tending to contradict the admission in the agreement that plaintiff made the advancements to their father and mother to the amount as stated therein. Their assignment of error is based solely upon their contention that their agreement, in writing, signed by them, five years after the death of their father, is not legally sufficient to entitle plaintiff to the relief which he seeks by this action.

Plaintiff does not contend that defendants, by the agreement, conveyed, or contracted to convey to him, their respective interests in the house and lot, which their father owned at his death; he does not seek

to recover damages for breach of contract to convey, nor is he asking for a decree of specific performance. He neither alleges nor offers to prove an indebtedness of his father to him for money loaned, upon either an express or an implied contract. He seeks to enforce a contract in the nature of a family settlement, made by brothers and sisters, each of whom was of full age at the time it was made, in recognition not of strict legal liabilities, perhaps, but of obligations arising out of facts known to each of them as members of a family.

The cases cited to sustain propositions of law discussed in defendants' brief show, we think, a misconception of plaintiff's cause of action. The receipt signed by Mrs. Palmer (now Hicks) is not a deed; it does not purport to be a deed, or a contract for the conveyance of her interest in the lot. It was signed by her in contemplation of a sale of the house and lot for the settlement of her father's estate. Whether the effect of her receipt is to assign to plaintiff all her interest in the proceeds of the sale, or whether the receipt should be construed only as making her a party to the agreement signed by her sisters and brother, R. F. Tise, and which it was contemplated that she should also sign, does not now appear. This may be determined upon the trial, which must be had in accordance with the order remanding the action to Forsyth County Court.

The validity of the agreement, as to Mrs. Brewer and Mrs. Sanders, is not affected by the fact that each was a married woman at the time she signed the paper-writing, or by the further fact that her husband did not assent thereto in writing. The paper-writing is not a conveyance of real estate by these defendants, requiring for its validity the assent in writing of their husbands, but is a contract by which each defendant deals with her property so as to affect same as she is authorized to do by C. S., 2507. The agreement as to the division and distribution of the proceeds of the sale of the house and lot, made upon a valuable consideration, is predicated upon a conveyance to be made thereafter by the heirs at law, upon a sale to be made by plaintiff as their agent. These defendants could not have made this conveyance without the assent in writing of their husbands, and without the privy examination required by law. The lot was sold, not indeed by plaintiff, as agent, but by the administrator, who was thereto lawfully authorized by the court; it was conveyed, not by the heirs at law, but by the administrator, upon confirmation of the sale by the court. All the heirs at law were parties to the proceeding by which the lot was sold. The proceeds of the sale are now in the hands of defendant administrator to be distributed and paid to the parties according to their respective interests. The interest of each of these parties, including the married women, is subject to his or her contract. The effect of the Martin Act,

ch. 109, Laws 1911, C. S., 2507, is to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, *sui juris*. *Dorsey v. Corbett,* 190 N. C., 783; *Satterwhite v. Gallagher,* 173 N. C., 525; *Thrash v. Ould,* 172 N. C., 728; *Warren v. Dail,* 170 N. C., 406; *Royall v. Southerland,* 168 N. C., 405; *Lipinsky v. Revell,* 167 N. C., 508. The interests of the defendants in the funds derived from the sale of the house and lot were subject to their contracts, notwithstanding the fact that they were married and the further fact that their husbands did not assent in writing to such contracts.

The agreement offered in evidence, made and entered into by defendants, upon a valuable consideration received by each of them from plaintiff, is sufficient, nothing else appearing, to support an action by plaintiff for its enforcement against defendants, parties thereto, as a family settlement. The revocation by defendants of their appointment of plaintiff as their agent to sell and dispose of the house and lot to the best advantage, does not affect the validity of the agreement with respect to the distribution among them of the fund arising from the sale, made by the administrator. This agreement was founded upon a valuable consideration, which defendants have retained, and which is separate and distinct from that which induced them to appoint plaintiff as agent.

Family settlements, such as that made by these brothers and sisters, when fairly made, and when they do not prejudice the rights of creditors, are favorites of the law. They are made by members of a family, after the death of the father or mother, when the ties of family affection are strong and sacred, and before they are weakened by separation of brothers and sisters, which is inevitable. They are made in recognition of facts and circumstances known, often, only to those who have lived in the sacred family circle, and which a just family pride would not expose to those who neither understand nor appreciate them. They proceed from a desire on the part of all who participate in them to adjust property rights, not upon strict legal principles, however just, but upon such terms as will prevent possible family dissensions, and will tend to strengthen the ties of family affection. The law ought to, and does respect such settlements; it does not require that they shall be made in accord with strict rules of law; nor will they be set aside because of objections based upon mere technicalities. *Judge Gaston,* speaking of an agreement similar to that involved in this action, says, in *Bailey v. Wilson,* 21 N. C., 182, "The agreement was confessedly entered into for the purpose of quieting disputes between the children of the same father, in relation to the disposition of his property; it is apparently equal; it is not denied to be fair, and was deliberately as-

sented to as a proper and just family arrangement. Such arrangements are upheld by considerations affecting the interest of all parties, often far more weighty than any considerations simply pecuniary." 11 R. C. L., 29, sec. 15; 18 C. J., 891, sec. 159; *Moore v. Gregory* (Va.), 131 S. E., 692.

The judgment of the Superior Court, sustaining the assignment of error upon appeal from the county court, and remanding the action for a new trial, is

Affirmed.

STATE v. BEATRICE SIMMERSON.

(Filed 21 April, 1926.)

Criminal Law—Burden of Proof—Presumption of Innocence—Self-Defense.

The presumption of innocence remains with the defendant in a criminal action throughout the trial, and upon evidence tending to show that the defendant cut the prosecuting witness with a knife, it is reversible error for the trial judge to instruct the jury that she must prove self-defense to a moral certainty by her evidence tending to sustain it.

CRIMINAL ACTION, tried before *Stack, J.*, at October Term, 1925, of FORSYTH.

The defendant was indicted upon a bill of indictment charging assault with a deadly weapon, to wit, a knife, with intent to kill one Dave Smith. The evidence tended to show that Dave Smith, the prosecuting witness, and the defendant had been going together for some time, and that on a certain night in June, 1925, the defendant came to Smith's house at his request. Clara Davis was in the house with him. When the defendant came in the room there were some words between Smith and the defendant, and thereupon he commanded the woman, Clara Davis, to "stand back out of the way," and drew a split-bottom chair and hit the defendant, pushing her through the door and over a bed in the back room where there was no light. The defendant testified that after she had been hit with the chair three times and pushed back on the bed in the back room where there was no light, and while Smith was on top of her, beating her, that she got a knife and cut upwards, inflicting wounds upon him.

In response to a question asked the defendant by the court as to why she cut the prosecuting witness, she testified that she was afraid of her life; that Smith had a knife and was on top of her threatening to kill her at the time she cut him.

The cause of the fight was doubtless correctly expressed by the defendant in a statement to the policeman who arrested her, and who testified that the defendant said "that she was in love with Dave Smith, and when she saw him in the room with another woman she went all to pieces."

The defendant was convicted and sentenced to the State's prison for a period of not less than one year nor more than two years, from which judgment the defendant appealed.

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

J. E. Alexander for defendant.

BROGDEN, J. The trial judge charged the jury as follows: "The court charges you that when the State has shown the use of a deadly weapon, and the court charges you that it was a deadly weapon, and further shows that the defendant stabbed the prosecuting witness in the manner indicated by the prosecuting witness, that the State has made out a prima facie case. Then the burden shifts. The defendant comes forward and says that she is not guilty. She admits that she stabbed the prosecuting witness with a knife, but says that she cut in self-defense." The court further charged the jury: "It is the duty of the defendant to fully satisfy you of this or to a moral certainty that she acted in self-defense before you can excuse her. If she has so fully satisfied you or satisfied you to a moral certainty that she cut in self-defense, then you will acquit the defendant, but unless you are so satisfied, you will convict the defendant."

This charge of the trial judge is not in accordance with the law and cannot be upheld. The vice of the charge consists of two elements: first, the shifting of the burden to the defendant; and, second, the imposing upon the defendant, in substance, the burden of establishing her innocence beyond a reasonable doubt. The correct principle governing cases of this sort is thus expressed by *Ruffin, J.*, in *S. v. Wilbourne,* 87 N. C., 529: "The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offense charged must be established by the prosecutor. The rule itself is but another form of stating the proposition, that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice; and so forcibly has it commended itself by its wisdom and humanity to the consideration of this Court, that it has never felt willing, whatever circumstances or difficulty might attend any given case, to disregard it."

The correct doctrine as to burden of proof in criminal cases is thus expressed by *Stacy, J.*, in *S. v. Falkner,* 182 N. C., 796: "The burden is still with the State, under all the evidence, to satisfy the jury, beyond a reasonable doubt, of the defendant's guilt."

These just principles are so intimately wrought into the fabric of the law that it is unnecessary to debate the proposition. *S. v. Little,* 178 N. C., 722; *Speas v. Bank,* 188 N. C., 524; *S. v. Redditt,* 189 N. C., 176; *S. v. Kline,* 190 N. C., 177.

Indeed, the able attorneys for the State, under the authority of *S. v. Redditt, supra,* frankly confess error in the brief filed in this cause.

There must be a

New trial.

PILOT REAL ESTATE COMPANY v. E. J. FOWLER ET ALS.

(Filed 21 April, 1926.)

1. Demurrer—Appeal—Reversal.

Where a demurrer *ore tenus* is sustained in the inferior court, and the exceptions thereto sustained in the Superior Court, its effect is to overrule the demurrer.

2. Demurrer—Pleadings—Counterclaim.

Upon plaintiff's demurrer to defendant's counterclaim, every material allegation therein is to be taken as established.

3. Pleadings—Statute of Frauds—Demurrer.

The Statute of Frauds must be pleaded by one claiming that a contract relied on by the opposing party was verbal, when a written contract was required, and a demurrer on such ground is untenable.

4. Same—Consideration.

Where a party to a contract claims in an action that a lack of consideration renders it unenforceable, it is necessary for him to aver it in his pleadings, and he may not maintain this defense upon demurrer to the pleadings of the opposing party.

CIVIL ACTION before *Lane, J.*, at March Term, 1926, of FORSYTH.

Prior to 6 April, 1920, R. G. Stockton listed with the plaintiff for sale a certain house and lot located on Jackson Street in Winston-Salem. An officer of the plaintiff solicited the defendants to purchase said property for a home. The defendants, with said agent, looked over the property and agreed to purchase the same for $4,500. The plaintiff represented to the defendant that the lot fronted 50 feet on Jackson Street and extended back to a depth of 150 feet. On 6 April, 1920, the defendants paid the plaintiff as a cash payment $1,480.60, and received

a receipt for the amount so paid. Thereafter, on 11 October, 1920, the defendants executed two promissory notes, one for $140.00, payable to R. G. Stockton, six months after date, with interest at six per cent, and the other to the plaintiff, Pilot Real Estate Company, for $144.40, payable six months after date. Said notes were secured by deed of trust upon the property, executed by the defendants to the Wachovia Bank and Trust Company, trustee for said Stockton and the plaintiff. On or about 14 November, 1923, the defendants paid the Stockton note of $140.00, and thereupon by mistake and inadvertence the Wachovia Bank and Trust Company canceled the deed of trust. Thereupon the plaintiff brought this suit against the defendants, Fowler and wife, and Wachovia Bank and Trust Company, trustee, upon the note of $144.40. The Wachovia Bank and Trust Company filed an answer admitting in substance the allegations of the complaint. The defendants, Fowler and wife, filed an answer admitting the execution of the note and deed of trust, and the cancellation of said deed of trust, but denying that said deed of trust had been canceled by mistake, and further denying that they owed the plaintiff anything.

The said defendants set up a counterclaim and independent cross-action against the plaintiff, alleging that they had purchased a lot 50 by 150 feet, and had received a deed for a lot 43 by 102 feet, and that by reason of such deficiency in the quantity of property, they had been damaged in the sum of $1,000. The defendants further allege a new and special contract between the parties, to wit: "That these defendants, after discovering that they had not received the number of feet in width and depth that they had been promised and which the plaintiff represented the lot contained, demanded of plaintiff and said R. G. Stockton that they be given the number of feet which they had purchased and were promised, and the plaintiff and R. G. Stockton promised that they would take the property back and pay these defendants the money they had paid on said property or would furnish them the number of feet which these defendants had expected and which the receipt for the $1,480.60 called for, and which was promised these defendants they would receive when the first payment of $1,480.60 was made to the plaintiff in this action; that the plaintiff and R. G. Stockton have never paid these defendants the money nor have they ever given these defendants the number of feet of land which these defendants bought and which was promised to them."

The plaintiff demurred *ore tenus* to defendants' counterclaim and cross-action, in that the said counterclaim was not sufficient to constitute a cause of action for the reason that no fraud or mutual mistake was alleged; and, further, that the special contract was within the statute of frauds and, in addition, there was no consideration to sup-

port it. The demurrer was sustained in the county court, and the defendants, Fowler and wife, appealed to the Superior Court. His Honor, Lane, J., holding the Superior Court of Forsyth County, entered judgment sustaining the exceptions of the defendants to the ruling of the judge of the county court and remanded the case to the county court for trial before a jury upon appropriate issues. From said judgment plaintiff appealed.

Ratcliff, Hudson & Ferrell for plaintiff.
Charles W. Stephens for defendants.

BROGDEN, J. The effect of the judgment of the Superior Court of Forsyth County was to overrule the demurrer *ore tenus,* which had previously been sustained by the County Court of Forsyth County.

The initial question to be considered is whether or not the demurrer should have been overruled.

A demurrer to an answer admits as true every material fact alleged in the answer to the same extent and with the same force as a demurrer to a complaint. *Trust Co. v. Wilson,* 182 N. C., 168.

The allegations of the answer constituting a counterclaim or cross-action are loosely drawn, but it is alleged that after the discovery of the shortage in quantity the parties made a new contract whereby the plaintiff and Stockton "promised that they would take the property back and pay these defendants the money they had paid on said property or would furnish them the number of feet which these defendants had expected." The plaintiff demurs *ore tenus* to this new contract for that the alleged contract is: (1) within the Statute of Frauds, and (2) without consideration. Both grounds of demurrer are untenable. Verbal contracts relating to the sale or conveyance of land are not void but voidable, and the Statute of Frauds must be pleaded. It cannot be set up by a demurrer. *Curtis v. Lumber Co.,* 109 N. C., 401; *Loughran v. Giles,* 110 N. C., 423; *Williams v. Lumber Co.,* 118 N. C., 928; *Hemmings v. Doss,* 125 N. C., 400; *Stephens v. Midyette,* 161 N. C., 323.

The answer does not disclose whether the special contract is verbal or written. Conceding that the contract alleged is verbal and executory, and therefore requiring a consideration to support it, yet a failure of consideration is a defense and must be pleaded. In *Godwin v. Gardner,* 182 N. C., 97, *Stacy, J.,* declares the law to be that: "Matters set up in defense, or as a bar to plaintiff's suit and requiring proof, may not be considered upon a demurrer."

The judgment of the Superior Court must, therefore, be

Affirmed.

EDWARDS LUMBER AND LAND COMPANY v. P. H. SMITH AND SMITH REALTY COMPANY.

(Filed 21 April, 1926.)

1. Contracts—Options—Lands—Specific Performance—Damages.

A contract to purchase land provided the bargainor could give title to a certain acreage, is a unilateral contract or option, and upon his inability to make good title, he is neither compellable in equity to specifically perform, or liable in damages for his failure to do so.

2. Same—Tender of Purchase Price—Notice of Acceptance.

The proposed purchaser of lands under an option is required to make tender of the purchase price within the terms of the contract, and his mere notice of acceptance is insufficient.

BROGDEN, J., took no part in the decision of this case.

APPEAL by plaintiff from *Grady, J.*, at September Term, 1925, of DURHAM. Affirmed.

Action for specific performance of contract to convey land, with abatement of purchase price, or for damages for breach of said contract. The execution of the contract as alleged in the complaint was admitted; defendant denied its breach. In defense defendant alleged an offer of full performance by him, in accordance with the terms of the contract, and the refusal by plaintiff to accept said offer. At the close of all the evidence, upon motion of defendant, judgment of nonsuit was entered. From said judgment plaintiff appealed.

Fuller, Reade & Fuller, McLendon & Hedrick, and Brawley & Gantt for plaintiff.

Manning & Manning for defendant.

CONNOR, J. On 23 May, 1923, defendant, P. H. Smith, for and in consideration of $50, agreed in writing, signed by him, to sell and convey to plaintiff, by good and sufficient deed, in fee simple, with full covenants of general warranty of title, certain lands situate in Durham County, described by metes and bounds, as lot No. 1, and lot No. 2, for the sum of $16,000, "provided that seller can give title," and "provided, however, said party of the second part (plaintiff) accepts said offer on or before 5 July, 1923. If not accepted on or before said date, I (defendant, P. H. Smith), am no longer bound to sell, or party of second part (plaintiff) bound to buy, and this agreement and option expires by its limitation as above." Some ten days thereafter plaintiff notified defendant that it would accept said offer, and requested defendant to convey lot No. 1 to L. P. McLendon and N. D. Bitting, and lot No. 2 to plaintiff.

Upon receipt of said notice, defendant requested the Durham Loan and Trust Company to execute a deed, conveying the land described therein to the Smith Realty Company. This deed was executed on 6 June, 1923, and was duly recorded. Thereafter, at defendants' request, the Smith Realty Company executed a deed conveying the land described therein, which was a part of the land conveyed to it by the Durham Loan and Trust Company to L. P. McLendon and N. D. Bitting. This deed was tendered to plaintiff, and Messrs. McLendon and Bitting, who declined to accept same. The land conveyed in the last mentioned deed is the same land as that referred to as lot No. 1 in the contract between plaintiff and defendant. The part of the land conveyed to Smith Realty Company by the Durham Loan and Trust Company, not included in the deed to McLendon and Bitting, is the same land as that described in the contract as lot No. 2. By reason, however, of difference in the lengths of the boundary lines as contained in said descriptions, the area of the land described in the deed from Smith Realty Company to McLendon and Bitting, is less than the area of lot No. 1, as described in the contract; for the same reason, there is a deficiency in the area of the lot conveyed by the Durham Loan and Trust Company to Smith Realty Company, which is the same land as that described in the contract as lot No. 2. It appears from the evidence that defendant is unable to give title to all the lands described in the contract, by the deed executed by the Durham Loan and Trust Company to the Smith Realty Company. There was no evidence that defendant had or could give title from any source to that portion of the land as described in the contract which was not included in the descriptions contained in the deed to the Smith Realty Company.

Plaintiff contends that there was a breach of the contract between plaintiff and defendant, for that defendant failed to convey to its assignees, Messrs. McLendon and Bitting, all of lot No. 1, or to plaintiff all of lot No. 2, as described in the contract, by good and sufficient deeds in fee simple, with full covenants of general warranty of title, as he had contracted to do. If, however, defendant was unable to give title by such deeds, he was relieved of any obligation to do so, by the express words of the first proviso in the contract. He contracted to so convey, provided he could give title. If, as plaintiff alleged and contended, defendant was unable to give title, there was no contract for the breach of which plaintiff was entitled to recover damages, or of which the court could decree specific performance. The contention of plaintiff that the first proviso could be invoked only for its protection cannot be sustained. It constitutes one of the terms upon which defendant entered into the agreement with plaintiff to sell and convey the land described in the contract. Plaintiff acquired no rights under the contract, unless

defendant was able to give title to the land by deed as set out in the contract. It needed no protection, for it was not bound until by its voluntary act it accepted the offer of defendant to sell as set out in the agreement. The contract is an option; its obligation, until acceptance of the offer by plaintiff, is unilateral.

While there was evidence that plaintiff notified defendant that it would accept the offer to sell and convey the land described in the contract, there was no evidence from which the jury could have found that plaintiff tendered defendant the purchase price of the land, in cash and notes, as provided in the contract. Defendant was not bound by a mere notice of acceptance of his offer as contained in the option, unaccompanied by a tender of the purchase price. *Hudson v. Cozart,* 179 N. C., 247. A party to a contract, in order to maintain an action for damages for its breach, or for specific performance, if it be such a contract as will be enforced specifically by the court, must both allege and prove performance by him, or a waiver of performance by the party against whom relief is sought. There was no evidence at the trial of this action that plaintiff had performed his part of the contract or that defendant had waived such performance. There was no error in allowing the motion for nonsuit. The judgment is

Affirmed.

BROGDEN, J., took no part in the decision of this case.

GILLIAM v. JONES ET ALS.

(Filed 21 April, 1926.)

1. Appeal and Error—Pleadings—Judgments — Fragmentary Appeal—Dismissal.

An appeal from the refusal of the trial judge for judgment upon the pleadings, should be by exception noted to be considered upon appeal from the final judgment therein, and a direct appeal will be dismissed as fragmentary.

2. Same—Discussion of Merits.

The Supreme Court will not adjudge the rights of the parties upon dismissing the appeal, though sometimes it has done so, when from the incompleteness of the record or otherwise, no final disposition of the case can be accomplished.

CIVIL ACTION before *Schenck, J.,* at December Term, 1925, of GUILFORD.

W. E. Holley died a resident of Guilford County, leaving a widow, who is the plaintiff in this action, the defendants being the heirs at law of said Holley. In January, 1919, the land of the deceased was partitioned among his heirs at law, and his dwelling-house, together with other property, was allotted to his widow as dower in said proceeding. Thereafter the widow insured the dwelling-house, and on or about 2 December, 1924, the residence and dwelling-house was destroyed by fire. The insurance company adjusted the loss and paid into the hands of the clerk of the Superior Court of Guilford County the proceeds of the policy, amounting to $1,948.70. The plaintiff in this suit alleges "that she is entitled to have out of said money on deposit a sum or portion thereof equivalent to the extent of her insurable interest in said residence, the premium on such insurance having been paid by her." The defendants filed an answer claiming that the proceeds of said fire insurance belongs to them and not to the widow. There is no reference to the policy in the record, and it, therefore, does not appear as to how the policy was written. The record shows the following entry: "Plaintiff moves in the above-entitled case for a judgment on the pleadings for $1,948.70, being the total amount recovered on the insurance policy mentioned in the pleadings. Motion overruled and the plaintiff excepts. Plaintiff appeals to the Supreme Court."

Myrick & Stanley for plaintiff.
King, Sapp & King for defendant.

BROGDEN, J. This appeal must be dismissed for the reason that the denial of a motion for judgment on the pleadings is not appealable, there being no final judgment. It was the duty of the plaintiff, under the practice, to have excepted to the refusal of the judge to grant the motion, so that it could have been considered on an appeal from a final judgment. *Mitchell v. Kilburn,* 74 N. C., 483; *Walker v. Scott,* 106 N. C., 56; *Cameron v. Bennett,* 110 N. C., 277; *Cooper v. Wyman,* 122 N. C., 784; *Duffy v. Meadows,* 131 N. C., 31; *Barbee v. Penny,* 174 N. C., 571; *Duffy v. Hartsfield,* 180 N. C., 151; *Pender v. Taylor,* 187 N. C., 250.

It will be observed that in some of the cases, although the court dismissed the appeal for the reasons given, still an opinion was expressed as to the merits of the controversy where such an opinion would terminate the litigation.

This is not such a case. In the complaint the plaintiff alleges that she is entitled to a sum of money equivalent to the extent of her insurable interest in said residence, alleging in substance, that she paid the

premiums and that the contract of insurance was for her benefit. This is denied by the defendants. In addition, no reference is made to the policy of insurance, and it does not appear how the policy was written; so that any opinion by this Court, in the present state of the record, would be a mere "leap in the dark."

Appeal dismissed.

JOHN A. COLLINS v. SOUTHERN RAILWAY COMPANY.

(Filed 21 April, 1926.)

Negligence — Evidence — Nonsuit—Railroads—Municipal Corporations—Streets—Obstructions.

Evidence that a railroad company had previously allowed a city to cut an underpass for a street through its embankment, supported in the middle by a wooden pier with an eighteen-foot driveway on each side for the use of the public; and that later the railroad company replaced the wooden pier by one of concrete occupying the same space, is insufficient of the railroad's negligence in an action to recover damages for plaintiff's injury caused by running into the pier while driving his automobile. *Dillon v. Raleigh*, 124 N. C., 184, where the obstruction was in the street, cited and distinguished.

APPEAL by plaintiff from *Finley, J.*, at November Term, 1925, of FORSYTH.

Civil action to recover damages for an alleged negligent injury to plaintiff and his automobile sustained while plaintiff was driving along Patterson Avenue in the city of Winston-Salem and caused by his running into a concrete pier which stands, according to plaintiff's allegation, in the middle of the street and supports the defendant's overhead bridge or trestle spanning the same.

The defendant denied any liability on its part for the plaintiff's injury or damage, and upon the usual issues of negligence, contributory negligence and damages being submitted to the jury, there was a verdict for the defendant on the first issue.

From the judgment rendered thereon, denying any right of recovery, the plaintiff appeals, assigning errors.

Z. C. Camp for plaintiff.
Manly, Hendren & Womble for defendant.

STACY, C. J. There is no evidence, as we understand the record, to show that the concrete pier, with which the plaintiff collided, injuring himself and car, was erected in the street or public highway by the defendant.

The plaintiff was injured at a point where Patterson Avenue, a public street, in the city of Winston-Salem, passes under the railroad track of the Southern Railway Company, leading from Winston-Salem to Rural Hall. The defendant's track was built in 1889 when there was no roadway or underpass at this point, but rather an embankment or fill upon which the railroad track was constructed. In 1895, under an agreement with the public authorities, an opening for a roadway was cut beneath the track and through the embankment, the excavation for said opening being done by the public authorities, while a wooden trestle, supported in the center with a wooden pier, five feet wide at the bottom, was built by the defendant to preserve its track over the roadway. In 1921 the defendant was required to remove the old wooden trestle and replace it with a more suitable structure, which it did by erecting a steel bridge, supported in the center by a concrete pier, four feet wide at the base, and placed on the exact spot where the wooden pier formerly stood. The street at this point is forty feet wide from curb to curb, with a passage way on either side of the pier, eighteen feet in width.

The space upon which the pier stands has never been used as a part of the street or highway, nor has it been condemned or title thereto acquired in any way superior to the defendant's right to use it as a part of its right of way. Therefore, in no sense can it be said to be an obstruction placed in the street or highway by the defendant. *New Bern v. Wadsworth,* 151 N. C., 309.

The decision in *Dillon v. Raleigh,* 124 N. C., 184, is not at variance with our present position, for in that case the piers, posts or benches were erected *in the street* by the railroad company, and not on ground reserved as a part of the defendant's original right of way.

Under this view of the evidence, it is not necessary to consider the plaintiff's assignments of error, as he has failed to show any negligence on the part of the defendant, Southern Railway Company.

The verdict and judgment will be upheld.

No error.

AUSTIN, ADMINISTRATOR, v. BROWN ET AL.

(Filed 28 April, 1926.)

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

A timber contract conveys all standing trees as realty, but when severed they become personalty, and where a time for the cutting and removing of the timber is fixed by the conveyance, at the expiration thereof such

trees severed or standing as are left remaining on the lands are the property of the grantor, though the conveyance does not specify that they shall revert to him.

2. Same—Lumber.

The word "timber" which a grantee in a timber contract must remove from the lands within a stated time, does not include lumber, a manufactured product, and at the expiration of the period, the grantee may remove the same within a reasonable time, unless the contract by its terms includes the lumber as well as the timber.

3. Same—Appeal and Error—Issues.

Where the purchaser under a timber contract has taken lumber left on the premises by claim and delivery, after the time fixed for the removal by him of timber, which he has endeavored to remove within a reasonable time, it is reversible error for the court to refuse an issue as to his title to the timber, and submit only an issue of damages for its wrongful detention.

CIVIL ACTION tried by *Dunn, J.*, at December Term, 1925, of MOORE.

On 7 February, 1913, Duncan W. Brown conveyed to James W. Austin and his heirs and assigns "all merchantable timber, both standing and down, of pine and other varieties on the home farm of said party of the first part, consisting of 159 acres." Among other conditions, not pertinent, the following pertinent clause appears in the deed: "The party of the second part (James W. Austin) shall have the right to establish and operate a steam sawmill, with suitable site for same, on the above-described tract . . . and ingress and egress to any part of said tract necessary in cutting and removal of the timber; and shall have a period of five (5) years from the date hereof for the cutting and removal of the timber herein conveyed, with the privilege of continuing such operations during a further period of five (5) years by payment to the party of the first part (Brown), his heirs or assigns, at the rate of twenty-five dollars ($25.00) per annum, each period of three months or fraction thereof to be paid for as three months. It is mutually covenanted and agreed by and between the parties to this agreement that the said party of the first part (Austin) shall have the right to enter and remove from said land his firewood, any lightwood and parts of trees left on the ground by said party of the second part, and that this agreement terminates at the expiration of ten (10) years from date hereof, unless sooner terminated as above provided."

The plaintiff is the surviving partner of James W. Austin, the grantee in said deed. Under and by virtue of the terms of said deed the said Austin located his sawmill on the land and began cutting the timber. Austin died 12 January, 1923, and the plaintiff is his adminis-

trator and surviving partner. D. W. Brown, the grantor, died also prior to 7 February, 1923, and the defendants are his widow and his children.

The time for cutting and removing the timber expired 7 February, 1923. At that time the plaintiff had cut all the timber, removed the logs to the mill where they had been sawed into lumber, and the lumber stacked on sticks and in piles upon the land. On 8 February, the day after the time for cutting and removal had expired, the defendants notified plaintiff that he could not go upon said land to remove the lumber stacked thereon by reason of the fact that the defendants claimed that the lumber belonged to them because it had not been cut and removed during the period limited in the contract. The plaintiff thereupon brought this suit and instituted claim and delivery proceedings for possession of said lumber and the same was seized thereunder. There was a dispute between the parties as to the amount of lumber upon the premises.

The plaintiff tendered the following issue: "Is the plaintiff the owner and entitled to the possession of the lumber described in the complaint?" The court declined to tender this issue, but tendered the following issue: "What was the reasonable market value of the lumber at the time of seizure under the claim and delivery?"

At the conclusion of plaintiff's evidence, the trial judge stated to the jury that he would hold, as a matter of law, that the plaintiff had no right to enter upon the land described in the complaint after the expiration of the term mentioned in the contract and remove the lumber therefrom, which had been manufactured out of the timber trees cut down upon said land; and that, as a matter of law, the title to said lumber upon the expiration of said contract vested in the owner of the land, and the only matter reserved to be heard was the value of the lumber seized under the claim and delivery proceedings.

There was judgment for the defendant for the sum of $410.00, said judgment further adjudging that the action as to plaintiff's cause of action be nonsuited.

From the foregoing judgment plaintiff appealed.

H. F. Seawell for plaintiff.

U. L. Spence and J. C. Sedberry for defendants.

BROGDEN, J. The proposition is this: Can the purchaser of standing timber enter upon the land described in the contract and remove therefrom manufactured lumber after the period for "cutting and removal" prescribed in the contract has expired?

The construction and interpretation of timber contracts has been a fruitful source of litigation and has produced an almost unnumbered

multitude of decisions in the various courts of the country. The courts are hopelessly divided upon many pertinent questions relating to rights flowing from timber contracts, and any attempt to distinguish, reconcile or harmonize decisions upon the subject is an impossible and fruitless task.

In North Carolina it has been generally held: (1) That deeds for standing timber convey a fee-simple interest in such timber as realty, determinable as to all such timber as is not cut and removed within the time specified in the deed; (2) that upon severance of the trees from the land they become personal property; (3) that uncut timber and timber cut and not removed within the time specified in the contract becomes the property of the owner of the land, irrespective of whether the contract contains an express reverter clause or not. *Bunch v. Lumber Co.,* 134 N. C., 116; *Hawkins v. Lumber Co.,* 139 N. C., 160; *Lumber Co. v. Corey,* 140 N. C., 462; *Midyette v. Grubbs,* 145 N. C., 85; *Hornthal v. Howcott,* 154 N. C., 228; *Bateman v. Lumber Co.,* 154 N. C., 248; *Williams v. Parsons,* 167 N. C., 529; *Ollis v. Furniture Co.,* 173 N. C., 542; *Williams v. Lumber Co.,* 174 N. C., 229; *Morton v. Lumber Co.,* 178 N. C., 163.

The exact question presented by this appeal has not been determined by this Court. The nearest approach to a decision of the question is found in *Lumber Co. v. Brown,* 160 N. C., 281, in which the law was declared to be that saw logs left upon the premises at the expiration of the time designated by the contract reverted to the owner. It should be observed, however, that the actual question decided in the *Brown case* was that there was sufficient evidence of a sale to go to the jury. But conceding that the *Brown case* holds that logs left on the land reverted to the owner of the land, still the *Brown case* is not decisive of the question presented by this record for the plain reason that this record presents the question of manufactured lumber and not timber, trees or logs. Therefore, we come face to face with the question as to what is meant by the term "timber." Timber means growing trees and logs. *Johnson v. Truitt,* 122 Ga., 327. Perhaps the clearest and most comprehensive statement of the question involved is found in the case of *Hubbard v. Burton,* 75 Mo., 65, and is in this language: "We have no doubt that any trees standing, or felled, and lying in their natural state upon the land, after the expiration of twelve months from the date of the contract, would belong to the vendor. But does the term 'timber' embrace articles manufactured out of the timber? Suppose instead of purchasing the timber for the purpose of making railroad ties, the object of the purchaser had been to manufacture barrels, buckets or shingles, would defendant have been entitled to all such manufactured articles found upon the premises, after the expiration of the specified

time? It is evident that the object of inserting that provision in the contract was to avoid conferring upon the purchaser a right, indefinite as to time, to enter upon the land and cut down the timber—to limit the right to cut and remove the timber, or work it up, after the lapse of twelve months. We think the fair and reasonable construction of the contract is, that only the timber standing, or cut and lying upon the ground in its natural state, was forfeited to defendants."

The facts in the *Hubbard case, supra,* were that the contract provided that all timber not removed from the land within twelve months, whether cut or standing, was to be the property of the owner, and that certain railroad ties which had been manufactured prior to the expiration of the time specified in the contract, had been left upon the land, and suit was instituted to recover possession of said ties. The same definition and distinction was thus declared in *Butler v. McPherson,* 95 Miss., 635: "When the timber was manufactured into railroad crossties its use and nature changed. It was no longer timber. Its character as timber ceased when the labor of those who felled the trees, and cut the trunks thereof into appropriate lengths ceased and the labor of the manufacturer commenced. When the article is once perfected for immediate use, it is only known by its appropriate name, and is no more timber than bread is flour, or flour wheat, or mutton sheep, or beef oxen."

Some of the courts have held that when trees have been cut into saw logs that this in itself is a removal under contracts similar to the contract in the case now under discussion. *Macomber v. R. R.,* 108 Mich., 491; *Mahan v. Clark,* 219 Pa., 229; *Lancaster v. Roth,* 155 S. W., 597.

But however this may be, the weight of authority and the weight of reason is to the effect that when the trees are cut into logs, and the logs conveyed to a mill and manufactured into lumber, and the lumber stacked or piled upon the premises, that it ceases to be timber or standing trees, and therefore the principle of reverter does not apply. This principle has been recognized and upheld in the states of Maryland, Texas, Michigan, Maine, Georgia, Wisconsin, Pennsylvania, Missouri, Mississippi, New Hampshire, Minnesota, Kentucky, New Jersey, and Indiana: *Wimbrow v. Morris,* 118 Md., 91; *Lancaster v. Roth,* 155 S. W., 597; *Macomber v. Detroit L. & N. R. R.,* 108 Mich., 491; *Erskine v. Savage,* 96 Maine, 57; *Johnson v. Truitt,* 122 Ga., 327; *Golden v. Glock,* 57 Wis., 118; *Mahan v. Clark,* 219 Pa., 229; *Hubbard v. Burton,* 75 Mo., 65; *Butler v. McPherson,* 95 Miss., 635; *Tuttle v. Pingree,* 75 N. D., 288; *Pryor v. International Lumber Co.* (Minn.), 195 N. W., 772; *Irons v. Webb,* 41 N. J. Law, 203; *Halstead v. Jesup,* 150 Ind., 85.

The contrary view is discussed in the case of *Smith v. Wells* (Mass., 1924), 145 N. E., 50, which cites authorities in New York and Virginia. But, upon the other hand, in the case of *Clark v. Aldrich,* heard in the District Court of the U. S., for the District of Massachusetts and reported in 278 Fed., 941, it is held that sawed lumber, slabs and cord wood left upon the land at the termination of the time specified in the contract was personal property and could not be forfeited to the owner of the land unless such intention was plainly expressed in the contract. The opinion uses this language: "We have no occasion to undertake to reconcile the numerous and somewhat conflicting rulings as to contracts for the cutting and removal of timber. It is enough to note that the overwhelming weight of authority applicable to such a contract as was made by these parties is in support of the view taken by the court below," citing *Wimbrow v. Morris,* 118 Md., 91, and quoting with approval from that case as follows: "It seems to be the rule even in those jurisdictions which hold that all the rights of the parties to the timber terminated at the expiration of the time limit, if the timber is manufactured into lumber the owner of the timber does not lose his right thereto by the expiration of the time limit."

The various shades of definition and the reasons supporting the divergent views of the courts are collected in exhaustive notes contained in 15 A. L. R., 41; and 31 A. L. R., 944.

The contract in the case now under consideration specified a period for "cutting and removal of the timber." It further provided that the purchaser of the timber should operate a sawmill upon the land, and it was therefore in contemplation of the parties that the purchaser of the timber should have the right to saw during the entire period and until the last moment thereof if he so desired, and this very right would necessarily imply the privilege of removing the completed product from the premises.

It is urged that the principles of law upon which this decision is based, modify the contract of the parties by extending the time which the parties had agreed upon for the cutting and removal of the timber. This argument is not based upon sound reason because the parties contracted that *timber* should be cut and removed. The *timber* was cut and removed when it went through the mill and came out a manufactured product, and was therefore not embraced in the contract. The decisive principle is thus expressed in *Taylor-Brown Timber Co. v. Wolfe Creek Coal Co.* (Ky.), 107 S. W., 733, cited in defendants' brief:

"In respect to the lumber on the land, we think the lower court correctly ruled that appellant should have the right to remove it upon the ground that it is not embraced by the contract. There is no limitation in the contract as to the time the lumber should be removed from the

land. Nothing is said about it, and the time limit as to trees and logs does not embrace the manufactured product. The lumber was a chattel, left by the appellant on the land, and it should be allowed a reasonable time in which to remove it."

It was therefore error for the trial judge to hold, as a matter of law, that the plaintiff had no right to enter upon the lands described in the complaint for the purpose of moving the lumber stacked thereon, and it was also error to decline to submit the issue tendered by the plaintiff as to the ownership of said property. If the property belonged to plaintiff, we hold that he had a right to go upon the land and remove it within a reasonable time. Therefore, there must be a

New trial.

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

(Filed 28 April, 1926.)

1. Mines and Minerals—Contracts—Leases—Implied Covenants.

For the terms of a written contract with a reverter clause, for the mining of sand and gravel at a certain price per ton, payment to be made every six months, or deposited in a bank to the owner's credit, there is an implied covenant that the grantee will work the mine as such mines are ordinarily worked.

2. Same—Abandonment.

The absolute failure of the grantee of mining interests in land to work the mines under an implied covenant to do so, will be regarded as an abandonment of his right.

3. Same—Equity—Suits—Cloud on Title.

Where the grantee of mining interests in lands has abandoned his right to work them under the terms of the contract or conveyance, the grantor may maintain his suit to declare the conveyance forfeited, and to remove it as a cloud upon his title.

4. Pleadings—Demurrer.

Upon demurrer to the complaint, every material allegation thereof, and reasonable inference therefrom tending to establish the plaintiff's cause of action, will be taken as true.

5. Same—Mines and Minerals—Breach of Covenant.

Where the plaintiff alleges in his complaint a breach of defendant's implied covenant to mine the *locus in quo*, and that thereby, by his continued possession he has deprived the plaintiff of the value of his property rights therein, a demurrer is bad and should be overruled.

HURWITZ *v.* SAND AND GRAVEL CO.

APPEAL by plaintiffs from *Dunn, J.*, at December Term, 1925, of MOORE. Reversed.

This is an action brought to remove cloud from title to land by cancelling certain deeds from plaintiffs to John A. Royall and from said Royall to defendant, for nonuser and forfeiture in not complying with the terms of a mining contract. The complaint of plaintiff alleges that a contract to lease the sand, gravel and stone on certain land of plaintiffs was made with John A. Royall, the predecessor in title of the present defendants. Under the contract a certain amount was paid for five years and the other material provisions in the mining contract are: "And after the expiration of five years the said grantee, for himself, his heirs, administrators, executors and successors and assigns, agree to pay to 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 and 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 $2,000 royalties have been paid, exclusive of the $1,000 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. All obligations herein assumed or imposed upon the grantee shall be imposed upon his successors, heirs and assigns, but shall in no case relieve the said grantee of his personal responsibility to the grantors, their heirs, administrators, executors, successors and assigns. And it is further understood and agreed that the grantee, his heirs, administrators, successors and assigns, may deposit with Page Trust Company, for the benefit of the grantors, their heirs, administrators and assigns, the several sums of money or royalties hereinbefore provided for, and at the times hereinbefore specified in lieu of paying same to grantors, their

heirs and assigns. To have and to hold the said gravel, sand and stone and the said rights and privileges hereinbefore described, unto the said grantee, his heirs, successors, administrators and assigns, and the said grantee, for himself, his heirs, successors and 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 15 June, 1919, and the said grantee, for himself, his heirs, administrators, successors and assigns guarantees and agrees to pay the said grantors, their heirs, administrators and assigns the said sum of money and royalties above set forth."

The complaint alleges, in part:

"That since 15 June, 1924, the defendant has made no payment whatever of any rent, although same was due and owing to these plaintiffs, and that by reason thereof the defendant has forfeited all its right, title and interest in and to said contract, as provided by the terms thereof.

"That the contract between the plaintiff and John A. Royall under date of 15 June, 1919, recorded in Deed Book No. 74, page 77, and the conveyances from John A. Royall to the defendant herein, as recorded in Deed Book 76, page 215, constitute a cloud upon the title of the real estate of these plaintiffs which they are entitled to have canceled of record, as they are advised, informed and believe and so allege.

"That by reason of the default of the defendant in the payment of its rent, as provided by the terms of the contract and agreement and the conveyances of record as above set out, these plaintiffs are deprived of the use and enjoyment of their valuable sand, stone and gravel on the said described land by the nonuse thereof and default of the defendant."

The demurrer is as follows:

"1. The complaint does not state facts sufficient to constitute a cause of action in that—

"(a) It is not alleged that there was any default in the payment of royalties for five years after 15 June, 1919, specified in the deed, copy of which is attached to the complaint;

"(b) Under the terms of said deed and the allegations of the complaint the defendant is chargeable with one cent per ton for all gravel, stone and sand removed from said two tracts of land, and it is nowhere alleged that any gravel, stone or sand, after 15 June, 1919, has been removed from said land;

"(c) It is nowhere alleged in the complaint that any royalty in any specified amount was due or owing on any payment day mentioned in said deed to the plaintiffs or either of them by the defendant."

The demurrer was sustained and plaintiffs excepted, assigned error and appealed to the Supreme Court. The other material facts will be set forth in the opinion.

W. R. Clegg for plaintiffs.
H. F. Seawell for defendants.

CLARKSON, J. The present action was commenced on 3 December, 1925. There was an action for injunction heretofore between the same parties. 189 N. C., 1.

A demurrer admits the allegations of the complaint and all reasonable inferences to be drawn therefrom under a liberal construction of its terms, which must be upheld unless wholly insufficient. The pertinent parts of the mining contract to the controversy must be considered. From a careful examination of the contract, after 15 June, 1924, the five-year period having expired, it was clearly the intention of the parties that the mining for gravel, sand and stone should continue as heretofore, one cent per ton paid for all gravel, sand and stone removed from the land payable quarterly, and any default in the payment for six months, the title and interest in the mining contract shall revert to plaintiffs and their legal representatives. The contract further provided that the grantee should keep a true and strict account of all gravel, sand and stone removed from the land and furnish an itemized statement quarterly from 15 June, 1919, to plaintiffs. This action is brought over a year after the first quarterly period of default.

In *Conrad v. Morehead,* 89 N. C., p. 35, *Merrimon, J.,* construing a similar mining contract, said: "In the case before us the lessee covenanted expressly to pay the lessor 'One-tenth part of all the gold, silver and other metals that may be procured from said land, and to account for the same quarterly, if so required.' There is no express covenant that the lessee shall work the mine continuously, or in any particular way, or at all; but there is manifestly an implied covenant on the part of the lessee that he will work it as such mines are usually worked, and with ordinary diligence, under the surrounding circumstances; not, indeed, simply for his own advantage and profit, but as well to the end the lessor may have his toll 'quarterly, if he shall so require,' or at such longer intervals as he may see fit to prescribe. Taylor, L. & T., secs. 252, 253, 421; *Rosley v. Walker,* 5 Term Rep., 373; 4 Wait, Ac. & Def., 203, 246; Arch., 68. Such covenant arises by necessary implication. It would be unjust and unreasonable, and contravene the nature and spirit of the lease to allow the lessee to continue to hold his term a considerable length of time, without making any effort at all to mine for gold and other metals. Such a construction of the rights of the

parties would enable him to prevent the lessor from getting his tolls under the express covenant to pay the same, and deprive him of all opportunity to work the mine himself, or permit others to do so. The law does not tolerate such practical absurdity, nor will it permit the possibility of such injustice. . . . (p. 36.) It is of the essence of the contract, necessarily implied, that the lessee should work the mine with reasonable diligence, or surrender the lease, as he had the right to do by express stipulation, so that the lessor might, in the first alternative get the tolls; or, in the other, work the mine himself, or sell, or let it to some other person, in his discretion. This construction is reasonable and just, and in the absence of any express stipulation in respect to working the mine, the law implies that this was the contract between the lessor and lessee." *Maxwell v. Todd,* 112 N. C., 687; *Hawkins v. Pepper,* 117 N. C., 407.

In the mining contract there is a reverter clause in favor of plaintiffs. This is enforceable by plaintiffs. *Sharpe v. R. R.,* 190 N. C., p. 350.

The defendants now have possession of the land under the mining contract for the purpose of mining for gravel, sand and stone. The plaintiffs are entitled to a royalty since 15 June, 1924, of one cent a ton for all that is mined since the expiration of the five-year period. This mining contract is valuable to plaintiffs as well as to defendant. Under a contract, as in the present case, for a particular mining industry to be carried on, the defendant cannot keep the land and refuse to go on with the operation. Such a course would destroy plaintiffs' royalty and render their land valueless. Defendant will not mine, and plaintiffs are not allowed to do so. It would be the old fable of the "dog in the manger." For such a contingency we think the contract makes provision. Under the five-year lease contract, the payments are to be made quarterly. It is provided in the latter part of the lease contract, in reference to the one cent per ton to be paid after the five-year period, "the several sums of money or royalties hereinbefore provided for and at the times hereinbefore specified in lieu of paying same to grantors," the fund may be deposited with the Page Trust Company, for the benefit of plaintiffs. The lease contract by fair implication provided that the mine must be operated and quarterly royalty is to be paid, and true and strict account kept of all gravel, sand and stone removed from the land and an itemized statement furnished plaintiffs quarterly. It is true the contract provides that this shall not be paid until removed from the land. But, when defendant refuses to carry on its mining operations according to contract with reasonable diligence, and does not mine so it can sell and pay the royalty, it waives its right by omission, abandonment and neglect, and the plaintiffs can, after

waiting six months after these quarterly periods, as it has done in this case according to the contract, bring an action under the mining contract for reverter, especially provided by the contract, and to remove the cloud on the title to the land. Any other construction, from the entire contract would work a grave injustice to plaintiffs never contemplated by the parties and be inequitable and unconscionable. The position here taken is fully borne out by the authorities in this State and elsewhere.

The question arises, does the plaintiffs' complaint, by reasonable inference, allege facts sufficient to come within this position here taken? We think so.

It is alleged, among other things, that the defendants by nonuse and default have deprived plaintiffs of the use and enjoyment of their land. We think this allegation makes out a cause of action. It is a statement of a good cause of action, from the view we take of the mining contract. If the statement of a good cause of action is too general, a bill of particulars or a motion more definite is allowed under our statutes. C. S., 534-537; *Power Co. v. Elizabeth City,* 188 N. C., 285.

In *Hawkins v. Pepper, supra, Avery, J.,* speaking to the question, says: "It is a well settled principle that where an estate or interest in land is conveyed for a nominal consideration subsequent which constitutes the consideration on the part of the grantor for executing the deed conveying it, a reasonable time will be allowed for its performance, after which the courts will adjudge that the grantee, if he has taken no steps looking to and giving promise of a compliance with it, has abandoned the purpose to perform it. *Ross v. Tremaine,* 2 Met. (Mass.), 495; *Allen v. Howe,* 105 Mass., 241; 6 A. & E. Enc., p. 903, note 1; 2 Washburn (5 ed.), p. 12, star pp. 449-450; *Austin v. Cambridgeport Parish,* 21 Pick. (Mass.), 215."

In 1 Tiffany on Real Property (2 ed.), sec. 254, p. 870, it is said: "By some decisions, if the rent is, by the terms of the lease, entirely dependent on the extraction of ore, a covenant on the part of the lessee is to be implied that he will work the claim or mine with reasonable diligence, and occasionally it has been decided that, although there is no express provision to that effect, the lessor may assert a forfeiture for failure to work. It would, however, be more in accord with principle to base the rights of the lessor in such case, as to resumption of possession, upon the theory that the failure to work involves an offer to relinquish possession which the lessor may accept, thereby effecting a surrender by operation of law, or upon the theory that a promise to work the mine is to be implied, and that upon the lessee's repudiation of that promise the other party may rescind and recover the consideration for the promise, that is, the possession of the land."

It is well settled that certain apt words will be held to create a condition subsequent and work a forfeiture. *Hall v. Quinn,* 190 N. C., 326; *Shields v. Harris, ibid.,* 520; *Cook v. Sink, ibid.,* 629. The contract in the present case has an express reverter clause.

For the reasons given the demurrer is overruled and the judgment of the court below

Reversed.

IDEAL BRICK COMPANY AND HUSKE HARDWARE COMPANY v. L. GENTRY, BOARD OF EDUCATION OF CUMBERLAND COUNTY, FIDELITY AND CASUALTY COMPANY OF NEW YORK ET AL.

(Filed 28 April, 1926.)

1. Pleadings—Demurrer.

The sufficiency of the pleadings is determined upon demurrer, taking as true the material allegations thereof and the reasonable inferences therefrom that tend to sustain it.

2. Same—Admissions—Facts—Conclusions.

Upon demurrer, the allegations admitted are those as to the facts in controversy, and do not extend to erroneous conclusions arising from allegations as to the facts pleaded.

3. Mechanics' Liens—Contracts—Principal and Surety—Bonds—Material and Labor.

The bond of the surety on a building contract and the contract to which it refers are construed together, in determining the liability of the surety to those furnishing material for or doing work in the construction of the building.

4. Same—Municipalities—Public Buildings—Statutes.

The statute requiring a municipality to require a bond of the contractor for the erection of a public building, C. S., 2445, before its amendment by chapter 100, Public Laws of 1923, imposes no liability upon the surety in favor of those furnishing material, etc., for the building, unless such is to be construed from the terms expressed in the bond, together with the building contract to which it refers.

5. Same—Public Policy—Liability of Surety to Materialmen.

Where a surety bond is given to a board of education for the erection of a public school building, which does not refer to the provisions of C. S., 2445, nor purport to be in pursuance thereof, and expressly limits its liability to any loss the obligor may sustain by the contractor's failure to pay for the material and labor in the building, no question of public policy is raised, and the surety is not liable to material furnishers, etc., whom the contractor may have failed to pay, and there is no liability therefor on the obligee of the bond.

6. Pleadings—Demurrer—Remedy—Conditions Precedent—Principal and Surety—Contracts.

A limitation in a surety bond as to the time in which an action may be maintained against the surety thereon, after notice of default, is contractual, and affects the remedy, and it is necessary that the surety plead it in the action for it to be available as a defense; and where it does not sufficiently appear in the pleadings to which the defense is directed, a demurrer thereto on that ground is a speaking demurrer and should be overruled. C. S., 6290.

APPEAL by defendant Casualty Company from *Dunn, J.,* at September Term, 1925, of CUMBERLAND.

Civil action to recover for materials furnished by plaintiffs and used by the contractor in the construction of a public school building.

The primary purpose of the suit is to hold the Fidelity and Casualty Company of New York liable for the claims of the plaintiffs by reason of a $15,000 bond executed to the Board of Education of Cumberland County to indemnify it against loss due to any failure of the contractor to complete the school building in accordance with the terms of a written contract. The case was heard on demurrers filed by the Fidelity and Casualty Company to the complaint of the plaintiffs and a cross-bill interposed by the board of education. From judgments overruling the demurrers, the Fidelity and Casualty Company of New York appeals.

Cook & Cook and C. M. Walker for plaintiffs.
J. Bayard Clark for defendant, Board of Education.
Ruark & Fletcher for defendant, Fidelity and Casualty Company.

STACY, C. J. The office of a demurrer is to determine the sufficiency of a pleading, admitting, for the purpose, the truth of the allegations of fact contained therein. *Whitehead v. Tel. Co.,* 190 N. C., 197; *Davies v. Blomberg,* 185 N. C., 496.

The plaintiffs allege in their complaint that L. Gentry, a contractor, entered into a written agreement with the Board of Education of Cumberland County 11 July, 1922, for the erection of a school building at Linden, N. C., in which it was stipulated, among other things, that "the contractor shall provide and pay for all materials, labor, water, tools, equipment, light and power necessary for the execution of the work"; that in pursuance of its duty under C. S., 2445, and for a valuable consideration, the board of education, on 13 July, 1922, took from the contractor, as principal, and the Fidelity and Casualty Company of New York, as surety, a bond in the sum of $15,000 for the faithful performance of said contract, the condition of the bond being "that if

the principal shall indemnify the obligee for all loss that the obligee may sustain by reason of the principal's failure to comply with any of the terms of the contract, then this obligation shall be void; otherwise it shall remain in force"; that the plaintiffs, relying upon said bond as security, furnished certain materials to the contractor which were used by him in the partial erection of said school building, but for which he has failed to pay the plaintiffs, and they demand judgment against the defendants for the amount of their claims, to wit, $756.57 and $627.00. It is further alleged that the contractor failed to complete the building; that he abandoned the work, and his present whereabouts is unknown, and for this reason he has not been served with summons in the instant action.

The bond, which is attached to and made a part of the complaint, contains the further provision: "No right of action shall accrue hereunder to or for the use or benefit of any one other than the obligee, and the obligee's rights hereunder may not be assigned without the written consent of the surety."

There is no provision in the contract, which is also attached to and made a part of the complaint, requiring that a bond be given, the only reference to a bond being "owner to pay bond premium, if bond required."

Do these allegations, taken in connection with the instruments themselves, entitle the plaintiffs to recover on the bond given by the Fidelity and Casualty Company of New York? We think not.

True, it is provided in C. S., 2445, that every county, city, town or other municipal corporation, which lets a contract for building, repairing or altering any building, public road or street, shall require the contractor of such work (when the contract price exceeds $500.00) to execute a bond, with one or more solvent sureties, before beginning any work under the contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done or materials and supplies furnished on said work, and upon which suit may be brought for the benefit of the laborers and materialmen having claims. *Noland Co. v. Trustees,* 190 N. C., 250.

And it is alleged that the bond in suit, which is attached to and made a part of the complaint, was taken and given in view of the requirements of this statute and for the protection of the plaintiffs, as well as for the protection of the county board of education, but it will be observed that the bond is one of strict indemnity, the Board of Education of Cumberland County being the obligee mentioned therein, and it is not conditioned, as required by the statute, for the payment of all labor done or materials and supplies furnished on said work. Hence, as the bond is attached to and made a part of the complaint, the allegation

that it was taken and given in view of the requirements of the statute for the protection of the plaintiffs and to insure the faithful performance of the contract as it relates to them, must be considered more in the nature of legal conclusions of the pleader, rather than allegations of fact. *Surety Co. v. Excavation Co.,* 61 Okl., 219, L. R. A., 1917, p. 558. It is not nominated in the bond that it is given for the faithful performance of the contract as it relates to the plaintiffs; and the only reference in the contract to the bond is, "owner to pay bond premium, if bond required." On the other hand, it is expressly stipulated in the bond that it is given to "indemnify the obligee," the Board of Education of Cumberland County, and that "no right of action shall accrue hereunder to or for the use or benefit of any one other than the obligee."

Conclusions of law are not admitted by a demurrer. *Bank v. Bank,* 183 N. C., 466. "It is fully recognized that, for the purpose of presenting the legal question involved, a demurrer is construed as admitting relevant facts, well pleaded, and ordinarily relevant inferences of fact, necessarily deducible therefrom, but the principle is not extended to admitting conclusions or inferences of law," etc.—*Hoke, J.,* in *Board of Health v. Comrs.,* 173 N. C., 250.

The principle is well established by many authoritative decisions, here and elsewhere, that in determining the surety's liability to third persons on a bond given for their benefit and to secure the faithful performance of a building contract as it relates to them, the contract and bond are to be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285. In application of this principle, recoveries on the part of such third persons, usually laborers and materialmen, though not expressly named therein, are generally sustained where it appears, by express stipulation, that the contractor has agreed to pay the claims of such third persons, or where by fair and reasonable intendment their rights and interests were being provided for and were in the contemplation of the parties at the time of the execution of the bond. *Lumber Co. v. Johnson,* 177 N. C., 44; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Gastonia v. Engineering Co.,* 131 N. C., 363; *Morton v. Water Co.,* 168 N. C., 582; *Gorrell v. Water Supply Co.,* 124 N. C., 328. The obligation of the bond is to be read in the light of the contract it is given to secure, and ordinarily the extent of the engagement, entered into by the surety, is to be measured by the terms of the principal's agreement. *Brown v. Markland,* 22 Ind. App., p. 655; *Dixon v. Horne,* 180 N. C., 585; *Scheflow v. Pierce,* 176 N. C., 91.

Here, the contract contains the express stipulation that "the contractor shall provide and pay for all materials, labor, etc., necessary for the execution of the work," but the obligation of the bond is not for the faithful performance of the contract as it relates to the plaintiffs;

the surety agrees to indemnify the obligee, and no one else, against all loss that the obligee may sustain by reason of the principal's failure to comply with any of the terms of the contract; and all other persons are expressly excluded from its protective provisions. A similar limitation was upheld in *Mfg. Co. v. Andrews, supra.* It is a principle too well established to require the citation of authorities that "as a party consents to bind himself, so shall he be bound." *Ins. Co. v. Durham County,* 190 N. C., 58; *Nash v. Royster,* 189 N. C., p. 416. See *Cleveland Metal Roofing, Etc., Co. v. Gaspard,* 89 Ohio St., 185, as reported in 39 Ann. Cas., 745, and note, where the pertinent authorities are collected by the annotator. See, also, *Dunlap v. Eden,* 15 Ind. App., 575, a case identical in principle and practically on all-fours with the one at bar.

Plaintiffs rely chiefly upon *Ingold v. Hickory,* 178 N. C., 614, but in that case the bond contained direct stipulation for the payment of laborers and materialmen, and expressly referred to the requirements of the statute in explanation of its true meaning and intent. It was held in *Ingold's case,* and rightly so, we think, that where a bond was given in compliance with the requirements of the statute, the surety might not, in such case, restrict its liability to suit contrary to the statutory provision, for this would be to uphold a stipulation directly opposed to the public policy of the State, and thus enable the parties, by private agreement, to set the statute at naught in direct violation of its terms. And here, if it did not clearly appear, from the terms of the bond, that it was not given in view of the requirements of the statute for the protection of the plaintiffs and to insure the faithful performance of the contract as it relates to them, we should be disposed to hold the stipulation, restricting the surety's liability to suit, void as being contrary to the public policy of the State as expressed in the statute.

The instant case is controlled by the decisions in *Warner v. Halyburton,* 187 N. C., 414, *McCausland v. Construction Co.,* 172 N. C., 708, and *Mfg. Co. v. Andrews,* 165 N. C., 285. On authority of these cases, and the principle they illustrate, we are of opinion that the demurrer of the Fidelity and Casualty Company of New York to the complaint of the plaintiffs should have been sustained.

We may add that the Legislature of 1923 (chap. 100) amended section 2445 of the Consolidated Statutes so as to provide that every bond given by a contractor to any county, city, town or other municipal corporation, for the building, repairing or altering of any building, public road or street, as required by this section, "shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so

given." It is further provided in the amended law that only one action may be brought on such bond, all claimants to be duly notified, and if the aggregate sum exceeds the amount of the bond, there shall be a pro rata payment. The surety is also allowed, by paying into court in such suit the full amount of the penalty of the bond, to be relieved from any other or further liability thereon.

This amendment, of course, can have no effect on the present case, as the bond in suit was given prior to the amendment. Such was the holding in *Warner v. Halyburton, supra.*

But we are of opinion that the demurrer to the cross-bill or cross-complaint of the Board of Education of Cumberland County was properly overruled.

The demurrer to the cross-complaint is bottomed on a stipulation in the bond to the effect that "legal proceedings for recovery hereunder may not be brought unless begun within twelve months from the time of the discovery of the act or omission of the principal on account of which claim is made." All the parties agree that this limitation is controlled by C. S., 6290. *Lumber Co. v. Johnson,* 177 N. C., 44. It is a contractual limitation, fixing the time within which suit must be brought, inserted for the benefit of the Casualty Company and may be waived by it. *Dibbrell v. Ins. Co.,* 110 N. C., 193. True, it is made a condition precedent to the right of recovery, though not an integral part of the cause of action, and, being a matter affecting only the remedy, it need not be alleged in the complaint. *Bank v. Fidelity Co.,* 126 N. C., 320; *Sharrow v. Inland Lines,* 214 N. Y., 101, as reported in 57 L. R. A. (N. S.), 1192, and note. The plaintiff is not bound to assume that the defendant will take advantage of a matter which may be waived. *Bank v. Britton,* 66 N. C., 365. It is not like a condition or stipulation in the agreement upon the performance of which the plaintiff's right of action depends, there being a distinction in this respect between a condition precedent which affects the right of action itself and one which operates only upon the remedy after the cause of action has accrued. *Culbreth v. R. R.,* 169 N. C., 723.

We have not overlooked the decisions in *Bennett v. R. R.,* 159 N. C., 345, *Hall v. R. R.,* 149 N. C., 108, *Gulledge v. R. R.,* 147 N. C., 234 (on rehearing), 148 N. C., 568, *Roberts v. Ins. Co.,* 118 N. C., 429, *Best v. Kinston,* 106 N. C., 205, *Taylor v. Iron Co.,* 94 N. C., 526, and others of like character, nor are they at variance with our present position, for in each of these cases the court was dealing with a statutory provision limiting the time for suit which affected, not merely the remedy, but the right of action itself. See, also, *Belch v. R. R.,* 176 N. C., 22, and cases there cited.

Of course, where the defect appears on the face of the complaint, it may be taken advantage of by demurrer. *Holly v. Assurance Co.,* 170 N. C., 4. This is not our case.

It is alleged in the cross-complaint that the contractor "stopped work upon said building prior to 18 April, 1923, and thereafter wrongfully failed and refused to complete the same, or comply with the terms of his contract"; that the defendant Fidelity and Casualty Company of New York was notified of said failure on 11 April, 1923; and that by reason of the failure of the contractor and the Casualty Company to finish said building, the Board of Education of Cumberland County has had to complete the same at great loss, etc.

Summons in this action was issued 10 March, 1924, but it is alleged that the cross-complaint of the board of education was not filed until 12 July, 1924, hence the Casualty Company says that no legal proceeding for recovery under the bond was begun by the board of education until the filing of its cross-complaint 12 July, 1924, and this was more than twelve months from the time of the discovery of the act or omission of the principal on account of which claim is made. *Capps v. R. R.,* 183 N. C., 181.

But it does not appear from the allegations of the cross-complaint when legal proceedings were begun for recovery on the bond by the Board of Education of Cumberland County; hence, to this extent at least, the plea interposed by the Casualty Company is in the nature of a "speaking demurrer," which is not allowed with us. "When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer." C. S., 517.

A demurrer can be sustained, and it is only appropriate, when the defect or objection appears on the face of the pleading, as it is not the province of a demurrer to state objections not apparent on the face of the pleading to which it is directed. A "speaking demurrer," as styled by the books, is one which invokes the aid of a fact, not appearing on the face of the complaint, in order to sustain itself, and is condemned, both by the common law and the Code system of pleading. *Besseliew v. Brown,* 177 N. C., 65; *VonGlahn v. DeRossett,* 76 N. C., 292.

There was error, however, in overruling the demurrer to the plaintiffs' complaint. Let the cost of this appeal be divided between the plaintiffs and the Fidelity and Casualty Company of New York.

Error.

STATE OF NORTH CAROLINA EX REL. W. D. SMITH v. THE FIDELITY AND DEPOSIT COMPANY OF BALTIMORE, MD.

(Filed 28 April, 1926.)

1. **Statutes—Police Powers—Public Policy — Corporations — Worthless Shares of Stock—Constitutional Law.**

   It is within the police powers of a state to pass a statute for the protection of its citizens against the sale to them of worthless shares of stock in speculative companies in the exercise of a reserved power in the state from that granted to the general government, and does not contravene either the State or Federal Constitution. 3 C. S., 6363-6372.

2. **Same—Insurance Commissioner — Principal and Surety — Actions—Fraud—Cui Tam Actions.**

   Where the Insurance Commissioner has required a bond conditioned in a certain amount to protect the investor from the fraudulent representations of the agent selling its shares in North Carolina under the provisions of C. S., 6372, the exercise of this power by the commissioner in the respect stated is valid, and the one injured by the fraud may maintain an action against the surety on the bond upon its penalty on relation of the State.

3. **Same—Statutes—Interpretation.**

   By express provision of chapter 190, Public Laws of 1925, known as the Blue-Sky Law, its provisions do not affect those of prior statutes on the subject, and those of 3 C. S., 6363-6372 are applicable to causes of actions theretofore arising.

4. **Demurrer—Misjoinder—Principal and Surety.**

   Where two causes are alleged in an action against the surety arising under the same bond, a demurrer by the surety for misjoinder of parties and causes of action is bad.

APPEAL by plaintiff from *Finley, J.*, at September Term, 1925, of FORSYTH. Reversed.

This case was first heard by the judge of the Forsyth County Court on demurrer of defendant. The demurrer was sustained and the action dismissed. Upon appeal to the Superior Court the judgment of the county court was affirmed, and plaintiff appealed to the Supreme Court.

The necessary allegations for the determination of the appeal will be considered in the opinion.

Holton & Holton for plaintiffs.
Ratcliff, Hudson & Ferrell for defendant.

CLARKSON, J. Vol. 3 C. S., 6363, amended by Public Laws 1923, ch. 161, reads as follows: "Before any bond, investment, dividend, guarantee, registry, title guarantee, debenture, or other like company (not strictly

an insurance company as defined by this chapter), or any individual, corporation, or partnership who, by agents, offers for sale or sells the stocks, bonds, securities, or obligations of any foreign corporation, whether organized or to be organized or being promoted, may be authorized to do business in this State, such company, individual, or partnership must be licensed by the Insurance Commissioner; and the Commissioner is authorized to issue such license when he is satisfied that such company or corporation is safe and solvent, and has complied with the laws of this State applicable to fidelity companies and governing their admission and supervision by the Insurance Department. The term 'security,' or 'securities' shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas or mining lease, collateral trust certificate, any transferable share, investment contract, or benefit interest in or title to property or profits, or any other instrument commonly known as a security. If such company is chartered and organized in this State and has its home office within the State, and is solvent to the extent of at least fifteen thousand dollars, it may, if a stock company, commence business with a capital stock of twenty-five thousand dollars. The license issued to such companies and their agents shall be issued and paid for as provided for those of insurance companies. This section shall also apply to every corporation, company, copartnership, or association organized or to be organized in this State where such company or organization by its organizers or promoters puts or proposes to put the stock of the company on the market in person or by agents."

C. S., 6372, is as follows: "No person shall transact or offer to transact business in this State as agent for such company, or transact or offer to transact any business described in this article unless such person shall hold a license issued by the Insurance Commissioner. *The license shall issue only upon the filing with the Insurance Commissioner by such agent of a bond in the sum of one thousand dollars* ($1,000), *with such conditions and sureties as may be required and approved by the Insurance Commissioner.* The license shall expire on the first day of April following, unless the authority is sooner revoked by the Insurance Commissioner, and such authority shall be subject to revocation at any time by such officer for cause appearing to him sufficient. The fee for such agent's license shall be the same as prescribed for fidelity companies."

It may be noted that a more stringent act, known as the "Blue-Sky Act," was passed, Public Laws of North Carolina, 1925, ch. 190, p. 415, entitled "An act to provide laws governing the sale of stocks, bonds and

other securities in the State of North Carolina." Section 25 of this act is as follows: "All laws and clauses of law in conflict with this act are hereby repealed: *Provided, however,* that this clause shall not be construed to prevent the prosecution of any offenses committed before the passage of this act against any law or laws heretofore in force, but all such crimes and offenses committed before the ratification of this act may be prosecuted to final judgment under the laws in force at the time of the commission of such crimes or offenses. *This act shall not affect any right accrued or liability incurred prior to the ratification of this act.*"

The present action is brought under the old statute, the rights are especially protected in section 25, *supra.*

The purpose of this wise legislation, C. S., 6363-6372, was to protect the general public from "wild cat" organizers, promoters and their agents, whether foreign or domestic, preying upon an unsuspecting and confiding public by selling "blue-sky stock," without obtaining license and giving bond. *S. v. Agey,* 171 N. C., p. 831; *Bank v. Felton,* 188 N. C., p. 384; *Phosphate Co. v. Johnson,* 188 N. C., 419.

It is a matter of common knowledge that millions of dollars were lost in this State through these organizers, promoters and their agents—men and women made homeless by investing in worthless stocks and bonds, savings of a lifetime in many cases swept away, financial wreckage and ruin following the wake of these irresponsible foreign and domestic corporations that sold nothing for something, the honor of men dealing in such fraudulent schemes smirched and destroyed. Often as an inducement and bait, large dividends were offered and guaranteed. The intent of the statute, under the police power of the State, was to protect the people of the State from this kind of fraud and imposition. The police power of a state is broad and comprehensive. It is elastic so that the governmental control may be adequate to meet changing social, economic and political conditions. Under the U. S. Constitution the police power has been left to the states—in fact it is inherent in the states. Each state has the power to regulate the relative rights and duties of all persons, individuals and corporations within its jurisdiction for the public convenience, welfare and good—for public health, public morals and public safety. The only limit is that no law shall be enacted repugnant to the Constitution of the United States or the State. *Durham v. Cotton Mills,* 141 N. C., p. 615; *Shelby v. Power Co.,* 155 N. C., p. 196; *Shields v. Harris,* 190 N. C., 527; *Moore v. Greensboro, ante,* p. 592; 6 R. C. L., sec. 188-190.

It is well settled law in this State and elsewhere that the states under the police power, in matters of this kind, have the power to pass an act like the one attacked in this case, and it does not violate the Fourteenth

Amendment of the Constitution of the United States or any constitutional provision of this State. The Legislature has an unquestioned right to require an examination and certificate as to the competency of persons desiring to practice medicine or exercise other callings affecting the public, requiring skill and proficiency. *S. v. Call,* 121 N. C., p. 643. To the same effect persons desiring to practice law, to be druggists, pilots, engineers or exercise other callings, whether skilled trades or professions affecting the public and which requires skill and proficiency. *S. v. Call, supra,* p. 646. The Legislature can authorize municipalities and counties to require persons to be vaccinated. *S. v. Hay,* 126 N. C., 999. The examination as to dentists. *S. v. Hicks,* 143 N. C., p. 689. Also examination State Board of Accountancy. *S. v. Scott,* 182 N. C., p. 880; *Provision Co. v. Daves,* 190 N. C., at pp. 13, 14, 15.

Under C. S., 6372, no agent can do business for any individual, corporation or partnership licensed under C. S., 6363 in the State unless license is issued by the Insurance Commissioner. *"The license shall issue only upon the filing with the Insurance Commissioner by such agent of a bond in the sum of $1,000 with such conditions and sureties as may be required and approved by the insurance commissioner."*

Wyatt Johnson Heflin, Edward G. Mathews and Clarence Wilmot Rawlings all entered into separate bonds, each in the sum of $1,000, to be paid to the State of North Carolina, in compliance with section 6372, as agent to sell in the State stocks, bonds, etc., for Bailey Bros. The conditions of each of the bonds were: "Now, therefore, if the above bounden (setting forth name) shall well and truly perform all the requirements of the aforesaid law during the period for which he shall be licensed from time to time as provided in above-cited law, and the said Insurance Commissioner of North Carolina shall be satisfied that the stocks, bonds or other securities sold or offered for sale by the said (setting forth name) are in all respects valid and proper investments for the citizens of North Carolina, and that the said (setting forth name) has not been guilty of fraud or misrepresentation in the sale of said stock, bonds or other obligations, then this bond to be null and void; otherwise, in full force and effect." Each bond was signed by defendant Fidelity and Deposit Company of Maryland as surety.

The bond in controversy was made to the State of North Carolina and the statute provided that the Insurance Commissioner could require "conditions and sureties," and these were put in the bonds under the statute. Defendant now contends, after signing the bonds as surety, that the Insurance Commissioner had no right to put in the conditions. The provision is to the effect that the bond was enforceable if the agent was guilty of fraud or misrepresentation in the sale of any stock, bonds

or other obligations. We think the bond was made for the benefit of one who was defrauded by the agent. The bond was made for the protection of those who purchased from the agent and that the agent would not be guilty of fraud or misrepresentation. *Schofield v. Bacon, ante,* 253. Under the police power of the State, the authority given the Insurance Commissioner was valid.

In *S. v. Hodges,* 180 N. C., p. 751, the defendant was indicted for the violation of the rules and regulations adopted by the State Board of Agriculture to prevent the infection of sound cattle from other cattle infected with tick fever and to cure those already tainted with the germ. The method was to dip in "vats" containing an improved solution (arsenical) which would destroy and eradicate the tick. The Legislature gave the power to the Secretary of Agriculture to make rules and regulations to stamp out infectious or contagious diseases among live stock. Any person violating such regulations, a right of civil action was given to the person injured, and it was also made a misdemeanor. This was held constitutional and the decision cited and approved at this term in *S. v. Maultsby, ante,* 482. All the counties in the State are now under tick eradication legislation and the holding of these acts within the police power has made a marked improvement in promoting better milk and beef cattle, a matter of untold benefit to the State.

It will be noted that a violation was made a misdemeanor and the right of civil action given to any one injured. Surely it will not be contended that the criminal aspect is constitutional and a civil action cannot be maintained under the police power of the State.

We think the action properly instituted: "State of North Carolina *ex rel.* W. D. Smith." It is brought by analogy to actions on official bonds. Although the statute gives the right in default on official bonds to bring the action in the name of the State, yet the Insurance Commissioner, having the right to require this kind of bond made payable to the State for the benefit of one defrauded, we think the action was properly brought. If this was not so, a wrong would be done for which there was no remedy.

The plaintiff in the complaint alleges fully the fraud and misrepresentation by which the three agents obtained $4,000 from him. The allegations of the complaint make out a cause of fraud and misrepresentation. The demurrer of the defendant admits as true the allegations of the complaint.

The complaint is not demurrable for a misjoinder of both parties and causes of action. *Roberts v. Mfg. Co.,* 181 N. C., 204. There are only two parties to this action—plaintiff and defendant, though three separate contracts are sued upon, which may be properly joined in the same complaint. As to whether the agents are necessary parties, does not arise on demurrer.

The defendant surety company signed these bonds, received the premium, and now, after allegations of fraud and misrepresentations, are charged against the principals in the bond and suit brought on the bonds by the party injured, defendant is taking the position that the Insurance Commissioner had no authority to take such a bond, although with full knowledge of the law it signed the bonds as surety. There is no uncertainty or ambiguity about the bond. If the bonds were not to protect those who were defrauded in the purchase of the stocks, etc., for what purpose were the bonds given? The defendant surety company received premiums on and signed what it now contends are illegal bonds. It received the benefits of the premiums, it ought to bear the burden it assumed. There is no reason in law or morals why the defendant surety company should not be held to its solemn contract.

For the reasons given, the demurrer is

Reversed.

C. O. GALLIMORE ET AL. v. THE TOWN OF THOMASVILLE.

(Filed 28 April, 1926.)

1. Municipal Corporations—Assessments—Front Foot Rule — Presumptions.

The correctness of the assessment of property along a street improved by a municipality, will be conclusively presumed when it appears that each property owner was assessed an amount according to the lineal foot rule, unless it appears to the court as a matter of law, from the facts on the face of the record that the assessment was erroneously made by the municipal authorities. C. S., 2707, 2710.

2. Same—Certificate of Clerk—Courts—Reassessments—Procedure.

Where it appears that the city clerk and city manager checked up the number of owners of land upon a street improved, and certified to the municipal authorities that a majority, according to the front foot rule, had signed the petition, and accordingly the improvement upon the street had been made and expense incurred, objection by one of the land owners that a sufficient number of petitioners had not signed, cannot be held by the courts, the proper proceedings being by objection made to the city authorities and a reassessment of the property affected. C. S., 2707.

3. Same—Sewerage.

Where a city has assessed the property owners on a street improved under the lineal foot rule, objection, if valid, to the difference in the assessment for sewer connection according to the expense therefor to the different lots, should be taken to the assessment so made, and request to the municipal authorities for a reassessment, and not by independent action to the courts to declare the assessments so made as invalid on that ground.

4. Constitutional Law—Statutes—Validating Statutes — Municipal Corporations—Assessments.

The Legislature has authority to ratify an assessment made by a municipality on the owners for street improvements, C. S., 2707, 2710, and such is not a violation of the constitutional inhibition as to the passage of local laws, etc. Art. II, sec. 29.

APPEAL by plaintiffs from judgment of *Schenck, J.*, at September Term, 1925, of DAVIDSON. No error.

Appeal from assessments made by the town of Thomasville upon lands owned by plaintiffs and abutting on Fisher Ferry Street in said town. These assessments were made pursuant to petition filed with said town for the purpose of defraying the expense of local improvements on said street. C. S., 2707.

Plaintiffs allege that said assessments are invalid (1) for that the petition for said improvements was not signed by a majority in number of the owners of lots fronting on the street proposed to be improved; (2) for that the clerk of said town did not make an investigation to determine the sufficiency of the signers of said petition and certify the result of such investigation to the governing body of the town; (3) for that the amounts assessed upon said lots are not uniform, in that they were not assessed according to the extent of their respective frontage, by an equal rate per foot of such frontage; and (4) for that the amount assessed against each lot exceeds the value of the lot, and the collection of said amount will result in confiscation of the lot so assessed. Defendant contends that said assessments were made in substantial compliance with statutory provisions authorizing them, and that said assessments have been validated by act of the General Assembly.

From judgment upon the verdict as rendered by the jury, sustaining the validity of the assessments, plaintiffs appealed to the Supreme Court.

Raper & Raper, Walser & Walser, and Z. I. Walser for plaintiffs.
H. R. Kyser for defendant.

CONNOR, J. At a meeting of the city council of the town of Thomasville, held 3 September, 1923, a petition was presented, requesting that all of Fisher Ferry Street in said town from the end of the present pavement, extending southward 1,500 feet, be improved by paving said street with asphalt covering upon a concrete base, or with other hard surface. Said petition purported on its face to be signed by a majority in number of the owners of property abutting on that portion of Fisher Ferry Street, which it was proposed should be improved, representing a majority of the lineal feet of frontage of all the lands abutting on same. The city clerk testified that she and the city manager checked up the owners of lands fronting on said street, and also the number of lineal

feet of the respective lots, and presented said petition to the city council for its consideration. The city council accepted said petition and ordered that said street be improved as requested therein.

The statute, C. S., 2707, provides that the determination of the governing board upon the sufficiency of the petition for local improvements shall be final and conclusive. In *Tarboro v. Forbes,* 185 N. C., 59, this Court held that where it appears upon the face of the petition, as a matter of law, that the signers of the petition do not represent a majority of the lineal feet of the total frontage on the street, proposed to be improved, the determination of the governing body as to the sufficiency of the petition is not final or conclusive. In that case, the petition was held insufficient to support assessments, because it appeared upon the face thereof and from the order of the board of town commissioners, that the lineal feet of the frontage of the "Town Common" had been excluded in determining the total of the frontage on the street, proposed to be improved. It was held that said frontage should have been included, as a matter of law, and that inasmuch as the total number of signers did not represent a majority of the lineal feet of frontage, including the frontage of the "Town Common," the petition was not sufficient. In this case, the city council found that at the time the petition was considered by them, there were 25 persons who owned lands abutting on Fisher Ferry Street, and that thirteen of these had signed the petition. On the trial evidence was offered tending to show that there were twenty-six persons who owned lands fronting on said street, at time petition for the improvements was considered. Of these twenty-six persons, one was the wife of one of the landowners who had been counted as the owner of two lots. He had been counted as the owner of both lots, whereas in fact, as the evidence tended to show, he was the owner of one, and his wife was the owner of the other lot. As to whether the number of persons owning lands fronting on said street was twenty-five or twenty-six involves only a question of fact; insofar as the sufficiency of the petition, authorized to be filed under C. S., 2707, involves only questions of fact, the determination of the governing body, in the absence of fraud, and when acting in good faith, is final and conclusive. The purpose of the statutory provision is manifestly to prevent attacks upon the validity of proceedings for public improvements, after the improvements have been made, and when the governing body of the municipality is called upon to provide for their payment by assessments upon the lands benefited by the improvement, or otherwise, as authorized by statute. The fact that there were twenty-six, and not twenty-five, persons who owned the lands fronting on the street proposed to be improved, was not called to the attention of the city council until after the improvements had been made, and the expense for the same had been incurred. The sufficiency of the petition could not then be called into

question for that a majority of the landowners had not signed same. That fact had been conclusively determined by the city council, acting in good faith, before the improvements had been ordered. *Anderson v. Albemarle,* 182 N. C., 434. No question of law is presented by plaintiffs in their attack upon the sufficiency of the petition. *Tarboro v. Forbes, supra,* is, therefore, not applicable. The determination of the city council that the petition was sufficient, under the statute, was final and conclusive.

There was evidence that the petition was presented to the clerk of the town of Thomasville; that she checked up the lineal feet of the lots abutting on the street, owned by the petitioners, and that the city manager checked up the owners of all the lots abutting on said street; that she then submitted the petition to the city council for its consideration. There was no evidence that the city clerk certified, in writing, the result of her investigation. Although it may be conceded that the statute contemplates that the city clerk shall certify in writing the result of the investigation which the statute requires him to make, when the petition is filed with him, the failure to do so is a mere irregularity which may be waived by the governing body, as it appears was done in this case. It cannot be held that the validity of assessments for improvements thereafter made, will be determined by whether or not the clerk certified the result of his investigation in writing at the time the petition was submitted to the governing body for its consideration. There is a presumption in favor of the regularity of a proceeding under which public improvements, authorized by the General Assembly, have been made. An attack upon the validity of such proceeding, for mere irregularities, first made after the improvements have been completed, by those who seek, by such attack, to have their property, which has received the benefit of such improvements, relieved of assessments made for the purpose of paying for the improvements, will not be sustained, when it appears that notices required by statute have been given and ample opportunity afforded for all interested persons to be heard before the improvements were ordered and made.

There was evidence that the assessments on all the lots fronting on the improved street were made in accordance with the front-foot rule, as provided by statute, C. S., 2710. It was necessary to provide for the drainage of certain of these lots. The cost of constructing the drain upon each lot was added to the assessment upon said lot for the improvement of the street. This cost was not uniform, because of the difference in the location and slope of the several lots. The principle upon which the cost of the drain constructed upon each lot was included in the amount assessed against said lot, is recognized in the statute, C. S., 2710(4), as just and proper. If it should be held that there was error in adding the cost of constructing drains on certain of the lots, to the

assessment upon said lots, for the street improvement, the only relief to which such of the plaintiffs as owned said lots would be entitled, would be a reassessment of the cost of the drains upon all the lots abutting on the improved street. C. S., 2715. The validity of the proceeding under which the assessments were made would not be affected by such holding; nor would it be necessary to reassess the expense of the improvements on the street, said expense having been assessed in compliance with the statute.

It is not open to plaintiffs to attack the validity of the assessments upon their respective lots, upon the ground that their lots were not benefited by the improvement made upon the street, on which said lots abutted. The question of benefit is one of fact to be determined by the governing body of the municipality, in the exercise of legislative authority expressly conferred upon such body. *Anderson v. Albemarle,* 182 N. C., 434; *Felmet v. Canton,* 177 N. C., 52; *Justice v. Asheville,* 161 N. C., 62; *Tarboro v. Staton,* 156 N. C., 504. If assessments are made for public improvements, under express legislative authority and in substantial compliance with the provisions of the statute authorizing them, an owner of land upon which as assessment is levied, except in rare cases, will not be heard to say that such assessment exceeds the value of his land, and that its collection will result in a confiscation of his property. In *Kinston v. Wooten,* 150 N. C., 296, this Court, in the opinion written by *Hoke, J.,* says "that while the right of the court to interfere for the protection of the individual owner of property is recognized, its exercise can only be justified and upheld in rare and extreme cases, when it is manifest that otherwise palpable injustice will be done and the owner's rights clearly violated. This limitation arises of necessity in this scheme of taxation, for in its practical application it would well nigh arrest all imposition of these burdens if each individual owner of property were allowed to interfere and to stay the action of officials on any other principle."

Between the date on which plaintiffs appealed from the assessments made on their lands, and the trial of this appeal in the Superior Court, chapter 217, Private Laws 1925, was enacted by the General Assembly. This act provides "that any and all acts heretofore done and steps taken by the city of Thomasville in the paving of the streets of the city of Thomasville and the assessments levied therefor are hereby in all respects approved and validated." Defendant was permitted by the court to amend its answer to the protest of plaintiffs, and to plead this act in support of the validity of the assessments.

Conceding that there were defects and irregularities in the proceedings under which the assessments were levied, sufficient to render said assessments invalid, as contended by plaintiffs, it must be held, under the authority of *Holton v. Mocksville,* 189 N. C., 144, that said assessments are

now valid, by virtue of said act, provided the act itself is valid. Plaintiff's contentions that said act is invalid, because the General Assembly was prohibited by the Constitution of the State from passing it, cannot be sustained. It is not in violation of section 29, Art. II, of the Constitution; it does not authorize the laying out, opening, altering, maintaining or constructing of highways, streets or alleys. *Holton v. Mocksville, supra; Reed v. Eng. Co.,* 188 N. C., 39; *S. v. Kelly,* 186 N. C., 365; *Brown v. Com.,* 173 N. C., 598; Allen's Reported and Cited Cases, 1926. The act was duly ratified as required by the Constitution; this Court conclusively presumes from such ratification that the notice required by section 12 of Art. II, was given. *Power Co. v. Power Co.,* 175 N. C., 668. It does not impose any tax upon the people of the State, or allow any county, city or town to do so; it is not therefore dependent for its validity upon its passage in compliance with section 14 of Article II. It is a remedial or curative statute, by which the General Assembly, in order to remove doubts, and settle controversies as to the validity of acts and proceedings which it has authorized, declares that such acts and proceedings are approved, and validated. The power of the General Assembly to enact such statutes has been repeatedly and uniformly upheld. *Holton v. Mocksville,* 189 N. C., 144; *Brown v. Hillsboro,* 185 N. C., 375. The principle that when there are defects and irregularities in a proceeding duly authorized by the General Assembly, due to an inadvertent violation or nonobservance of statutory provisions, for the conduct of such proceedings, the General Assembly may correct the defects and cure the irregularities, and thus validate the proceeding, by proper legislative action, provided no vested rights have supervened, has been very generally recognized. *Kinston v. Trust Co.,* 169 N. C., 207; *Reid v. R. R.,* 162 N. C., 355.

Plaintiff's assignments of error are not sustained. The judgment is affirmed. There is

No error.

THE STANDARD ELECTRIC TIME COMPANY, INC. v. THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND ET AL.

(Filed 28 April, 1926.)

1. Mechanics' Liens—Liens—Principal and Surety—Statutes—Laborers—Material.

A surety bond given by a contractor for the erection by a municipality of a public building since the amendment of C. S., 2445, by chapter 100, Public Laws of 1923, is liable to those doing labor thereon or furnishing material therefor, whether such condition is written into the obligation of the bond itself or otherwise.

2. Same—Contracts.

The indemnity bond given by a contractor for the erection of a municipal building and the contract itself, are to be construed together upon the question as to whether provision is made for the nonpayment by the original contractor of the laborers on and material furnished for the erection of the building, the subject of the contract.

3. Same—Subcontractors.

When according to the terms of its undertaking the surety on a contractor's bond for the erection of a municipal building is liable to those doing labor thereon or furnishing material therefor, this liability not only extends to such as may have furnished the material directly to the original contractor, but to those who have done so to his subcontractors.

4. Same—Bills and Notes.

Where the plaintiff has furnished material and labor to a subcontractor for the erection by a municipality of a public building, and has a right of action against the surety on the indemnity bond given by the original contractor to the city, such right is not impaired by reason of his having taken the note of the contractor for the materials and labor furnished under contract with the subcontractor.

APPEAL by the defendant, Fidelity and Deposit Company of Maryland, from *Finley, J.*, at November Term, 1925, of ROCKINGHAM.

Civil action to recover for materials furnished by plaintiff to a subcontractor and used in the construction of a public school building.

The purpose of the suit is to hold the Fidelity and Deposit Company of Maryland liable for the claim of the plaintiff by reason of a $60,000 bond executed to the Reidsville Graded School Committee to save it harmless, together with the materialmen and laborers, from loss due to any failure of the principal contractor to complete a public school building at Reidsville, N. C., and to pay for all labor done and materials furnished thereon, in accordance with the terms of a written contract.

Upon denial of liability, and issues joined, there was a verdict and judgment for plaintiff in the sum of $981.00 with interest and costs, from which the Fidelity and Deposit Company of Maryland appeals, assigning errors.

W. R. Dalton for plaintiff.
Humphreys & Gwyn for defendant, Fidelity and Deposit Company.

STACY, C. J. On 1 June, 1922, L. B. Flora & Co., Inc., contractor, entered into a written agreement with the Reidsville Graded School Committee for the erection of a public school building at Reidsville, N. C., in which it was stipulated, among other things, that "the contractor shall and will provide all the materials and perform all the work" necessary for the erection of the said school building; and on the same day, for a valuable consideration, the Reidsville Graded School

Committee took from the contractor, as principal, and the Fidelity and Deposit Company of Maryland, as surety, a bond in the sum of $60,000 to insure the faithful performance of said contract, the condition of the bond being as follows: "Now, therefore, if the said L. B. Flora & Company, Inc., shall well and truly perform all the conditions therein set out in all particulars, and particularly shall pay for all labor done on, and all material and supplies furnished for said work, then this obligation to be void; otherwise to remain in full force and virtue."

Thereafter, on 12 June, 1922, the general contractor sublet a portion of the work on the building, to wit, the installation of the electric-time equipment and fire-alarm system, to the Wells Electric Company, which said company, in turn, on 2 August, 1922, purchased from the plaintiff certain fixtures and materials for use in equipping the building with an electric clock and fire-alarm system as called for in the building contract.

There is evidence tending to show that the general contractor, as well as the supervising architect, had knowledge or were advised, though not formally notified, of the fact that the plaintiff was supplying the Wells Electric Company with certain materials for use in executing its part of the work.

The general contractor made payments, from time to time, to the Wells Electric Company, for its part of the work, and on 13 August, 1923, a complete settlement was had, the general contractor paying the Wells Electric Company in full for installing in said building the electric-time equipment and fire-alarm system, as called for by the building contract.

In January, 1924, about five months after its settlement with the general contractor, the Wells Electric Company made an assignment for the benefit of its creditors. Immediately following, the plaintiff called upon L. B. Flora & Company, the general contractor, to pay its claim for materials furnished and used in the construction of the public school building at Reidsville. Up to this time the plaintiff had only looked to the Wells Electric Company for payment, and had taken its ninety-day trade acceptance for the amount due as a matter of business convenience. Payment was refused by the general contractor. This suit is to recover on the bond.

On motion of the Reidsville Graded School Committee, judgment of nonsuit was entered as to it, and correctly so, under authority of *Noland Co. v. Trustees,* 190 N. C., 253. The appeal presents only the case of the surety company.

It is conceded by all the parties that the bond in question was taken and given in view of the provisions of C. S., 2445, as amended by chapter 100, Public Laws 1923, requiring every county, city, town or

other municipal corporation, which lets a contract for building, repairing or altering any building, public road or street, to take from the contractor of such work (when the contract price exceeds $500.00) a bond, with one or more solvent sureties, before beginning any work under the contract, payable to said county, city, town or other municipal corporation, and conditioned "for the payment of all labor done on and materials and supplies furnished for the said work," and upon which suit may be brought for the benefit of laborers and materialmen having claims. *Warner v. Halyburton,* 187 N. C., 414.

The statute, as amended, provides that every bond given to any county, city, town or other municipal corporation, for the building, repairing or altering of any public building, public road or street, as required by this section, "shall be conclusively presumed to have been given in accordance therewith, whether such bond be so drawn as to conform to the statute or not, and this statute shall be conclusively presumed to have been written into every such bond so given." It is further provided in the amended law that only one action may be brought on such bond, all claimants to be duly notified, which was done in the instant case, and if the aggregate sum exceed the amount of the bond, the payments are to be prorated. The surety is also allowed, by paying into court in such suit the full amount of the penalty of the bond, to be relieved from any other or further liability thereon.

The principle is well established by many authoritative decisions, here and elsewhere, that in determining the surety's liability to third persons on a bond given for their benefit and to secure the faithful performance of a building contract as it relates to them, the contract and bond are to be construed together. *Mfg. Co. v. Andrews,* 165 N. C., 285. And in application of this principle, recoveries on the part of such third persons, usually laborers and materialmen, even when not expressly named therein, are generally sustained where it appears, by express stipulation, that the contractor has agreed to pay the claims of such third persons, or where by fair and reasonable intendment their rights and interests were being provided for and were in the contemplation of the parties at the time of the execution of the bond. *Lumber Co. v. Johnson,* 177 N. C., 44. The obligation of the bond is to be read in the light of the contract it is given to secure, and ordinarily the extent of the engagement, entered into by the surety, is to be measured by the terms of the principal's agreement. *Brick Co. v. Gentry, ante,* 636, and cases there cited.

Here, by the express stipulation of the contract and under the provisions of the bond, it is clear, we think, that the claims of laborers, doing work on the building, and of materialmen, furnishing material

and supplies for said work, were not only being provided for and were in the contemplation of the parties at the time of the execution of the contract and bond, but that they also come directly within the terms of the statute governing the matter. *Ingold v. Hickory,* 178 N. C., 614; *Hill v. Amr. Surety Co.,* 200 U. S., 197.

It is provided in C. S., 2445, that "any laborer doing work on said building and materialman furnishing material therefor and used therein," still have "the right to sue on said bond, the principal and sureties." This language is quite similar to that used in U. S. Comp. St., 1913, sec. 6923, and in *Hill v. Amer. Surety Co.,* 200 U. S., 197, the Supreme Court of the United States held the Act of Congress and the bond given thereunder sufficient to cover claims of materialmen furnishing material and supplies to a subcontractor. In the course of an elaborate opinion dealing with the purpose and intent of the statute, Mr. *Justice Day* said:

"If literally construed, the obligation of the bond might be limited to secure only persons supplying labor or materials directly to the contractor, for which he would be personally liable. But we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end. Statutes are not to be so literally construed as to defeat the purpose of the Legislature. . . . There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor, but all persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated. We cannot conceive that this construction works any hardship to the surety. . . . It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure.

In view of the declared purpose of the statute, in the light of which this bond must be read, and considering that the act declares in terms the purpose to protect those who have furnished labor or material in the prosecution of the work, we think it would be giving too narrow a construction to its terms to limit its benefits to those only who supply such labor or materials directly to the contractor."

We have quoted at length from this opinion because it is an apt and clear exposition of our own statute. The reasoning of that case controls here. The language of the Federal Act is no stronger than the language used in our own statute. Such statutes are enacted in the exercise of a sound public policy. The contractor gets the benefit of the work done and materials furnished, and the statute requires that he pay for them, to the end that public works may not be erected by the use of labor and materials belonging to others. Speaking to the policy of the law in this respect, *Dean, J.*, in *Philadelphia v. Stewart,* 201 Pa., 526, said:

"Seldom are contractors for large public works able of themselves to furnish the labor and material necessary to the completion of their contracts; in nearly every case they rely on many subcontractors and materialmen to furnish different kinds of mechanical skill and labor, also material, such as stone, brick, lumber, glass, and iron; these have nothing on which to rely for payment except the honesty and ability of the principal contractor. If the contractor of himself do not inspire confidence among these, who must be subordinate to him, his ability in many cases to bid for large work must be weakened or altogether destroyed; as a necessary consequence, competition for work disappears, in large measure, and there follows a monopoly to the few contractors of large capital, with the inevitable result of exorbitant prices. Every one knows the city will pay the principal contractor, but will he pay his subcontractors and materialmen, whether he makes or loses on his contract? is the question with them."

Nor can the surety complain at this holding, because when a surety executes a bond in compliance with a statute requiring it, he knows that such statute enters into and becomes a part of the undertaking. *House v. Parker,* 181 N. C., 40; *Hardware Co. v. Liability Co.,* 178 Cal., 252; *Cleveland Metal Roofing Co. v. Gospard,* 89 Ohio St., 185, reported in 39 Ann. Cas., with valuable note.

The acceptance by the plaintiff of a ninety-day trade acceptance for the amount due from the Wells Electric Company, as a matter of business convenience, is not a bar to its right to recover on the bond. *Guaranty Co. v. Pressed Brick Co.,* 191 U. S., 416.

In the instant case the general contractor agreed to provide "all the material and perform all the work," required for the erection of the

building, and to "pay for all labor done on, and all material and supplies furnished for said work." These provisions, read in the light of the statute, look to the protection of those who furnish the labor and materials provided for in the contract, and not to the particular contract or engagement under which they are supplied. If the general contractor sees fit to let a portion of the work to a subcontractor, who employs labor and buys materials which are used to carry out and fulfill the engagement of the original contractor, the principal contractor is thereby furnished with the labor and materials for the fulfillment of his engagement as effectually as he would have been had he directly hired the labor or bought the materials.

This interpretation finds support generally in the decisions of other jurisdictions. *Multnomah County v. U. S. F. & G. Co.*, 87 Or., 205; *Columbia County v. Consolidated Contract Co.*, 83 Or., 258; *Crane Co. v. Md. Cas. Co.*, 102 Wash., 66; *Haakinson & B. Co. v. McPherson*, 182 Iowa, 477; *Hardware Co. v. Aetna Acc. & Liability Co.*, 178 Cal., 252; *Associated Oil Co. v. Commary-Peterson Co.*, 32 Cal. App., 586; *School District v. Hallock*, 86 Or., 692; *Oliver Const. Co. v. Williams*, 152 Ark., 419.

We conclude that the material and supplies furnished by the plaintiff in the instant case were within the obligation of the surety on the bond, and in this view the verdict and judgment must be upheld.

No error.

STATE v. JOHN WHITENER.

(Filed 28 April, 1926.)

1. Evidence—Competency—Courts—Preliminary Questions—Appeal and Error.

The trial judge is required to hear the evidence, including that of the defense, when so requested, in determining its competency, and where in a criminal case the State offers confessions of the prisoner with evidence tending to show they were voluntarily made by him, the defendant in his own behalf has the legal right to offer evidence to the contrary, and the judge's refusal to hear him is reversible error.

2. Appeal and Error—Conclusions of Law—Evidence—Preliminary Hearings—Courts.

Upon determining whether the confessions of a prisoner on trial were made voluntarily and therefore competent, the conclusions of the trial judge upon the weight and credibility of the evidence are conclusive on appeal, but his refusal to hear the prisoner's evidence to rebut that of the State's witness is an error of law, and is reviewable thereon.

3. Same—Criminal Law—Witnesses—Defendants—Statutes.

The defendant in a criminal action is competent as a witness in his own defense upon the preliminary hearing of the trial judge, as to whether confessions he had made to the officers of the law were voluntarily made or induced from him contrary to law. C. S., 1799.

APPEAL by defendant from *Schenck, J.*, at September Term, 1925, of GUILFORD.

Criminal prosecution tried upon an indictment charging the prisoner with a capital felony, to wit, murder in the first degree.

From an adverse verdict and judgment of death pronounced thereon, the prisoner appeals, assigning errors.

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

Sidney S. Alderman and Kenneth M. Brim for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on the night of 9 June, 1925, Fred G. Claywell, in company with two fellow-policemen of the city of High Point, went to the home of the defendant, John Whitener, to break up a gambling game, which they had reason to believe was going on in his house.

Quite a battle ensued between the officers and the colored men who had gathered at the defendant's home for a game of cards. Fred G. Claywell, one of the officers, was shot, which resulted in his death a few days thereafter; the defendant was shot twice, though not mortally wounded, while another of the card players was killed almost instantly. In the confusion which followed, an oil lamp was turned over and the house was destroyed by fire. Officer Claywell and the defendant were both taken to the hospital. The latter recovered from his injuries, the former did not.

While the defendant was in the hospital the police officers kept him constantly under guard and endeavored to elicit from him a statement as to who shot officer Claywell, and the circumstances under which the shooting occurred.

After several days' questioning, the prisoner signed a written confession to the effect that he was the one who shot officer Claywell; in fact, the only one in his party who had a pistol; and that the wounded officer returned the fire while lying on the floor, or after he had been felled by the defendant.

To the introduction of this evidence the accused, through his counsel, objected, on the ground that the confession was not given voluntarily; and the prisoner asked that the jury be withdrawn from the court room, to the end that he might interrogate the State's witnesses before the court on the preliminary question as to the competency of such pro-

posed evidence. The jury was excused, and on cross-examination by counsel for the prisoner, the witnesses for the State testified that the confession was made voluntarily, after the prisoner had been informed of his rights, and that no inducements whatever were held out to him which caused him to make it.

For the purpose of denying this evidence touching the voluntariness of his confession, the prisoner, through his counsel, asked that he be allowed to take the stand, not before the jury, nor in the cause, but before the judge, to give his version as to how the alleged confession was obtained from him. His Honor ruled that, as a matter of law, he could not hear the testimony of the defendant, in the absence of the jury, on the preliminary inquiry looking to the admissibility of the alleged confession. In this ruling we think there was error. The evidence of the prisoner, had he been allowed to testify, and, if believed, would have rendered the alleged confession incompetent as evidence against him. *S. v. Roberts,* 12 N. C., 259. See, also, *S. v. Davis,* 125 N. C., 612, *S. v. Drake,* 82 N. C., 593, *S. v. Dildy,* 72 N. C., 325, and *S. v. Matthews,* 66 N. C., 106, as pertinent authorities bearing upon the instant case.

"A confession is voluntary in law if, and only if, it was in fact, voluntarily made."—*Mr. Justice Brandeis* in *Ziang Sung Wan v. United States,* 266 U. S., 1, reported in 69 L. Ed., 131, with valuable note.

The case of *Bram v. United States,* 168 U. S., 532, 42 L. Ed., 568, contains an exhaustive review of the English and American authorities on the subject, the opinion of the Court being written by *Mr. Justice White,* with a dissenting opinion filed by *Mr. Justice Brewer.* See, also, *Ammons v. State,* 80 Miss., 592, as reported in 18 L. R. A. (N. S.), 768, for a collection of the pertinent authorities in a valuable note by the annotator covering the whole subject now under investigation.

After declining to hear the testimony of the defendant touching the manner in which the alleged confession was secured, the court found as a fact from the evidence of the State's witnesses, that the confession was given voluntarily, and thereupon permitted the solicitor to offer it in evidence against the prisoner.

The record, therefore, presents the question squarely as to whether the prisoner, at his own request, was entitled, as a matter of law, to testify before the judge, in the absence of the jury, on the preliminary inquiry addressed only to the court, with respect to the admissibility of the alleged confession as evidence against him. We think the prisoner, at his own request, was entitled to be heard on this preliminary inquiry—the credibility of his testimony, of course, being a matter for the judge.

In this jurisdiction it is the province of the judge, and not that of the jury, to determine every question, whether of law or of fact, touching

the admissibility of evidence. *Monroe v. Stutts,* 31 N. C., 49. The parties are entitled, as a matter of right, to have the judge definitely decide all questions relating to the admissibility of evidence, and to admit or reject it accordingly. *S. v. Dick,* 60 N. C., 440.

Speaking to the identical question in *S. v. Andrews,* 61 N. C., 205, *Pearson, C. J.,* said: " 'It is the duty of the judge to decide the facts upon which depends the admissibility of testimony; he cannot put upon others the decision of a matter, whether of law or of fact, which he himself is bound to make.' *S. v. Dick,* 60 N. C., 440. . . . What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this Court. So what evidence the judge should allow to be offered to him to establish these facts is a question of law. So whether there be any evidence tending to show that confessions were not made voluntarily is a question of law. But whether the evidence, if true, proves these facts, and whether the witnesses giving testimony to the court touching the facts are entitled to credit or not, and, in case of a conflict of testimony, which witness should be believed by the court are questions of fact to be decided by the judge; and his decision cannot be reviewed in this Court, which is confined to questions of law."

And further in the same opinion it is said: "The duty of finding the facts preliminary to the admissibility of evidence is often a very embarrassing one, as in this case, where there is a conflict of testimony. But this duty must be discharged by the judge, and the evil of allowing him to let the jury also pass on these facts is this: If he decide for the prisoner and reject the evidence, that is the end of it, whereas, if he decide for the State, and can leave it to the jury to review his decision, it is an inducement for him to decide *pro forma* for the State, and so the evidence goes to the jury without having the preliminary facts decided according to law."

This is the fixed law of North Carolina as settled by a long line of decisions. *S. v. Davis,* 63 N. C., 578; *S. v. Vann,* 82 N. C., 631; *S. v. Efler,* 85 N. C., 585; *S. v. Sanders,* 84 N. C., 728; *S. v. Burgwyn,* 87 N. C., 572; *S. v. Crowson,* 98 N. C., 595; *S. v. Page,* 127 N. C., 513.

And to like effect are the decisions in other jurisdictions. *Enoch v. Com.,* 126 S. E. (Va.), 222; *Com. v. Culver,* 126 Mass., 464; *People v. Fox,* 121 N. Y., 449; *Briscoe v. State,* 67 Md., 6; *Brown v. State,* 71 Ind., 470; *S. v. Fidment,* 35 Iowa, 541.

Speaking to the question in *People v. Rogers,* 192 N. Y., 331, *Bartlett, J.,* said: "Where in a criminal prosecution a paper alleged to be a written confession by the defendant is offered in evidence against him and he objects to its admission, and offers to prove at that stage of the

trial that the paper was procured from him by such threats or promises or under such other circumstances as, if established, would render it inadmissible, it is the duty of the trial judge to receive the evidence thus offered against the admissibility of the alleged confession before deciding as to the competency of the confession itself; and it is error to admit the paper without first receiving and considering such evidence."

In *S. v. Kinder,* 96 Mo., 548, *Black, J.,* states the law of Missouri as follows: "When there is reason to believe that the confessions were obtained by the influence of hope or fear, it becomes the duty of the judge to hear the evidence and determine whether it shall go to the jury. Whether the confessions were made with that degree of freedom which allows of their admission, is a preliminary question for the judge to determine. This is the long-settled rule in this State. *Hector v. State,* 2 Mo., 167; *S. v. Duncan,* 64 Mo., 262; *S. v. Patterson,* 73 Mo., 696. This being the law, it would seem to follow that the judge should hear all the evidence bearing upon the question whether the confessions were obtained by improper influences, before he passes upon their admissibility. It is the duty of the judge to hear all such competent evidence on this preliminary question as the defendant may see fit to offer. This is true though the officer or other person called to the stand by the State may deny that any improper influences were used. Whart. Crim. Ev., sec. 689; *People v. Soto,* 49 Cal., 69. Since a defendant is a competent witness, under our statutes, in his own favor, he is a competent witness on this preliminary issue. This indeed is the legitimate deduction to be drawn from what we said in the recent case of *S. v. Rush,* 95 Mo., 199."

By express statute (C. S., 1799), a defendant on trial in this jurisdiction, charged with a criminal offense, is, at his own request, but not otherwise, competent to testify in his own behalf, and we see no valid reason why he should not be permitted, at his own request, to give evidence before the court, on the preliminary inquiry, touching the admissibility of an alleged confession, which the State proposes to offer as evidence against him. True, this may result, at times, in producing embarrassing situations for the judge, especially where the evidence is conflicting and the witnesses are unknown to him, nevertheless the question of the competency of evidence in this jurisdiction is one for the judge, and not for the jury, to decide. *S. v. Maynard,* 184 N. C., p. 658.

For the error in declining, as a matter of law, to hear the prisoner on this preliminary inquiry, a new trial must be awarded.

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.

New trial.

PAGE TRUST COMPANY ET AL. v. CAROLINA CONSTRUCTION COMPANY ET AL.

(Filed 28 April, 1926.)

1. Mechanics' Liens—Bonds—Principal and Surety—Municipal Corporations—Statutes—Contracts—Materialmen.

Where the contractor's bond for the erection of a public building used in connection with the contract does not create a liability on the surety to pay for the materials furnished for the erection of the building, but only the municipality against loss, there is no presumption prior to the enactment of chaper 100, Public Laws of 1923, that the bond incorporated this provision, and under the provisions of C. S., 2445, no liability to the surety will be thereunder created.

2. Same—Assignment by Contractor of Funds Reserved—Priority.

Where those furnishing materials, etc., for the erection of a municipal public building have acquired no lien thereon for their payment, and the surety on the contractor's bond has no liability thereunder, the interest of the contractor in the amount reserved for final payment to him is assignable by him in equity for money loaned him to pay for material, etc., also furnished for and used in the buildings, as against the claims of others who have furnished material, etc., for the building, and has priority of payment out of the funds so reserved in accordance with the priority of date of such assignments.

3. Same—Bills and Notes—Renewal Notes.

Where the contractor has made a valid assignment as security for money loaned to pay for material, etc., used in a public building, the renewals of his note to the bank lending the money upon the same conditions, are enforceable by the bank as against the unpaid material furnishers, to the same extent as the note originally given.

APPEAL by plaintiffs, other than Page Trust Company and Bank of Hamlet, from *McElroy, J.*, at November Term, 1925, of ANSON. Affirmed.

Fred J. Coxe, H. P. Taylor, B. F. McLeod, C. W. Tillett, Jr., Frank L. Dunlap, D. B. Smith, Williams & Williams, McLendon & Covington, and Manning & Manning for appellants.

Stewart, McRae & Bobbitt for American Surety Company.

Gibbons & LeGrand for Bank of Hamlet.

ADAMS, J. On 16 May, 1922, the Carolina Construction Company contracted with the Board of Trustees of the Wadesboro Graded School to provide all the material and perform all the work necessary for the erection and completion of a school building in Wadesboro, and a few days thereafter executed a penal bond, with the American Surety Company of New York as surety, conditioned to indemnify the board of

trustees against any loss or damage directly arising by reason of the contractor's failure to perform his contract. Owing to financial difficulties the contractor made default, and with his consent and with that of the surety company the board of trustees took over and completed the work at its own expense. In addition to the amount previously paid the contractor, the trustees expended $5,754.15, and after doing so had in their hands as the remainder of the retained percentage the sum of $4,431.08. Several creditors sued the contractor, the surety company, and the board of trustees, on their respective accounts for labor and material; and upon issues joined the cause was referred to R. C. Lawrence as referee, with instructions to hear the evidence and to report his findings of fact and his conclusions of law. The referee made his report in compliance with the order of reference and the appellants filed exceptions. The exceptions were overruled by the trial judge, who affirmed the referee's findings of fact and conclusions of law. The appellants again excepted and appealed. The ultimate object of the action, which was treated as a creditors' bill, is the recovery of judgments against the surety on the contractor's bond.

The first conclusion of law is this: "As the contract does not require the contractor to pay for labor and material, and as the bond does not upon its face extend to cover the claims of laborers and materialmen, there is no liability against the surety company." This, we think, is the correct conclusion. The bond of the surety company was executed in May, 1922. It was not conditioned for the payment of all labor done on and material and supplies furnished for the building, as required by C. S., 2445, but only to indemnify the obligee, the board of trustees, against loss or damage; and the bond is not conclusively presumed to have been given in accordance with the provisions of section 2445 as amended because the amendment which writes this provision into every bond given by any municipal corporation for the erection, repairing or altering of a public building did not become effective until 17 February, 1923. Public Laws 1923, ch. 100. The conclusion reached by the referee and by the judge is sustained by *Mfg. Co. v. Andrews,* 165 N. C., 285; *McCausland v. Construction Co.,* 172 N. C., 708; *Warner v. Halyburton,* 187 N. C., 414; *Brick Co. v. Gentry, ante,* 636. See, also, *Noland Co. v. Trustees,* 190 N. C., 250. In *Ingold v. Hickory,* 178 N. C., 614; *Supply Co. v. Lumber Co.,* 160 N. C., 428; *Gastonia v. Engineering Co.,* 131 N. C., 363, and *Hill v. Surety Co.,* 200 U. S., 107, 50 Law Ed., 437, cited by the appellants, there were stipulations for the payment of debts contracted for labor and material and herein lies the distinction pointed out in *Warner v. Halyburton, supra.*

The appellants say that there was error in holding that the laborers and materialmen had no lien on the school building or on the fund

remaining after the trustees had completed the building and in holding that this fund was the property of the contractor or his assignees. We do not concur, for all doubt seems to have been resolved against this position in a number of our decisions. *Noland Co. v. Trustees, supra; Warner v. Halyburton, supra; Ingold v. Hickory, supra; Scheflow v. Pierce,* 176 N. C., 91; *Hutchinson v. Comrs.,* 172 N. C., 844; *Hall v. Jones,* 151 N. C., 419.

On 24 October, 1922, the contractor borrowed from the Bank of Hamlet $7,000, and wrote upon the face of his note, "To secure this note we assign $7,000 of the amount due us by Wadesboro High School." This money was applied in payment of work done and material used in the construction of the building. The Bank of Hamlet endorsed the note and had it rediscounted by the Bank of Wadesboro, which thereby became a holder in due course. The contractor afterwards made certain payments on the note, and upon his failure to pay the remainder due the Bank of Hamlet took up the note and reacquired title thereto, with the usual rights and remedies. Thereafter the contractor renewed the note from time to time, the last renewal dated 1 April, 1925, being a note in the sum of $4,427.19. This note bore an assignment identical with that which was written on the face of the original note. The contractor gave a written order to the board of trustees to pay the note after its transfer to the Bank of Wadesboro, but the board declined to make payment because nothing could be paid without the architect's certificate. When the contractor notified the trustees to pay the note nothing was due him in excess of the fifteen per cent which was withheld under the contract. It was the purpose of the contractor to assign a sufficient amount of the moneys due or to become due to pay the note to the Bank of Wadesboro, and after it was returned to ratify the assignment and to make it effective. Upon these facts the referee reported the following conclusions of law, which were challenged by the exceptions and affirmed by the judge:

"The assignment made by the contractor to the Bank of Hamlet on 24 October, 1922, when considered in connection with the assignment provisions written in the face of the original notes and renewals thereof, and also when considered in the light of the letter or order of the contractor upon the school board dated 19 May, 1923, constitutes an equitable assignment, certainly as between the bank and the contractor, and as this is the first and superior assignment, and as the amount due will entirely consume the fund in hand, the Bank of Hamlet is entitled to recover the full and entire amount due by the school board to the contractor.

"The Bank of Hamlet is entitled to have and recover of the school board the sum of $4,431.08, balance admittedly due by the school board,

plus the further sum of $..... derived from the sale of the remaining material left over after the completion of the school building."

In considering the exceptions we must not overlook the fact that neither the contract nor the bond required the contractor to pay for labor or material. After the completion of the building the board of trustees had on hand $4,431.08, to which under the written agreement the contractor would have been entitled. The question is whether as against the appellants he had a legal right to make an assignment of this fund to the Bank of Hamlet.

At common law a mere possibility was not the subject of assignment. This rule was applied in the law of contracts; and to give validity to an equitable assignment of money due by contract it was necessary to show that a contract existed and that the money assigned had an actual or potential existence. In *Motz v. Stowe,* 83 N. C., 434, 439, the Court applied the general principle that anything written, said, or done for value in pursuance of an agreement to place a fund out of the owner's control and to appropriate it for the benefit of another constitutes an equitable assignment. Accordingly, it has been held that in equity contingent rights are assignable and that the assignee of a part of a debt acquires in equity a right of action against the assignor. *Brown v. Dail,* 117 N. C., 41; *Williams v. Chapman,* 118 N. C., 943; *Stott v. Franey,* 23 A. S. R., 132, and note; 2 R. C. L., 599. Therefore as between the creditor and his assignee it is not necessary to notify the debtor that the claim has been transferred. *Ponton v. Griffin,* 72 N. C., 362; *Chemical Co. v. McNair,* 139 N. C., 326. And in *Bank v. School Committee,* 121 N. C., 107, it is said that under our statute (C. S., 446), almost any contract that constitutes an indebtedness or money liability may be assigned. See, also, *Godwin v. Bank,* 145 N. C., 320, 326; *Hall v. Jones, supra; Corporation Commission v. Bank,* 164 N. C., 205. The contractor's claim, then, was assignable; and as the exceptions do not present the case of an equitable lien in favor of the creditors based upon the contract, the bond, or any other written instrument intended to charge the particular fund with payment of the appellants' claims (*Garrison v. Vermont Mills,* 154 N. C., 8), we discover no adequate reason for declaring the assignment to the Bank of Hamlet either void or voidable. The remaining exceptions require no discussion.

In our opinion the judgment is free from error and should be

Affirmed.

STATE v. WILLARD FERGUSON.

(Filed 28 April, 1926.)

1. Criminal Law—Courts—Jurisdiction—Parties—Evidence—Indictment.

A conviction of a criminal offense must be by a court of competent jurisdiction over the offense and the party charged therewith, which should be sufficiently charged in every material part by the indictment, with evidence sufficient to support a conviction, and the person thus tried must be properly made a defendant in the action, with the right to be heard therein.

2. Juvenile Courts—Jurisdiction—Delinquent Children—Superior Courts—Judgments—Adjudication—Statutes.

The juvenile courts of the State are now given by statute exclusive original jurisdiction of delinquent children under sixteen years of age, with prescribed procedure by which an adjudication may be therein determined. C. S., 5057.

3. Statutes—Interpretation—Child Welfare—Juvenile Courts.

The child's welfare act, Public Laws of 1919, ch. 97, and Art. 2 thereof, establishing the juvenile courts, C. S., 5039 *et seq.*, were enacted as a whole, and the sections are interrelated and interdependent, and the intent thereof is so to be interpreted.

4. Same—Courts—Jurisdiction.

The adjudication of one other than the parent or guardian of the child, of causing the delinquency of a female child under sixteen years of age, etc., must be had in the juvenile courts as having statutory original jurisdiction over the parties and subject-matter.

5. Statutes—Interpretation.

The courts will give various statutes upon the same subject-matter the interpretation which will reasonably harmonize them.

STACY, C. J., and CLARKSON, J., dissenting.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1926, of HALIFAX.

The second count in the indictment is as follows:

"And the jurors aforesaid on their oaths as aforesaid, do further present: That said Willard Ferguson at and in said county on 20 September, 1925, with force and arms, unlawfully and wilfully and knowingly did take riding in one automobile and give intoxicating liquor to one Elsie Pully, a child over whom her parents had the custody, which said acts produced, promoted and contributed to the condition which caused said Elsie Pully to be adjudged delinquent, neglected and in need of the care, protection and discipline of the State, contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

Upon this count the defendant was convicted, judgment was pronounced, and an appeal was taken based on exceptions duly entered of record.

The State's evidence tended to show that Elsie Pully, a girl fourteen years of age, lived with her father and mother at Rosemary in Halifax County. In September, 1925, she, R. E. Smith, Eliza Sanders, and Claude Parks went in a car to Roanoke Rapids, and then five miles further on to Floyd's store in Northampton County, where they found Salem Newsome and the defendant, Willard Ferguson. Ferguson was in his car. Salem Newsome, who was standing between the two cars, said, "Come and let's go and get some whiskey." Newsome, Smith, and Elsie went in Smith's car to Moss's store in Virginia, and Eliza Sanders, Claude Parks and the defendant went there in the defendant's car. When they arrived at the store in Virginia all except Elsie went in and drank some whiskey. Eliza Sanders brought Elsie some whiskey and she drank it; afterwards the defendant gave her a drink. On the return Eliza Sanders, Elsie, Parks and the defendant occupied the defendant's car. When she awoke she was alone in the automobile near Floyd's store. The defendant was near by. Dr. Long examined Elsie after her return, and on the trial he expressed the opinion that she had engaged in immoral conduct. Her father testified that before the trip he had been able to control his daughter, but not since her return home.

The statute is as follows: "A parent, guardian or other person having the custody of a child who omits to exercise reasonable diligence in the care, protection or control of such child, causing it to be adjudged delinquent, neglected, or in need of the care, protection or discipline of the State as provided in this article, or who permits such child to associate with vicious, immoral or criminal persons, or to beg or solicit alms, or to be an habitual truant from school, or to enter any house of prostitution or assignation or any place where gambling is carried on, or to enter any place which may be injurious to the morals, health, or general welfare of such child, and any such person or any other person who knowingly or wilfully is responsible for, encourages, aids, causes or connives at or who knowingly or wilfully does any act to produce, promote or contribute to the condition which caused such child to be adjudged delinquent, neglected, or in need of the care, protection or discipline of the State, shall be guilty of a misdemeanor." C. S., 5057.

Attorney-General Brummitt and Assistant Atorney-General Ross for the State.

George C. Green for defendant.

ADAMS, J. In disposing of this appeal we must guard against the natural tendency to ignore a familiar legal principle because the case

happens to exhibit a gross type of delinquency. The defendant's conduct may have been immoral and indefensible; it may have been such as to make him amenable to other provisions of the criminal law; but these considerations should not obscure our vision or divert our minds from the single inquiry whether he should have been convicted upon the evidence offered by the State.

The object of our organic law is to secure the individual against the arbitrary exercise of powers unrestrained by established rules. In criminal prosecutions he is to be tried upon an indictment accurately describing the offense with which he is charged; he cannot lawfully be convicted unless the evidence adequately sustains every constituent element of the offense; and he cannot be haled to court for the commission of one crime and there convicted of another. *S. v. Wilkerson,* 164 N. C., 432, 444. These principles we must keep in mind in determining whether a right has been denied and a wrongful conviction obtained upon a total failure of essential evidence.

The statute upon which the indictment was drawn is set out in the statement of facts. It was enacted by the General Assembly in 1919 as one of a series of statutes providing for the creation and organization of juvenile courts. Public Laws 1919, ch. 97. These several statutes compose Art. 2 in the chapter on Child Welfare. C. S., 5039, *et seq.* They were enacted as a whole; they deal with one subject; they are a unified body of law, interrelated and interdependent.

An analysis of this section and an examination of its relation to the other sections in Art. 2 may aid us in ascertaining what the Legislature intended. Under its terms two classes are subject to indictment: (1) the parent, guardian, or other person having the custody of the child; (2) under certain conditions, "any other person." Either of those in the first class may be indicted (a) when he omits to exercise reasonable diligence in the care, protection, or control of such child, causing it to be adjudged delinquent, neglected, or in need of the care, protection or discipline of the State "as provided in this article" (Art. 2, *supra*); or (b) when he permits such child to associate with vicious, immoral or criminal persons, etc. The parent or guardian may be prosecuted for acts of omission, causing the child to be adjudged delinquent, etc., or for permitting certain enumerated acts of delinquency. But the latter part of the section includes both classes, and it is the only part which includes the defendant: the parent or guardian or any other person may be prosecuted when he knowingly or wilfully does any act to produce, promote, or contribute to the *condition which caused* such child to be adjudged delinquent, neglected, or in need of the care, protection or discipline of the State. Under this clause the defendant was not subject to indictment unless he had produced, promoted, or contributed to a

condition which had caused an adjudication of delinquency, or an adjudication of neglect, or an adjudication that the child was in need of the protection or discipline of the State. In our opinion the language of the statute forbids the interpretation that he was indictable if he had produced, promoted, or contributed to a condition which had caused her to be *adjudged* delinquent, or *to be* neglected, or *to be* in need of the care, etc., of the State. The words "to be adjudged" obviously apply to each of the conditions named, *i. e.,* to be adjudged delinquent, or to be adjudged neglected, or to be adjudged in need. As to these respective conditions the clause is disjunctive for the reason that if the copulative "and" had been used it would be necessary to show an adjudication of deliquency and of need and of neglect.

It is apparent, then, that a judgment of delinquency must be given, but in what forum? It requires no argument to prove that jurisdiction is absolutely necessary to a valid judgment. The court must have jurisdiction of the parties and jurisdiction of the cause of action embracing every question which its judgment or sentence assumes to decide. 33 C. J., 1072, sec. 34, 35, *et seq.* In the present case the Superior Court assumed to decide and to adjudge that Elsie Pully was a delinquent child. It had no jurisdiction to do so. It was expressly deprived of this jurisdiction when the act of 1915 was repealed. Public Laws 1919, ch. 97, sec. 25. The juvenile courts have exclusive original jurisdiction of any case of a child under sixteen years of age who is delinquent or neglected. The function of the court is defined; its procedure is fixed by statute. Sessions are held; petitions are filed; process is issued directed to the child and its parents; the child is brought before the court and given a hearing. Thereupon "the court, if satisfied that the child is in need of the care, protection or discipline of the State, *may so adjudicate,* and may find the child to be delinquent, neglected, or in need of more suitable guardianship." This is the adjudication referred to by section 5057. In this way the child is adjudged delinquent "as provided in this article." This, it would seem, is the plain meaning of the statute. Not only does it point out the particular method of adjudication; the last clause speaks of the adjudication as a fact accomplished; it refers to "the condition which *caused* such child to be *adjudged* delinquent"—words signifying a judgment; and this is very much more than a mere finding by the jury. Can Elsie Pully's status thus be determined in a criminal action to which she is not a party? Consider a concrete illustration. The defendant is on trial in the Superior Court. If the question of Elsie's delinquency is to be determined in this forum, what is the situation? She comes into court as a witness; she goes out "adjudged" a delinquent—a fit subject to become a ward of the State; and

this without notice to her and without the formality of a hearing. This is not permissible; the law hears before it condemns and renders judgment only after trial.

In our opinion the interpretation we have given these statutes is the only one by which they can be harmonized. It is unwise so to interpret one statute as needlessly to destroy another. We prefer a construction which will preserve the integrity of the juvenile courts and neither impair their usefulness nor take away the exclusive original jurisdiction which the Legislature has given them.

The indictment charges the adjudication, but the evidence fails to disclose it, and for this reason the conviction cannot be sustained.

Error.

STACY, C. J., and CLARKSON, J., dissenting.

INDEPENDENCE TRUST COMPANY ET AL. v. PORTER & BOYD, INC., ET AL.

(Filed 28 April, 1926.)

1. **Roads and Highways—State Highway Commission, Principal and Surety—Materialmen—Labor—Assignment of Claims—Contracts.**

   Where under the written terms of a bond given by a contractor for the building of a road project to the State Highway Commission, the surety is obligated to pay for the labor on and the materials furnished therefor, the assignment of the moneys due or to become due the contractor under his contract advanced for the purpose stated is valid, and upon compliance with the statute as to notice, etc., the assignee may recover out of the moneys withheld by the State Highway Commission and due the contractor paid over, under bond for its repayment, to the surety on the bond.

2. **Roads and Highways—State Highway Commission—Labor—Materialmen—Principal and Surety—Assignment of Claim.**

   The contractor for the building of a state highway gave bond to the State Highway Commission conditioned, among other things, for the payment for the labor and the material used in the project: *Held*, an assignment by the contractor of moneys due or to become due him under the contract to one furnishing money for the payment of such labor and material, was contemplated by the bond and included in the liability of the surety thereon.

APPEAL by defendant, Massachusetts Bonding and Insurance Company, from *Shaw, J.*, at January Special Term, 1926, of MECKLENBURG.

TRUST CO. *v.* PORTER.

Civil action to recover on two bonds—one given for funds assigned the plaintiffs by Porter & Boyd, Inc., road contractor, and turned over to the surety on the contractor's bond by the State Highway Commission, and the other to secure the faithful performance of a road-building contract and to protect materialmen and laborers, the latter having assigned their claims to the plaintiffs.

From a judgment overruling a demurrer interposed by the Massachusetts Bonding and Insurance Company, the said defendant appeals.

Stewart, McRae & Bobbitt for plaintiffs.
J. F. Flowers for defendant Bonding Company.

STACY, C. J. There are two causes of action stated in the complaint, hence two distinct questions are raised by the demurrer.

First, it is alleged that Porter & Boyd, Inc., road contractor, is indebted to the plaintiffs in the sum of $37,398.51, with interest, for moneys advanced or loaned on written assignments made by the said contractor to the plaintiffs for all deferred payments, retained percentages and all other moneys due or to become due under a contract with the State Highway Commission for the construction of a section of road in Person County, known as Project No. 463; that plaintiffs duly filed with the State Highway Commission notice of their claims as required by law, and also notified the Massachusetts Bonding and Insurance Company, surety on the bond of the said Porter & Boyd, Inc.; that the work was satisfactorily completed by the contractor according to the terms of its contract; that the State Highway Commission had on hand, at the time of the completion of the work, a balance of approximately $20,000 due the contractor under said contract, which amount was turned over to the Massachusetts Bonding and Insurance Company, under a bond given for its return in case the plaintiffs were adjudged to be entitled to said funds by virtue of their assignments; and that the State Highway Commission has agreed to submit to the jurisdiction of the court in this action, in order that the rights of all the parties may be judicially determined.

Upon these the facts chiefly pertinent, we think the demurrer as it relates to the first cause of action was properly overruled.

By written assignments, duly executed, all moneys due and to become due under the contract between Porter & Boyd, Inc., and the State Highway Commission, for the building of Project No. 463, including the retained percentages, etc., were all transferred to the plaintiffs. *Trust Co. v. Construction Co., ante,* 664. There being no question as to the validity of these assignments, it would seem that the plaintiffs, as against a demurrer, should be held to be entitled to the balance due the

contractor by the State Highway Commission upon the satisfactory completion of the work. *Hall v. Terra Cotta Co.,* 97 Kan., 103, Ann. Cas., 1918 D, 605, and note.

The liability of the Massachusetts Bonding and Insurance Company is on the bond given by it to the State Highway Commission to save it harmless or to insure the return of the funds due the contractor on Project No. 463, in case the plaintiffs should be adjudged entitled to said funds. This is the only bond declared upon in the first cause of action.

Second, it is alleged that the contractor, Porter & Boyd, Inc., gave to the State Highway Commission, as required by law, a bond in the penal sum of $148,710.00 with the Massachusetts Bonding and Insurance Company, as surety thereon, for the faithful performance of its contract in building the aforesaid road, and to insure the payment of all laborers and materialmen doing work on, or furnishing material for, said road construction; that the plaintiffs, in order to keep the contractor supplied with labor and materials for the work, advanced the sum of $11,069.65 to pay the laborers and took from them assignments of their claims against the contractor; that the balance now due on said assignments, and for which the bond of the Massachusetts Bonding and Insurance Company is liable, amounts to $8,693.10; and that proper notice of said claims has been duly filed with the State Highway Commission.

On these the facts chiefly relevant, we think the demurrer as it relates to the second cause of action was properly overruled. Undoubtedly, the laborers, had they not assigned their claims, would have been entitled to maintain an action on said bond, and we think it must be held, in keeping with the general trend of authorities on the subject, that the claims of laborers and materialmen may be assigned without losing the protection of the bond given and intended for their benefit. *Title Guaranty & T. Co. v. Crane,* 219 U. S., 24; *Bank v. Casualty Co.,* 93 Wash., 635, Ann. Cas., 1918 D, 645.

Here, the bond in suit was intended to perform a double purpose: 1. To insure the faithful performance of all obligations assumed by the contractor towards the State Highway Commission. 2. To protect third persons furnishing materials or performing labor in and about the construction of said roadway. *Plyler v. Elliott, ante,* 54; *Town of Cornelius v. Lampton,* 189 N. C., 714. In its second aspect, the bond contains an agreement between the obligors and such third persons that they shall be paid for whatever labor or materials they furnish or supply to enable the principal in the bond to carry out its contract with the State Highway Commission. *U. S. v. National Surety Co.,* 92 Fed., 549.

The general rule is that the assignment of a debt carries with it the security. 2 R. C. L., 633. The application of this general principle to such cases as the present obviously accords with the purpose of the bond. *U. S. v. Rundle,* 100 Fed., 400.

Affirmed.

INDEPENDENCE TRUST COMPANY ET AL. v. PORTER & BOYD, INC., ET AL.

(Filed 28 April, 1926.)

(For digest, see *S. c., ante,* 672.)

APPEAL by defendant, Massachusetts Bonding and Insurance Company, from *Shaw, J.,* at January Special Term, 1926, of MECKLENBURG.

Civil action to recover on a bond given by Porter & Boyd, Inc., road contractor, with the Massachusetts Bonding and Insurance Company as surety thereon, to insure the faithful performance of a road-building contract and to protect the claims of materialmen and laborers, the latter having assigned their claims to the plaintiffs.

From a judgment overruling a demurrer interposed by the Massachusetts Bonding and Insurance Company, the said defendant appeals.

Stewart, McRae & Bobbitt for plaintiffs.

J. F. Flowers for defendant Bonding Company.

STACY, C. J. The facts of this case are practically identical with those set out in the second cause of action in a suit between the same parties, this day decided, save and except the contract and bond, here in suit, apply to another section of road, to wit, Project No. 856; and, upon authority of the case just mentioned, the judgment overruling the demurrer in the present action must be approved.

Affirmed.

PAGE TRUST COMPANY v. RAPHAEL W. PUMPELLY ET AL.

(Filed 28 April, 1926.)

Clerks of Court—Orders—Judgments—Pleadings—Appeal—Jurisdiction—Superior Court.

Upon appeal, the judge has jurisdiction to pass upon orders of the clerk in matters of giving judgment by default upon the pleadings, permitting parties to file answers, etc., and to make new parties to the action.

TRUST CO. *v.* PUMPELLY.

APPEAL by the plaintiff and one of the defendants from *Stack, J.*, at February Term, 1926, of MOORE.

Civil action to foreclose certain mortgages and deeds of trust. From an order setting aside a default judgment, making additional parties and allowing time to file pleadings, the plaintiff, Page Trust Company, and defendant, Atlantic Joint Stock Land Bank of Raleigh, appeal, assigning errors.

U. L. Spence and Thos. E. Bass for plaintiff.

R. L. Burns for defendant, Atlantic Joint Stock Land Bank of Raleigh.

Brittain, Brittain & Brittain and H. F. Seawell for defendants, H. L. and Margarita P. Smythe.

Hoyle & Hoyle for Amelie Ripley Pumpelly.

STACY, C. J. While the record in this case is quite voluminous, the questions presented fall within a very narrow compass.

The case was instituted 21 October, 1925, by the Page Trust Company against Raphael W. Pumpelly and wife, Amelie Pumpelly, Eastern Cotton Oil Company, a Virginia corporation, and the Atlantic Joint Stock Land Bank of Raleigh. The Eastern Cotton Oil Company being a foreign corporation, and Mrs. Amelie Pumpelly a nonresident, service of summons on these defendants was obtained by publication.

Raphael W. Pumpelly filed answer to the complaint 17 December, 1925, but later withdrew the same by leave of his Honor, Michael Schenck, judge presiding, at the January Term, 1926, Moore Superior Court, the order allowing the withdrawal being entered on Saturday, 23 January, 1926. On the following Monday, 25 January, H. L. Smythe and wife, Margarita P. Smythe, were, upon their own application, made parties defendant by order of the clerk of the Superior Court, and allowed ten days within which to file answer. Later, on the same day, 25 January, the plaintiff, Page Trust Company, and the defendant, The Atlantic Joint Stock Land Bank of Raleigh, moved before the clerk for judgment by default upon the verified complaint of the plaintiff and verified answer of the moving defendant. This motion was continued until the following Monday, 1 February, 1926, at which time the clerk entered a default judgment in favor of the plaintiff and the defendant Land Bank, after striking out the order allowing H. L. Smythe and wife, Margarita Smythe, to be made parties defendant. But as the judgment entered was not as tendered, the plaintiff and said defendant Bank appealed from the judgment of the clerk to the judge. H. L. Smythe and wife likewise appealed from the judgment of the

clerk, revoking his former order allowing them to come in and be made parties defendant. On the same day, Monday, 1 February, 1926, Mrs. Amelie Pumpelly, for the first time, appeared through counsel and asked to be allowed to file answer, which was denied, and from the order of the clerk, denying her motion, she also appealed to the judge of the Superior Court in term.

The matter then came on for hearing before his Honor, A. M. Stack, judge presiding, at the February Term, 1926, Moore Superior Court, and from the judgment then entered, setting aside the default judgment of the clerk, allowing Mrs. Amelie Pumpelly to file answer and making additional parties, plaintiff and The Atlantic Joint Stock Land Bank of Raleigh appealed to the Supreme Court.

It will be observed that all the parties had appealed from the clerk to the judge at term. Therefore, the whole matter was properly before the judge of the Superior Court, and his judgment must be affirmed on authority of *Howard v. Hinson, ante,* 366; *Greenville v. Munford, ante,* 373, and *Caldwell v. Caldwell,* 189 N. C., 805. See, also, C. S., 492, and cases cited thereunder, touching the right of the non-resident defendant, Mrs. Amelie Pumpelly, who was served only by publication, to come in and defend, either before or after judgment.

There was no motion for judgment against Raphael W. Pumpelly alone.

Affirmed.

J. H. BOLICK v. CITY OF CHARLOTTE.

(Filed 28 April, 1926.)

Municipal Corporations—Cities and Towns—Charter—Private Statutes—Defenses—Demurrer—Appeal and Error.

A defendant relying as a defense upon a special provision in its charter requiring certain notice before action brought, must allege as well as prove it, and a demurrer to the complaint in which such provision is not set out as not sufficiently stating a cause of action, is bad.

APPEAL by defendant from *Bryson, J.,* at November Term, 1925, of MECKLENBURG. Affirmed.

Civil action to recover damages for injuries to plaintiff's land, alleged to have been caused by the negligent discharge of sewage by defendant, a municipal corporation, into Sugar Creek, which flows over and along the lands of plaintiff. Defendant demurred to the complaint, for that it is not alleged therein that plaintiff, prior to the commence-

ment of the action, gave to defendant notice of the alleged injury and his claim for damages, as required by section 15, ch. 251, Private Laws of 1911. From judgment overruling demurrer, and allowing defendant time to answer, defendant appealed to the Supreme Court.

T. L. Kirkpatrick, H. L. Taylor, Jas. A. Lockhart, and Preston & Ross for plaintiff.

C. A. Cochran, Cansler & Cansler, and Taliaferro & Clarkson for defendant.

PER CURIAM. Defendant, by its demurrer to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action against defendant, relies upon the provisions of section 15, ch. 251, Private Laws 1911, entitled, "An act to amend the charter of the city of Charlotte." There is no reference in the complaint to said private act of the General Assembly, nor is there an allegation therein that defendant is a municipal corporation by virtue of said private act. It is well settled that courts do not take judicial notice of private acts of the General Assembly. Parties to an action who rely upon such acts must plead and prove them. *Reid v. R. R.*, 162 N. C., 355; *Corporation Commission v. R. R.*, 127 N. C., 283; C. S., 541. Defendant cannot avail itself of the provisions of its charter, which is a private act of the General Assembly, by a demurrer to the complaint, in which said private act is neither alleged nor specifically referred to. Such provisions, if relied upon to defeat plaintiff in his action, must be set up in the answer as a defense. The demurrer of defendant is a "speaking demurrer"; it was properly overruled. *Sandlin v. Wilmington*, 185 N. C., 257; *Cherry v. R. R.*, 185 N. C., 90; *Trust Co. v. Wilson*, 182 N. C., 166; *Godwin v. Gardner*, 182 N. C., 97; *Kendall v. Highway Commission*, 165 N. C., 600; *Wood v. Kincaid*, 144 N. C., 393; *Von Glahn v. DeRossett*, 76 N. C., 292.

We have not considered the interesting questions, discussed in the briefs filed in this Court, involving the sufficiency of the notices given, as shown by the exhibits attached to the complaint. Whether such exhibits constitute a substantial compliance with the requirements of the statute cannot now be determined. It is not alleged that these notices were given as required by defendant's charter. We hold only that the demurrer was properly overruled, for the reasons herein stated. The judgment is, therefore,

Affirmed.

ESSIE B. FAWCETT, PERSONALLY AND AS ADMINISTRATRIX OF GEORGE D. FAWCETT, AND AS GUARDIAN OF FRANCES, ANNIE, AND THOMAS FAWCETT, JR., V. T. G. FAWCETT, FIRST NATIONAL BANK OF MOUNT AIRY, AND T. G. FAWCETT, MARY ARMFIELD, AND EDITH F. ANSLEY, EXECUTORS OF MARY LYNFESTER FAWCETT.

(Filed 5 May, 1926.)

1. Contracts Enforceable at the Death of Either Party—Consideration—Public Policy.

A contract by the parties that each should sell certain shares of stock in a bank in which both were officials at his death, upon condition that either may terminate the agreement upon written notice to the other, is upon a sufficient consideration not violative of public policy, and enforceable according to its terms.

2. Same—Wills.

Where a contract expresses itself to be such as to give to the survivor the right to purchase certain shares of stock of the other at the latter's death, and is in form an executory contract, it will be construed as an executory contract and not regarded as subject to the law of wills.

3. Same—Estates—Afterborn Children.

Where a paper-writing is construed as an executory contract to take effect at the death of either party, its terms are not affected by the fact that the condition of the estate was changed by children born of the decedent after its execution, under the law relating to wills.

4. Wills—Afterborn Children—Revocation—Statutes.

While afterborn children not provided for in the will of their deceased parent my claim by inheritance their part of the estate, C. S., 4135, 4169, it does not amount to revocation of the entire will.

5. Contracts—Revocation—Conditions—Notice to Terminate.

Where a mutual contract for the sale of shares of stock by one of the parties to the other at the death of either, provides that each thereof may terminate it upon written notice to the other, it will be enforced according to its terms, and as an executory contract may be enforced when such notice of its termination has not been given or affected by the change in the circumstances of the parties.

6. Contracts—Enforceable at Death of Party—Fraud—Evidence.

Where the parties have agreed that each would sell to the survivor his certain shares of bank stock at a fixed price, evidence that the survivor was a confidential adviser of the deceased and as his executor advised his widow taking the estate of her deceased husband, to sell at the price so fixed by the contract, to which she agreed, is not sufficient evidence of fraud on the part of the survivor.

7. Courts—Jurisdiction—Probate—Actions.

A lost will can only be restored as the law prescribes, and the courts cannot acquire jurisdiction over the subject-matter otherwise.

FAWCETT *v.* FAWCETT.

APPEAL by plaintiff from *Lyon, J.*, at September Special Term, 1925, of FORSYTH.

George D. Fawcett and T. G. Fawcett were brothers, each owning stock in the First National Bank of Mount Airy. On 11 August, 1908, they entered into the following contract:

"Whereas, upon the death of either party of this contract, it is the desire and will of each and both that any and all shares of stock in the First National Bank of Mount Airy, N. C., owned by either of the parties of this contract, at the time of death, shall become the property of the survivor, upon a par basis, and this instrument is a contract made by each and both parties hereto, to sell to the survivor said stock at par, and to give to the survivor five years during which to make payment for said stock, to be divided into five equal annual payments. And this contract shall be binding upon the administrators, executors or assigns of either party. This contract may be canceled by either party upon a change of mind, circumstances or sentiment with proper notice to the other party hereto in writing."

George D. Fawcett died intestate on 20 May, 1920, leaving as his heirs and distributees his widow and three children. Soon afterwards T. G. Fawcett took charge of the intestate's bank stock, had it retired or canceled, and accepted from the bank other certificates of stock issued to himself in lieu thereof.

On the trial T. G. Fawcett testified that he was cashier and that his brother had been president of the bank; that his brother had held $29,250 in stock of the par value of $100; that of this amount he had obtained from his mother $15,625, for which he had given her his note secured by a deposit of the stock. He testified that he had executed and delivered to Essie B. Fawcett, widow and administratrix of George D. Fawcett, his notes for the stock he had taken up pursuant to the agreement and had delivered to her the shares of stock as collateral security. He said that the certificates originally issued to his brother had been endorsed by Essie B. Fawcett, and that he had in all respects complied with the contract between him and his brother.

George D. Fawcett and Essie Fawcett were married in 1907. Their first child was born in May, 1909, the second in September, 1912, and the third in July, 1915.

The court instructed the jury if they believed the evidence to answer the first issue "No" and the second issue "Nothing." Thereupon the following verdict was returned:

1. Are the plaintiffs the owners and entitled to the possession of the stock in the First National Bank, described in the complaint? Answer: No.

2. What sum, if any, are the defendants indebted to the plaintiffs? Answer: Nothing.

Judgment and appeal by the plaintiff for error assigned.

R. C. Freeman, Holton & Holton for plaintiffs.
Carter & Carter, Swink, Clement & Hutchins for defendants.

ADAMS, J. The appellant contends that the alleged contract between George D. Fawcett and T. G. Fawcett should have been excluded because it was against public policy, unsupported by a valuable consideration, and therefore void and of no effect. To this position we cannot give our assent. Any benefit to the promisor or any loss or detriment to the promisee is a sufficient consideration to support a contract. In *Brown v. Ray,* 32 N. C., 72, it is said that to make a consideration it is not necessary that the person giving the promise should receive or expect to receive any benefit; it is sufficient if the other party be subjected to loss or inconvenience. A promise for a promise, a right, interest, or benefit accruing to the one party, or forbearance, detriment, or loss given, suffered or undertaken by the other, is sufficient to constitute a valuable consideration. *Institute v. Mebane,* 165 N. C., 644; *Brown v. Taylor,* 174 N. C., 423; *Mfg. Co. v. McCormick,* 175 N. C., 277; *Exum v. Lynch,* 188 N. C., 392. Nor do we find in the contract anything inconsistent with the doctrine of public policy. It has been said that public policy is an unruly horse astride which one may be carried into unknown paths; and observant of the danger the courts as a rule are not alert to denounce a transaction as invalid on the ground that it is against public policy, unless the transaction contravenes some positive statute or some established rule of law. A contract, for example, whereby A agrees to make a will in favor of B, or to refrain from making a will, is not of itself void on any ground of public policy; and a contract which is to be performed at the death of one of the parties is not for this reason illegal.

The agreement in question is not open to the objection that it is a testamentary disposition of property. *Clayton v. Liverman,* 29 N. C., 92; *Egerton v. Carr,* 94 N. C., 649; *Phifer v. Mullis,* 167 N. C., 405; *In re Southerland,* 188 N. C., 325. It has only one witness and purports to be, not a will, but an executory agreement. Six times it is specifically designated a "contract"; evidently it is "a present contract presently executed," the performance of which is deferred until the death of one of the parties. In *Green v. Whaley,* 271 Mo., 636, 653, it is said that a contract of this character resembles an agreement between two persons to make mutual wills, or to devise property in a certain way, or to leave it to a person at the death of the owner without desig-

nating in what particular way it is to vest in the party to whom it is given; and in *McKinnon v. McKinnon,* 56 Fed., 409, the Court said that such a contract is an executory agreement which determines the rights of the parties *inter se* and provides what disposition shall be made of the property on the happening of a certain event—a contract which at the promisor's death will be specifically enforced in equity or become the foundation for an action at law. It is upon this principle that a negotiable instrument may be made payable after death or a contract enforced which provides that compensation shall be made after death for services rendered in the lifetime of the promisor. *Lipe v. Houck,* 128 N. C., 115; 2 Page on Contracts, sec. 865; Daniel on Neg. Ins., sec. 46; *Koslowski v. Newman,* 3 L. R. A., 704; *Knell v. Cadman,* 14 L. R. A., 860; *Goff v. Supreme Lodge,* 37 L. R. A. (N. S.), 1191; *Buchtel College v. Chamberlain,* 84 Pac., 1000; 6 R. C. L., 710; 13 C. J., 271(60). See, also, *East v. Dolihite,* 72 N. C., 562; *Stockard v. Warren,* 175 N. C., 283; *Burch v. Bush,* 181 N. C., 125.

In our opinion the contract sued on is therefore neither void nor illegal. It contains a stipulation, however, by which the appellant contends that it may be avoided: "This contract may be canceled by either party upon a change of mind, circumstances or sentiment with proper notice to the other party hereto in writing." There is no evidence that George D. Fawcett gave a notice written or verbal of his purpose or desire to cancel the contract; but the appellant says that the birth of three children wrought a change in the intestate's circumstances which supplied the written notice and made void the agreement.

Under our statute law a will is not revoked by any presumption of an intention on the ground of an alteration in circumstances or by the birth of a child after the will is made, although children subsequently born are entitled to share in the estate. C. S., 4135, 4169. But, as we have said, the instrument in controversy is an executory contract, not a testament; hence the appellant's contention must be determined by the law of contracts. A contract may be discharged by performance; by a breach of such a nature as to justify the innocent party in treating it as rescinded; by fraud, mistake, or duress; by release; by renunciation; by parol agreement; by accord, novation, cancellation, alteration, merger, or impossibility of performance. 3 Williston on Contracts, sec. 1793 *et seq.;* Page on Contracts, sec. 2447 *et seq.* None of these conditions is pleaded or established by the evidence; and mere change in the circumstances of the parties is not sufficient to work a cancellation. The parties to a bilateral contract may agree to rescind it in a particular way; for as there must be mutual assent to form a contract, there may be mutual assent as to the method by which it may be rescinded. That is, as the parties are bound by their agreement, so by their agreement they

may be loosed from their mutual tie. Clark on Contracts, 606. Here the method of revocation was agreed on; by the express terms of the contract there must have been not only a change of mind, or circumstances, or sentiment, but "proper notice to the other party hereto in writing." Such notice was not given and presumptively there was no change that made notice necessary or desirable.

In her replication the plaintiff alleges that T. G. Fawcett obtained her intestate's shares of stock by fraud and undue influence; that he became her sole confidential adviser and instructed her in the management of the estate; that he procured the cancellation of this stock, caused certificates therefor to be issued to himself, and made on George D. Fawcett's note the following entry: "$14,300.00 stock to T. G. Fawcett, $1,325 stock to estate of George D. Fawcett, dated 28 May, 1920, and that thereupon the aforesaid note of $15,625, subject to the credits appearing thereon and set forth herein above, was turned over to Essie B. Fawcett, stamped paid, 29 May, 1920."

The appellant offered to testify as follows: "He had me transfer this stock. I was told to sign and I signed. T. G. Fawcett told me to do it. He said that he was paying me what the stock was worth; that my husband had loaded up the bank with a great many Liberty Bonds, and they would have to lose on that, and he had loaned large sums of money to people out of town, and they were going to lose; and he was buying it in protection of me; in case anything happened at the bank I would not be liable for any loss; that he was buying it as a protection to me." She offered also the following testimony of J. C. Hollingsworth: "I had nothing to do with the management of George D. Fawcett's estate; I suppose Mrs. Fawcett did, as she was administratrix and guardian for her children. T. G. Fawcett was advising her and helping her with it. T. G. Fawcett told me that he could help her and save attorneys' fees and commissions, and he would do it. She took his advice."

The proposed evidence was excluded and the appellant excepted on the ground that it tended to show fraud in the transfer of her intestate's stock. The plaintiff's allegations do not impute to T. G. Fawcett the performance of any act not authorized by the contract; for according to her evidence he made no representation as an inducement to her transfer of the bonds which relieved her as executrix from a strict compliance with the agreement. The representation upon which she chiefly relies is his statement that the stock "was worth par," whereas she afterwards learned that a few shares had been sold for $1.85. This, however, could not vary the contract. The parties agreed that when either of them died the shares of the deceased should "become the property of the survivor upon a par basis." Moreover, "this instrument is a contract made by each and both parties hereto to sell to the survivor said stock

at par"; and "this contract shall be binding upon the administrators, executors or assigns of either party." Whether the actual value of the stock was above or below par is immaterial; the price was fixed by the parties and in either event the appellant is bound by the agreement. As she had no right to demand any amount in excess of the contract price she cannot be heard to say that she was deceived by T. G. Fawcett's representation as to the value of the stock. Her allegations and her evidence therefore are not sufficient to show actionable deceit or false pretense. It may be observed that the alleged representations were made on or about 28 May, 1920, and the present suit was brought 7 April, 1923; also that there is no evidence of the plaintiff's offer to return the notes or the stock she received at the time her intestate's shares were transferred. *Martin v. Cook,* 59 N. C., 199. The record does not show that an issue as to fraud was tendered, and we are not able to see how the plaintiff was prejudiced in respect to this contention.

On cross-examination T. G. Fawcett testified: "I told her (appellant) George drew a will and I drew a will at the same time, but the will was never located. I read the will. If I remember right, he drew mine and drew his, and he said the thing to do was to write them in our own handwriting; that was better than to have a typewritten will; that has been fifteen or sixteen years ago, and was not far from the date of the execution of Exhibit 'A.' It was after his children were born. He left everything to his wife, just like I did. I imagine they had a child at that time. Both wills were written at the bank. I think Mrs. Fawcett's sister witnessed both of them. I do not know what became of George's will; I never saw it in the bank; he had it in his private papers; he never locked the box he had his papers in; it was left open. His will was in his own handwriting. He suggested to me that we should write them in our own handwriting; I saw him there working with it; he said it ought to be written out. I wrote one just like his in my own handwriting. I don't know how many of his children had been born then; he gave all his property to his wife. After George died I went to his home to talk to his widow; they lived next door to me. I carried the box there, and looked for the will. I said, I believed he had a will, because I knew he made a will at one time, and I said at the time the box was opened, 'If he had it, it ought to be right here.' I was very much surprised at not finding a will. And I expressed my surprise then."

On motion this testimony was withdrawn from the jury and the appellant excepted. If George D. Fawcett made a will it has been lost or destroyed; at least it has not been produced. If purposely destroyed by the testator it was revoked. *Hise v. Fincher,* 32 N. C., 139; *White v. Casten,* 46 N. C., 197; C. S., 4133. If lost, it can be restored only in the way prescribed by law, and its contents cannot be proved in a col-

lateral action or proceeding. The rejected evidence was incompetent. The difference between the probate of a will which is produced and one which is lost relates to the nature and quantity of the evidence required to prove it; but the loss of the will does not change the jurisdiction of the court. *McCormick v. Jernigan,* 110 N. C., 406; *Ricks v. Wilson,* 154 N. C., 282. His Honor, we think, very properly struck the objectionable evidence from the record.

The remaining exceptions are without merit and call for no discussion. We find

No error.

JOHN T. HALL v. RHINEHART & DENNIS.

(Filed 5 May, 1926.)

1. **Master and Servant—Employer and Employee—Due Process—Instrumentalities—Duty of Master—Safe Place to Work—Instructions—Appeal and Error.**

   Upon evidence tending to show that during the course of his employment in running a "dinky" engine where the defendant was engaged in blasting, the plaintiff was eating his dinner in a mess hall constructed of plank, covered by a roof of tar paper, when a rock from the blasting penetrated the roof and seriously injured him, in his action for damages a charge by the court was reversible error that required the defendant to furnish his employee such place as would be reasonably safe from the blasting operations of the company, the rule being that he should do so in the exercise of ordinary care under the circumstances.

2. **Instructions—Negligence—Appeal and Error—Reversible Error—Requests for Instructions—Objections and Exceptions—Statutes.**

   It is reversible error under our statute for the court to fail to charge the jury upon the essential elements of the law of negligence material to the determination of the issue arising from the evidence in the case, without special request so to do, when it appears that the appellant was prejudiced thereby, construing the charge contextually as a whole.

CIVIL ACTION tried before *Frances D. Winston, Emergency Judge,* and a jury, at September Term, 1925, of GASTON.

On 13 October, 1922, and prior thereto, plaintiff was employed by the defendant as a dinky engineer. The defendant was engaged in the construction of a hydro-electric power plant in the Catawba River at Mountain Island. The work necessitated heavy blasting in the bed of the river. The defendant, for the convenience of its employees, operated a dining-room or mess hall. Employees were not required to board in this place, but those who did board there were charged one dollar a day for meals, which amount was deducted from their pay. The mess hall

was a long, narrow one-story building, built of pine timber and covered with tar paper. This mess hall was situated about four or five hundred feet from the point in the bed of the river where the blasting took place. The plaintiff had left his engine and gone to the mess hall to get supper at about 6 o'clock in the evening. Just as plaintiff was seated at the table in the mess hall a heavy blast was set off in the river, and a rock weighing five or six pounds was hurled through the air by the force of the explosion, striking and penetrating the roof of the mess hall, and falling upon plaintiff's head, causing serious and permanent injuries.

At the time of his injury the plaintiff was about thirty-two years old and was earning five dollars per day.

The defendant offered no evidence, but denied the negligence and pleaded contributory negligence, assumption of risk and release by the plaintiff.

There was a verdict in favor of the plaintiff for $35,000 and judgment thereon, from which judgment defendant appealed.

A. E. Woltz, Geo. W. Wilson, Bramham & McCabe, Claude A. Thompson, John M. Robinson for plaintiff.

Mason & Mason, Clyde R. Hoey, Thomas C. Guthrie for defendant.

BROGDEN, J. The trial judge charged the jury as follows: (a) "The law of North Carolina requires the defendant, if they set up a mess hall of their own, to put it where those who work for them and eat at the mess hall would be reasonably safe from the operations of the company.

(b) "If you find that the company failed to provide him with a reasonably safe place in which to do its work or to eat his meals and the evidence in this case satisfies you of that fact by its greater weight, you will answer that issue yes."

(c) "You will take into consideration, the law says, his age, his habits, his intellect, his general demeanor, his capacity for work and labor, what he might be expected to accumulate or save by reason thereof, and take out of that the cost of living, charges he would be put to, and in giving him a sum reaching through years, find out what it is all worth right here in Gastonia at about half past four o'clock on 24 September. That is what you are expected to do."

(d) "You will give him the present value of his expectancy. The law says he may live from thirty to thirty-two years—something like that."

The wisdom of the law has evolved certain standards of obligation and measures of liability to govern and control the conduct of men in their duties and obligations to each other. The foregoing instructions of the trial court fail to correctly apply the law, both as to negligence and as to damages.

The last utterance of this Court on the subject is found in *Lindsey v. Lumber Co.*, 190 N. C., 844, in an opinion by the *Chief Justice*. In the *Lindsay case* the instruction complained of was as follows: "In this connection the court charges you it is the duty of the defendant in a case of this kind to furnish a reasonably safe place for its employees to work and to furnish reasonably safe tools and equipment with which to work, and the failure to do that is negligence, and if you find this was so, and it was the proximate cause of plaintiff's injury, it would be your duty to answer the first issue, yes." This instruction imposed upon the defendant a larger measure of duty than the law required, and this Court ordered a new trial.

The true rule is stated by *Clarkson, J.*, in *Riggs v. Mfg. Co.*, 190 N. C., 258: "It is the duty of the master to use or exercise reasonable care, or use or exercise ordinary care to provide the servant a reasonably safe and suitable place in which to do his work. The master is not an insurer. The failure to submit in a charge the qualification of this duty is error, and new trials have been frequently granted on account of the omission. It is a substantial right." *Cable v. Lumber Co.*, 189 N. C., 840; *Murphy v. Lumber Co.*, 186 N. C., 746; *Owen v. Lumber Co.*, 185 N. C., 612; *Gaither v. Clement*, 183 N. C., 450; *Tritt v. Lumber Co.*, 183 N. C., 830.

The correct rule governing the measure of damages for personal injuries of the sort complained of, is discussed and determined in *Ledford v. Lumber Co.*, 183 N. C., 616-17. This rule is firmly imbedded in the law. *Hill v. R. R.*, 180 N. C., 490; *Johnson v. R. R.*, 163 N. C., 431; *Fry v. R. R.*, 159 N. C., 362; *Pickett v. R. R.*, 117 N. C., 616; *Murphy v. Lumber Co.*, 186 N. C., 746.

The plaintiff, however, contends that the error specified is harmless for the reason that other portions of the charge of the trial judge tend to modify and explain the erroneous instructions given the jury. It is true that the charge should be considered contextually and not disjointedly and as a whole, and we have so considered and examined the charge in this case.

The inherent vice of the instruction given the jury, flows from the fact that the trial court was stating positive rules of law. Therefore, the following principle announced in *Construction Co. v. Wright*, 189 N. C., 456, applies: "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."

For the reasons given, there must be a

New trial.

FULTON ET ALS. v. WADDELL.

(Filed 5 May, 1926.)

Wills—Intent—Estates—Remainders—Contingent Remainders—Children Living at Death of First Taker—Heirs.

A devise of lands to the testator's two daughters for life, and after their death the property to be sold and the proceeds divided equally between all of the testator's children then living or their heirs: *Held*, the children of the testator and not his grandchildren were the primary objects of his bounty, and at the death of the life tenants, the other of testator's children then living take directly under the devise, and the children of those who are dead acquire no interest or estate in the subject of the devise.

CONTROVERSY without action, before *Finley, J.*, at September Term, 1925, of FORSYTH.

John D. Waddell, Sr., died in the year 1887, leaving a last will and testament, the pertinent part of which is as follows: "I loan unto my two daughters, Ann E. Matthews (widow), and Martha, my daughter, a certain tract or parcel of land . . . to have and to hold during their natural life. After their death the above property to be sold and the money arising there to be equally divided between all my children then living, or their heirs."

At the time of the death of the testator he left him surviving five children, to wit: Ann E. Matthews, Martha Waddell, James H. Waddell, Lucy Fulton, and John D. Waddell, Jr. Ann E. Matthews, one of the life tenants, died without issue in the year 1923. Martha Waddell, the other life tenant, died without children in 1921. James H. Waddell died in 1913, leaving three children. Lucy Waddell Fulton died in 1888, leaving her surviving seven children. At the time of the death of the life tenants, there were three grandchildren of Lucy Waddell Fulton living, being the children of her daughter, Minnie Fulton, who intermarried with J. W. Angel. The plaintiffs consist of the children of James H. Waddell, Lucy Waddell Fulton, and the grandchildren of Lucy Waddell Fulton, and the defendant is the sole surviving child of testator, John D. Waddell, Sr.

In 1888, Lucy Waddell Fulton conveyed her interest in the property to John D. Waddell. In the same year Jas. H. Waddell and wife conveyed their interest in the property to John D. Waddell, Martha R. Waddell and Ann E. Matthews. In 1915, Martha R. Waddell and Ann E. Matthews conveyed their interest in the property to John D. Waddell.

John D. Waddell, being under the impression that he was the sole owner of the property, has erected valuable improvements thereon, and

this action is instituted in order to determine the rights of the parties in and to the property in controversy. The trial judge "ordered and adjudged that the defendant is the owner in fee of the land in controversy, freed and discharged of any and all claims of plaintiffs or either of them in and to the same."

From the foregoing judgment plaintiffs appealed.

McMichael & McMichael for plaintiffs.
J. E. Alexander and L. M. Butler for defendant.

BROGDEN, J. The question is this: Under a devise of land for life and at the death of the life tenant, to be *"equally divided between all my children then living or their heirs,"* does the sole survivor of the children of testator take the entire property, or do the children and descendants of deceased brothers and sisters of such survivor share in the property?

The true answer to the question, gathered from decisions in point, may be stated in three propositions, to wit: (1) The remainder is contingent. *Starnes v. Hill,* 112 N. C., 1; *Whitesides v. Cooper,* 115 N. C., 570; *Bowen v. Hackney,* 136 N. C., 187; *James v. Hooker,* 172 N. C., 780; *Mercer v. Downs, ante,* 203.

(2) The remainder is limited to a class, and the class is to be ascertained at the termination of the life estate. *Bowen v. Hackney,* 136 N. C., 187; *Witty v. Witty,* 184 N. C., 375.

(3) The person or persons answering the description when the life estate terminates, take the whole property. In other words, when the contingency upon which the estate is to vest happens, the law immediately calls the roll of the class. Those who can answer, take. *Gill v. Weaver,* 21 N. C., 41; *Sanderlin v. Deford,* 47 N. C., 74; *Knight v. Knight,* 56 N. C., 167; *Hawkins v. Everett,* 58 N. C., 42; *Grissom v. Parish,* 62 N. C., 330; *Britton v. Miller,* 63 N. C., 270; *Wise v. Leonhardt,* 128 N. C., 289; *Cooley v. Lee,* 170 N. C., 18; *Witty v. Witty,* 184 N. C., 375; *Phinizy v. Foster,* 90th Ala., 262.

The prevailing rule, governing in such cases, is thus stated in *Demill v. Reid,* 71 Md., 187: "It seems to us to be clear law, as well as good sense, that in a case like this where there is an ultimate limitation upon a contingency to a *class of persons* plainly described, and there are persons answering the description *in esse* when the contingency happens, they alone can take."

Applying these principles to the facts in issue, it appears that John D. Waddell, Sr., left him surviving five children. He devised the land to Ann and Martha "during their natural life, and after their death to all my children then living." It is obvious that the designated class was

"all my children living" at the death of the life tenant, and it is admitted that the defendant, John D. Waddell, Jr., was the only living child of testator when the life estate terminated. Therefore, as he alone answered the description or roll-call, the title to the property vested in him.

The plaintiffs, however, contend that the testator by the use of the words "or their heirs" intended to devise the property to "my children then living" and the children of those who predeceased the life tenants.

We are of the opinion that such a construction of the devise cannot be maintained either by law or logic. It is apparent that the testator contemplated an equal division among his own children, and that they were the immediate objects of his bounty, because he specifically provides that the land shall be sold and the proceeds *"equally divided between all my children then living."* If the construction suggested by the plaintiffs should be allowed to prevail, then the estate must be divided per capita between the defendant and the plaintiffs for the reason that the plaintiffs would take under the will as purchasers and not by descent. Hence, the inevitable result would be that the defendant would receive one-fourteenth of the estate, and certainly not in excess of one-eleventh. Such a construction would wrench the plain meaning of the devise and violate the manifest intention of the testator. It follows that the deeds executed by the parties have no bearing upon the merits of the controversy.

Upon the record, we hold that it was the intention of the testator that the remainder should vest in all or any of his children that were living at the death of the life tenants, and in the event all of his own children were dead at that time, that their heirs should take the property under the will.

Therefore, the judgment, as written, must stand.

Affirmed.

E. H. KEPLEY AND GLADYS KEPLEY, BY NEXT FRIEND, GRADY GOODE, v. A. B. C. KIRK, PROPRIETOR OF THE KIRK AUTO SERVICE, AND A. B. C. KIRK.

(Filed 5 May, 1926.)

1. Evidence—Maps—Explanation—Witness—Corroboration—Substantive Evidence.

A map of a public road and surroundings made by a civil engineer showing the conditions under which the collision occurred in a negligence action, is competent when testified to by another witness as being a correct representation of the place at the time of the occurrence, for the purpose of other competent witnesses explaining their testimony, though not as corroborative evidence.

2. Automobiles—Collisions—Negligence—Highways— Evidence — Immaterial—Appeal and Error.

Where the evidence in a personal injury action for defendant's alleged negligence in driving a passenger coach on a public highway, causing a collision with an automobile is directed to the question as to whether the defendant should have driven the coach on the right side of a hard-surface highway and given plaintiff room to pass, evidence as to the condition of a dirt road near by, a part of the highway, is immaterial to the issue.

3. Evidence—Opinions Upon Collective Facts — Common Knowledge—Ordinary Observation—Expert Witnesses.

Testimony of a witness as to his opinion arising from ordinary observation of collective facts coming within ordinary experience, is not objectionable, and does not require the qualification of the witness as an expert.

4. Negligence—Contributory Negligence—Instructions—Appeal and Error —Prejudice.

The defendant cannot be prejudiced by an instruction under the issue of contributory negligence that places a greater burden upon the plaintiff than the law requires.

5. Negligence—Proximate Cause.

Where to recover damages in an action it is necessary to show that it was proximately caused by the negligence of a party, it is not required that it was proximate as to time or place, but that the negligence was the sole and efficient cause of a negligent act that in its sequence ultimately and proximately produced the injury the subject of the inquiry.

APPEAL by defendant from *R. B. Redwine, Emergency Judge,* at November Term, 1925, of MECKLENBURG. No error.

Civil action for damages brought by E. H. Kepley and Gladys Kepley, by next friend, Grady Goode, against A. B. C. Kirk. The actions were consolidated by consent.

The plaintiffs allege actionable negligence against A. B. C. Kirk, who was the owner of the Kirk Auto Service, and ran a bus line between the cities of Charlotte, Concord and Salisbury, transporting passengers. Walter H. Kirk was the driver of the bus at the time of the collision.

The injury to plaintiffs occurred on the evening of November 22, 1924, on the Charlotte-Concord-Salisbury road, just beyond the Southern railroad underpass on North Tryon Street in the residential section of the city of Charlotte. Defendant denies any negligence and pleads contributory negligence on part of plaintiffs.

Defendant also alleges actionable negligence against plaintiffs and claims damages to the bus.

Plaintiffs' replication denies the allegations of defendant's cross-action.

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

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

"2. Was the plaintiff, Mrs. Gladys Kepley, injured by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff, E. H. Kepley, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

"4. Did the plaintiff, Mrs. Gladys Kepley, by her own negligence, contribute to her injury, as alleged in the answer? Answer: No.

"5. What damages, if any, is the plaintiff, E. H. Kepley, entitled to recover? Answer: $10,000.

"6. What damages, if any, is the plaintiff, Mrs. Gladys Kepley, entitled to recover? Answer: $5,000.

"7. What damage, if any, is the plaintiff, E. H. Kepley, entitled to recover by reason of injury to his car? Answer: $800.

"8. What damage, if any, is defendant entitled to recover of the plaintiff, E. H. Kepley, by reason of injury sustained to its bus? Answer: ....."

Judgment was rendered on the verdict. Defendant excepted and assigned numerous errors and appealed to the Supreme Court. The material ones will be considered in the opinion.

T. L. Kirkpatrick, J. H. McLain and H. L. Taylor for plaintiffs.
Bridges, Orr & Vreeland for defendant.

CLARKSON, J. A map was made by a civil engineer about a year after the collision, showing the Southern Railroad underpass, with width of the entire road—the paved and dirt portions and the width of each—and alleged place of collision.

There was conflicting testimony as to the condition of the road at the place and time of the collision. The engineer who made the map was not familiar with the actual conditions at the time of the collision, but there was testimony on the part of the plaintiff, E. H. Kepley, that he helped the engineer make the measurements, and that the map was correct and represented the true condition of the road at the time of the collision. Defendant contends that the map was incompetent and prejudicial. As substantive evidence we think the defendant's contention correct, but, both on direct and cross-examination of the witnesses, the court below did not allow the map to be used as substantive evidence, but repeatedly stated that it was used for the purpose of illustrating the evidence and a repetition was: "This map is not admitted as evidence. It is admitted for the purpose of trying to illustrate the condition at that time."

The map, under the facts and circumstances, was competent "for the purpose of enabling the witness to explain his testimony and enabling the jury to understand it." *Britt v. R. R.*, 148 N. C., 37; *S. v. Jones*, 175 N. C., 713; *S. v. Mathews, ante*, 378; 22 C. J., p. 910.

Under the decisions of this State and elsewhere, we cannot hold that the map was incompetent or prejudicial to defendant, being used only to illustrate and explain the testimony of witnesses. The map must be correct and accurate in order that it may be admissible, but this does not require strict mathematical accuracy; the lack of accuracy goes to the weight and not the admissibility.

Wigmore on Evidence (2 ed.), sec. 794, p. 100, says: "A witness thus using the map or photograph as representing his knowledge need not be the maker of it. He affirms it to represent his observation; and that is the essential element. Even the maker could not use it without such a guarantee; and it may equally represent others' observation as well as his own. Indeed, if it is a correct representation, it will naturally be equally representative for all observers."

In *Hyde v. Town of Swanton*, 72 Vt., 264, a civil engineer was introduced as a witness "and produced a plan made by him, which he said was an accurate plan of the location where the accident happened. He did not profess to know anything about the situation and condition of the point in question at the time of the accident. Such knowledge on his part was not necessary. If the other testimony in the case tended to show that the situation was as shown upon the plan, it was admissible."

It was in evidence that the hard surfaced road was about 16 feet wide and laid on the east side of the public highway, and the balance of the road, 23 feet, was dirt, on the west side, except on the east side of the road between the paved road and the ditch there was about 5 feet of dirt road. At the time of the collision plaintiffs were going north in a Nash automobile driven by E. H. Kepley, and defendant's bus was coming south driven by Walter H. Kirk. There was evidence on the part of defendant that there was a water main put in the dirt part of the road on the west side, and the road was dug up about 4 feet deep and 18 inches wide, to lay the pipe. It left the dirt portion of the road in bad condition, but the evidence in this regard was conflicting. Plaintiffs' evidence was that the dirt road was in good condition. It was in evidence that the paved road, about 16 feet wide, was sufficient for the bus and automobile to pass in safety if each was driven to the right of the center of the paved road. The collision occurred 22 November, 1924; about 4:50 p.m. It was in evidence that it rained that day and the dirt road would become slick and muddy when it rained.

The defendant excepted and assigned error to the following testimony of plaintiff's witness, M. T. Skeen: "The ditch work was started in

March and completed in May. That would give it about six months to settle. Q. Any trouble about that class of soil settling in six months where it is properly put in? Answer: No, sir. With that type of soil, as I knew it, and where the work was done six months under the kind of superintendent Mr. Foster was, that road could be traveled over." If this testimony was incompetent, it was not material. The main evidence for plaintiff as to the collision was what he testified to that the front wheels of his car was right at the edge of the hard surface and the dirt road on the right going north at the time of the collision. The hard surface being about 16 feet wide, this would put him on the right of the center of the hard surfaced road. He testified that defendant coming south had about 30 to 31 feet of the road to his (plaintiff's) left from the point of collision. This included part of the hard surfaced road. Plaintiff only had five feet of the dirt road to the right going north. Plaintiff was driving to the right of the center of the paved strip in the highway, keeping close to the outer edge of the hard surface. From plaintiff's testimony, defendant was on the wrong side of the hard-surfaced road when the collision occurred, and therefore the condition of the dirt road was not material.

We can see no objection to the evidence. We think it competent. The witness knew the road and was familiar with the conditions and could state the facts from personal observation.

"Where an inference is so usual, natural, or instinctive as to accord with general experience, its statement is received as substantially one of a fact—part of the common stock of knowledge." 22 C. J., p. 530, citing numerous North Carolina cases.

In *Britt v. R. R., supra,* p. 41, it is said: "5 Encyc. Ev., 654, summarizes the decisions thus: 'The exception to the general rule that witnesses cannot give opinions is not confined to the evidence of experts testifying on subjects requiring special knowledge, skill or learning, but it includes the evidence of common observers testifying the results of their observations made at the time in regard to common appearances, facts and conditions which cannot be reproduced and made palpable to a jury,' citing, among other cases, *S. v. Edwards,* 112 N. C., 901. This is a clear statement of a well-settled principle, and is a common-sense restriction which keeps the wise general rule as to 'opinion' and 'expert' evidence from degenerating into absurdity."

From a careful reading of the charge, we think the court below applied the law to the facts. The court below first gave clearly the contentions of the parties; set forth the issues; defined the law of the road and negligence; correctly charged as to the burden of proof on the issues and the weight to be given the evidence; clearly stated the facts which would

make plaintiff guilty of contributory negligence, and charged that if plaintiff did any act of negligence as defined, which caused the injury or without which the injury would not have occurred, the jury should answer the third issue, Yes. This issue was: "Did the plaintiff, E. H. Kepley, by his own negligence, contribute to his injury as alleged in the answer?" The court left out "proximate cause," and the charge was more favorable than defendant was entitled to, as this contributory negligence must be the proximate cause of the injury. On the other hand, in the charge as to the alleged negligence of the defendant, the court several times charged that this negligence must be the proximate and *direct* cause of the injury. Although the charge is not full or fullsome, we cannot, on the whole, say that there is prejudicial error.

It was said in *Ordegard v. North Wisconsin Lumber Co.*, 110 N. W., 809, 818, 130 Wis., at p. 685: In an action for injuries to a servant, an instruction that "proximate" cause meant "the immediate, direct, actual, natural, efficient, and real cause," was no ground for reversal of a judgment in favor of plaintiff, as it placed a heavier burden on him than the correct rule.

The decisions of this State have approved the language of *Mr. Justice Strong* in *Ins. Co. v. Boon*, 95 U. S., 117: "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *R. R. v. Kellogg* (*ante*, 256), we said, in considering what is the proximate and what the remote cause of an injury, 'The inquiry must always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury.'"

In *Milwaukee and St. Paul Ry. Co. v. Kellogg*, 94 U. S., p. 470 (24 L. Ed., 259), written by the same Justice, it is said: "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or in the oft cited case of the squib thrown in the market place. *Scott v. Shepherd* (*Squib case*), 2 W. Bl., 892." *Taylor v. Lumber Co.*, 173 N. C., at p. 116; *Graham v. City of Charlotte*, 186 N. C., p. 667; *Hinnant v. Power Co.*, 187 N. C., p. 295; *Whitehead v. Telephone Co.*, 190 N. C., 197; *Paderick v. Lumber Co., ibid.*, p. 312.

"Now, as to the fourth issue—Did the plaintiff, Mrs. Gladys Kepley, by her own negligence, contribute to her injuries as alleged in the an-

swer?—the court charges you, gentlemen, that there is no evidence in this case of contributory negligence upon the part of the plaintiff, Mrs. Gladys Kepley, and it would be your duty to answer that issue, No." Mrs. Gladys Kepley was riding with her husband, but had no control over the automobile. *Albritton v. Hill,* 190 N. C., 431; *Hanes v. Utilities Co., ante,* 13.

The case is not a complicated one as to the law or facts. It was an action for actionable negligence. A collision on the public highway, conflicting evidence as to the right of the road. On the whole record, we cannot find any reversible or prejudicial error. *Davis v. Long,* 189 N. C., 137; *Fowler v. Fibre Co., ante,* 42.

The statute, C. S., 564, requires the court below: "He shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising therein." We have heard the able argument of defendant's counsel, and gone carefully over the well prepared brief, and we think the law has been substantially complied with. For the reasons given, there is

No error.

L. B. HUNTLEY v. SOUTHEASTERN EXPRESS COMPANY.

(Filed 5 May, 1926.)

Removal of Causes—Federal Courts—Jurisdiction—State Court—Orders—Pleadings—Nonsuit.

Where a suit is properly removable from the State to the Federal Court for diversity of citizenship, the jurisdiction of the State court terminates upon the filing by the nonresident defendant of a proper petition and bond therefor, within the time prescribed, and further orders of the State court allowing amendment to confer jurisdiction on it in respect to the amount involved, or permitting the plaintiff to take a voluntary nonsuit, is without effect.

APPEAL by defendant from *Stack, J.,* at May Term, 1925, of CALDWELL.

Civil action to recover damages for an alleged negligent injury, instituted by plaintiff, a citizen and resident of Caldwell County, North Carolina, against the defendant, a corporation chartered under the laws of the State of Georgia.

The defendant, in apt time, filed its petition and bond for removal of the cause to the District Court of the United States for the Western District of North Carolina for trial, on the ground of diverse citizenship. Upon the hearing of said petition before the clerk, the plaintiff

was allowed to reduce the amount of his claim, as set out in the complaint, from $10,000 to $2,999, and the petition was thereupon denied. The defendant excepted and appealed to the judge; and on the hearing before the judge, the plaintiff was allowed, over objection of the defendant, to submit to a voluntary nonsuit. From this judgment the defendant appeals, assigning error.

No counsel for plaintiff.
Squires & Whisnant for defendant.

STACY, C. J. The petition for removal, besides showing the presence of the requisite jurisdictional amount, asserts a right of removal on the ground of diverse citizenship, or that the case is one between citizens of different states. U. S. Judicial Code, sec. 28.

The cause being a proper one for removal, and the petition and bond having been filed in apt time, it was error for the clerk or the judge of the State Court to enter any order therein, affecting the rights of the parties, save the order of removal. *Kern v. Huidekoper,* 103 U. S., 485.

When a sufficient cause for removal is made out in the State Court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had therein unless and until its jurisdiction has been restored. *Baltimore, etc., R. Co. v. Koontz,* 104 U. S., 5.

It has been held that after the due filing of petition and bond, an amendment to the complaint, reducing the amount in controversy to a sum less than that required to give the Federal Court jurisdiction of the suit, will not defeat the jurisdiction of the Federal Court which has already attached. *Stephens v. St. Louis, etc., R. Co.,* 47 Fed., 530; *Lake Erie, etc., R. Co. v. Huffman,* 177 Ind., 126, Ann. Cas., 1914 C, 1272. But it has also been held that if the motion to amend precedes the filing of the petition to remove, the suit is not removable, even though the amendment has not actually been made. *Waite v. Phoenix Ins. Co.,* 62 Fed., 769. In the case at bar the motion to amend followed the petition to remove.

The jurisdiction of the Federal Court having attached immediately upon the filing of the petition and bond, and the jurisdiction of the State Court by the same act having been ousted, it follows that the judgment of nonsuit was erroneously entered in the State Court. *Nat. Steamship Co. v. Tugman,* 106 U. S., 118.

Reversed.

STATE v. W. M. PRYTLE.

(Filed 5 May, 1926.)

1. **Homicide—Murder—Defenses—Suicide—Mental and Physical Condition of Deceased.**

Where the evidence is conflicting as to whether the prisoner on trial for murder shot and killed the deceased, or that the deceased committed suicide, it is reversible error for the court to exclude the evidence of the defendant tending to show her great depression of mind caused by her pregnancy, an unmarried woman, and her declared suicidal intent unless the prisoner, the putative father, should marry her.

2. **Same—Suicide—Condition of Mind.**

The evidence in defense upon a trial for murder, that the deceased had taken her own life, which excludes the prisoner's guilt, is a complete defense if proved to be true, and her declarations tending to show her mental despondency or condition of mind, are not objectionable as hearsay, and its exclusion constitutes error to the defendant's prejudice.

APPEAL by defendant from *Shaw, J.*, at December Term, 1925, of CATAWBA.

Criminal prosecution tried upon an indictment charging the defendant with a capital felony, to wit, murder in the first degree.

The jury found defendant guilty of murder in the second degree; and, from the judgment pronounced thereon the defendant appeals, assigning errors.

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

A. A. Whitener, Louie A. Whitener, and T. Manly Whitener for defendant.

STACY, C. J. Viewed from the standpoint of opposing contentions, this case is one of homicide versus suicide.

The State charges, and on the trial offered evidence tending to show, that Pearl Childers was murdered on the night of 31 October, 1925, in a Brookford boarding house, where she was rooming at the time. The circumstances were such as to lead the authorities to believe, and the jury to find, that the deceased came to her death as a result of a pistol shot, fired by the defendant, which pierced her heart, causing instant death.

The defendant, on the other hand, contends, and offered evidence tending to show, that the deceased committed suicide. All the evidence, pro and con, was circumstantial in character. *S. v. Brackville,* 106 N. C., 701; *Rippey v. Miller,* 46 N. C., 479.

As tending to support the defendant's theory of suicide, he offered to show, but was not allowed to do so, that the deceased, an unmarried woman, was pregnant at the time of her death; that for quite awhile she had been despondent and gloomy over her condition; that she had openly declared on the day of her death, and on several occasions prior thereto, that she intended to kill herself if the defendant did not marry her; and further, if allowed, Dr. Hunsucker would have testified as follows:

"About two months prior to her death, Pearl Childers came to my office in Hickory. She came asking me for help, saying that she was in trouble and was pregnant, and wanted assistance, which I refused, and she seemed to be greatly depressed over the matter, saying that she would pay anything to get rid of it, even $500 if necessary, and I told her that I was sorry I could not give her the slightest assistance."

The declarations of the deceased were rejected as violative of the rule against hearsay, and it was thought that the testimony relative to her condition, tending to support the theory of suicide, was impertinent and irrelevant on the trial of the defendant for murder, hence, for this reason, such evidence was excluded. We think there was error in both rulings.

First, as to whether the evidence of the condition of the deceased, tending to support the theory of suicide, is competent on the trial of the defendant for murder: Tested by the weight of authority and by the better-considered cases, such evidence is generally held to be admissible, certainly since the decision in *Commonwealth v. Trefethen* (1892), 157 Mass., 180, 24 L. R. A., 235, which overruled a prior decision in that jurisdiction and has subsequently been followed in other states. See, also, *S. v. Beeson* (1912), 155 Iowa, 355, reported in Ann. Cas., 1914 D, with valuable note, and *S. v. Ilgenfritz* (1915), 263 Mo., 615, Ann. Cas., 1917 C, which contains an exhaustive review of the authorities on the subject.

The nature of the case proved by the State being such as not to render it impossible for the deceased to have committed suicide, the probability of her having done so would seem to be more likely, if it could be shown that she actually had an intention to take her life, than if she had no such intention. This evidence goes to a denial of the *corpus delicti,* which the State must establish beyond a reasonable doubt, as well as the other elements of the crime, and it is not in contravention of the rule, adhered to with some strictness in this jurisdiction, that evidence tending to show another committed the crime charged, is not competent unless it is of such character as to exclude the guilt of the accused. *S. v. Millican,* 158 N. C., 617; *S. v. Lane,* 166 N. C., 333; *S. v. Ashburn,* 187 N. C., 717. Here, proof of suicide is of such char-

acter; it would exclude the guilt of the accused, for if the deceased committed suicide, she could not, under the facts adduced on the hearing, have been murdered by the defendant.

Second, touching the alleged incompetency of the declarations of the deceased as hearsay: These declarations, it should be remembered, were offered, not as proof of the truth contained in such declarations, but as evidence of the fact that they were made, thus exhibiting a condition of mind, which may be shown by sounds or words, spoken or written, or by emotions displayed or acts done. Wigmore on Evidence (2 ed.), secs. 143 and 1725.

The condition of the mind is just as susceptible of proof as the condition of the stomach, but each can ordinarily be shown to others only by some external manifestation, such as an expression on the face, or a gesture or appearance of the body, or some act or speech; and proof of any or all of these for the sole purpose of showing the state of mind or intention of the person is proof of a fact or facts from which the state of mind or intention may be inferred. The admission of such evidence is not violative of the rule against hearsay. *Commonwealth v. Trefethen, supra.*

For the errors as indicated, in excluding the evidence offered by the defendant, there must be a new trial, and it is so ordered.

New trial.

STATE v. H. BALLANGEE.

(Filed 5 May, 1926.)

1. Criminal Law—Indictment—Offense Charged—Reference to Statute.

One charged with a criminal offense has the right to be informed by the allegations of the indictment of the specific offense, or the necessary ingredients thereof, and an indictment which does not substantially conform to the statute, and fails in this respect, is insufficient for a conviction though the statute is referred to in the indictment. 3 C. S., 4437(a), 4623.

2. Arrest of Judgment—Appeal and Error—Orders Ex Mero Motu.

The Supreme Court on appeal will order an arrest of judgment in a criminal action, *ex mero motu*, when it appears from the record that the defendant is entitled thereto.

APPEAL by defendant from *Shaw, J.*, at August Term, 1925, of CALDWELL.

The defendant was indicted for operating a lottery, and upon the return of a special verdict he was adjudged guilty. From the judgment pronounced he appealed.

STATE *v.* BALLANGEE.

Attorney-General Brummitt and Assistant Atorney-General Nash for the State.

W. C. Newland for defendant.

ADAMS, J. The indictment charges that the defendant "unlawfully and wilfully did operate a lottery, to wit, a slot machine (chapter 138, Public Laws 1923) against the form of the statute," etc. The statute provides: "It shall be unlawful for any person, firm or corporation to operate, keep in his possession or in the possession of any other person, firm or corporation, for the purpose of being operated, any slot machine that shall not produce for or give to the person who places coin or money, or the representative of either, the same return in market value each and every time such machine is operated by placing money or coin or the representative of either therein. Each time said machine is operated as aforesaid shall constitute a separate offense." 3 C. S., 4437(a).

Does the indictment charge a breach of this statute? An indictment shall be deemed to be sufficient in form if it express the charge against the defendant in a plain, intelligible, and explicit manner; and it will not be held defective by reason of any informality or refinement if the matter appearing therein be sufficient to enable the court to proceed to judgment. C. S., 4623. The specific question is whether the purported breach as set out in the bill is "plain, intelligible and explicit." *Chief Justice Ruffin* suggested that an informality can embrace, perhaps, only the mode of stating the fact, but if the fact be one which essentially enters into the offense it must be set forth (*S. v. Moses,* 13 N. C., 452, 464); and *Judge Gaston* observed that a refinement is understood to be the verbiage which is frequently found in indictments setting forth what is not essential to the constitution of the offense, and, therefore, not required to be proved. *S. v. Gallimore,* 24 N. C., 372. But in each of these cases it was said in substance that the statute does not supply the omission of a distinct averment of any fact or circumstance which is an essential constituent of the offense charged. To the same effect is a uniform line of subsequent decisions. Every crime consists of acts done or omitted, and it is not sufficient to charge a defendant generally with the commission of a particular offense (unless the form of the indictment is prescribed by statute), but all the essential facts and circumstances must be specifically set forth. *S. v. Hathcock,* 29 N. C., 52; *S. v. Eason,* 70 N. C., 88; *S. v. Woody,* 47 N. C., 335; *S. v. Whedbee,* 152 N. C., 770; *S. v. Carlson,* 171 N. C., 818; *S. v. Carpenter,* 173 N. C., 767. The breach of a statutory offense must be so laid in the indictment as to bring the case within the description given in the statute and inform the accused of the elements of the offense. The present indictment contains neither the words nor the substance of

the statute. Merely charging in general terms a breach of the statute and referring to it in the indictment is not sufficient. *S. v. Liles,* 78 N. C., 496; *S. v. Merritt,* 89 N. C., 506; *S. v. McIntosh,* 92 N. C., 794; *S. v. Mooney,* 173 N. C., 798; *S. v. Edwards,* 190 N. C., 322.

No motion in arrest of judgment was made on the trial, but in *S. v. Watkins,* 101 N. C., 703, it is said: "The court cannot properly give judgment unless it appears in the record that an offense is sufficiently charged. It is the duty of this Court to look through and scrutinize the whole record, and if it sees that the judgment should have been arrested it will *ex mero motu* direct it to be done."

As the indictment does not charge a criminal offense the judgment must be arrested.

Judgment arrested.

STATE v. THOMAS BRINKLEY, JR.

(Filed 5 May, 1926.)

Criminal Law—Indictment—"Feloniously"—Motions — Arrest of Judgment—Appeal and Error.

Where a statute makes its violation a felony, it is necessary for a conviction thereunder that the indictment use the word "feloniously" as a part of the description of the offense, and where it appears on appeal that this has not been done, the Supreme Court will grant an arrest of judgment upon motion therein made for the first time, for an arrest of judgment.

APPEAL by defendant from *Bryson, J.,* at January Term, 1926, of CABARRUS. Judgment arrested.

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

Armfield, Sherrin & Barnhardt for defendant.

PER CURIAM. This is a criminal action. The defendant was indicted under C. S., 4339, which is as follows: "If any man shall seduce an innocent and virtuous woman under promise of marriage, he shall be guilty of a felony, and upon conviction shall be fined or imprisoned at the discretion of the court, and may be imprisoned in the State prison not exceeding the term of five years: *Provided,* the unsupported testimony of the woman shall not be sufficient to convict: *Provided further,* that marriage between the parties shall be a bar to further prosecution hereunder. But when such marriage is relied upon by the defendant, it shall operate as to the costs of the case as a plea of *nolo contendere,*

and the defendant shall be required to pay all the costs of the action or be liable to imprisonment for nonpayment of the same."

The bill of indictment upon which defendant was tried is as follows: "The jurors for the State upon their oath present, that Thomas Brinkley, Jr., late of the county of Cabarrus and State of North Carolina aforesaid, on 1 July, A. D. 1924, with force and arms at and in the county and State aforesaid, by and under a promise to marry one Jettie Shafer made by him the said Thomas Brinkley, Jr., the said Jetttie Shafer then and there being an innocent and virtuous woman; her the said Jettie Shafer then and there did wilfully and unlawfully seduce, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The statute makes the crime a felony. It has been settled from time immemorial that the word "feloniously" must appear in the bill of indictment as descriptive of the offense. The Legislature has made no act to the contrary.

In *S. v. Holder,* 153 N. C., p. 608, *Clark, C. J.,* said: "Indictments for felony must contain the word 'feloniously.' *S. v. Shaw,* 117 N. C., 764; *S. v. Purdie,* 67 N. C., 26, not that it is of any aid or benefit to a defendant, but because it is of long usage, coming down from a remote past, when there was a reason for its use which has long ago ceased." *S. v. Harris,* 145 N. C., p. 457.

In this Court defendant moved in arrest of judgment because the bill did not contain the word "feloniously." The motion is allowed. *S. v. Ballangee, ante,* 700. This will not preclude the Solicitor from sending a new bill with the proper averment. The judgment is

Arrested.

E. V. CHAPPELL AND PRATT LUMBER COMPANY, INC., v. NATIONAL SURETY COMPANY.

(Filed 12 May, 1926.)

1. Judgments—Estoppel—Roads and Highways—Contracts—Mechanics' Liens.

Where the nonresident contractor for the building of a county highway has become insolvent and a receiver for its completion of the contract appointed in the state of its residence, and in an ancillary proceedings here before the referee in bankruptcy the surety on the contractor's bond has intervened, and its liabilty established as to some of the materialmen, the mere fact that certain materialmen have filed their claim in the original cause and obtained their proportionate part of their claims out of the funds in court for that purpose, does not estop them from enforcing their demand against the surety on the bond, when not involved in the scope of the inquiry on adjudication.

2. Liens—Mechanics' Liens—Roads and Highways—Municipal Corporations—Counties—Principal and Surety—Statutes—Limitation of Actions.

Under the provisions of chapter 100, Public Laws of 1923, amending C. S., 2445, ch. 150, Public Laws of 1913, and chapter 191, Public Laws of 1915, the bond given to a county by the contractor for the building of a public highway must be for the payment of materialmen, etc., and the statute presumed to be included in the provision of the bond, requiring that the amount of claims of this character be determined in one suit, etc.: *Held*, it was the legislative intent not to bar the rights of such claimants after three years from the time the materials were furnished, but from the time of the completion of the entire contract, and the principle that suit upon the surety bond (under seal) is limited as to its commencement by the limitation of the right of action against the principal, does not apply.

3. Same—Actions Pending.

The provisions of chapter 100, Public Laws of 1923, that its requirements as to the liability of the contractor's bond for the construction of a county highway shall not affect existing suits, applies to the remedy, and does not relate to those who have furnished material for the construction of the highway before the enactment of the statute, but have no action pending at that time.

4. Liens—Mechanics' Liens—Material—Feed for Teams.

Feed for teams working on a public highway come within the contemplation of the statute as material furnished, making a surety upon the contractor's bond for the building of a county highway liable.

APPEAL by defendant from *Barnhill, J.*, at November Term, 1925, of LENOIR.

The Pratt Lumber Company, the National Surety Company, and the T. H. Gill Company are corporations organized under the laws of the State of New York. On 21 October, 1919, the T. H. Gill Company contracted with the Highway Commission of Lenoir County to construct a road known as the Pink Hill Road and to furnish the necessary supplies and materials, and at the same time executed a bond in the penal sum of $15,000 with the defendant as surety. The bond had this condition: "The condition of this bond is such that if the above bounded T. H. Gill Company shall well and truly keep and perform all the terms and conditions of the foregoing contract hereto annexed, for building road improvements for the county of Lenoir, N. C., on its part to be kept and performed; and shall pay all claims of subcontractors, materialmen, furnishers of equipment or apparatus, foremen, and laborers, any or all arising from the carrying forward, performing and completing the attached contract; and shall indemnify and save harmless the said county and the said Highway Commission of Lenoir County, N. C., and its officers and agents, as therein stipulated, then this obligation shall

be of no effect; otherwise, it shall remain in full force and virtue. It is expressly understood that this bond shall be for the benefit of the materialman or laborer having a just claim, as well as for the benefit of the Highway Commission of Lenoir County, N. C., and the county."

E. V. Chappell performed labor and furnished material and Pratt Lumber Company sold pipe and iron bars, all of which went into the construction of the road; and Churchill & Company furnished feed for the teams. Service of process could not be made on the Gill Company, and the plaintiffs brought suit against the defendant to recover the amounts due on their respective claims. Before the completion of the road the Gill Company became insolvent, and a suit in equity was instituted in the United States District Court for the Northern District of New York in which Douglas V. Ashley was appointed receiver. This was followed by an ancillary proceeding in the United States District Court for the Eastern District of North Carolina in which said Ashley was appointed ancillary receiver. As such he completed the road. When the ancillary receiver was appointed there was in the possession of the Lenoir County Highway Commission and of the State Highway Commission (on another contract) a considerable sum which had been retained as a percentage as the work progressed. In the ancillary proceeding the defendant, National Surety Company, and certain creditors of the Gill Company intervened and the District Court held that the Surety Company had an equity against this percentage and ordered the receiver to transfer the fund to the District Court for the Northern District of New York for distribution under the orders of the latter court. Joseph C. Cheshire, Jr., as special master in the ancillary proceeding reported the various claims filed before him against the Gill Company. These claims were paid by the defendant on account of its liability on its bond. Neither Chappell nor the Pratt Lumber Company filed any claim before the referee, but they did file their claims against the receiver and received a dividend as ordered by the court of original jurisdiction. The verdict was as follows:

1. Did the plaintiff, E. V. Chappell, furnish to T. H. Gill Company labor, materials and supplies used in the building and construction of the Pink Hill Road as alleged? Answer: Yes.

2. What amount, if any, is due E. V. Chappell for labor, materials and supplies furnished to T. H. Gill Company in the building and construction of the Pink Hill Road? Answer: $2,588.07 with interest from July 12, 1920.

3. What was the date upon which E. V. Chappell furnished the labor, materials and supplies to T. H. Gill Company? Answer: Between 1 January and 12 July, 1920.

4. Did the plaintiff, Pratt Lumber Company, furnish to T. H. Gill Company labor, materials and supplies used in the building and construction of the Pink Hill Road as alleged? Answer: Yes.

5. What amount, if any, is due Pratt Lumber Company for labor, materials and supplies furnished to T. H. Gill Company in the building and construction of the Pink Hill Road? Answer: $4,939.21, with interest from 1 March, 1920.

6. What was the date upon which Pratt Lumber Company furnished the labor, materials and supplies to T. H. Gill Company? Answer: Between 5 December, 1919, and 1 March, 1920.

7. Did the plaintiff, Churchill & Company, furnish to T. H. Gill Company feed for team, which team were then working upon and constructing the Pink Hill Road? Answer: Yes.

8. What amount, if any, is due Churchill & Company for labor, materials and supplies furnished to T. H. Gill Company in the building and construction of the Pink Hill Road? Answer: $437.46, with interest from 8 June, 1920.

9. What was the date upon which Churchill & Company furnished the labor, materials and supplies to T. H. Gill Company? Answer: Between 17 January and 8 June, 1920.

10. What was the date of the completion of the Pink Hill Road by T. H. Gill Company or Douglas V. Ashley, receiver thereof? Answer: 11 August, 1921.

11. Did the plaintiffs, Pratt Lumber Company and E. V. Chappell, or either of them file proof of their claim with Joseph B. Cheshire, Jr., master appointed by the United States District Court for the Eastern District of North Carolina in the ancillary suit in equity, wherein Pratt Lumber Company was the plaintiff and T. H. Gill Company was the defendant, originating in the United States District Court for the northern district of New York? Answer: No.

12. Are either of the plaintiffs, Pratt Lumber Company or E. V. Chappell, estopped from asserting their claims against the defendant National Surety Company? Answer (by the court): No.

13. Are the claims of either the Pratt Lumber Company or E. V. Chappell barred by the statute of limitations? Answer (by the court): No.

14. Are the claims of either the Pratt Lumber Company or E. V. Chappell (or Churchill & Company) barred by reason of failure to file claims with the Highway Commission within six months after the completion of the project? Answer (by the court): No.

All the issues except the 12th, 13th and 14th were answered by consent, and these three were answered by the court as a matter of law.

Judgment was rendered in favor of the plaintiffs, and the defendant excepted and appealed. The assignments of error are referred to in the opinion.

Connor & Hill and Dawson & Jones for plaintiffs.
S. Brown Shepherd for defendant.

ADAMS, J. The appellant assigns for error his Honor's ruling that Chappell and the Pratt Lumber Company are not estopped in this action by reason of their failure to file their claims with the special master appointed in the ancillary cause. In the United States District Court for the Eastern District of North Carolina the Pratt Lumber Company instituted a suit in equity against the T. H. Gill Company, in which intervening creditors prayed the court to adjudge that their claims were entitled to priority in the disposition of the amounts due the receiver over the claims of the defendant's general creditors. *Pratt Lumber Co. v. T. H. Gill Co.*, 278 Fed., 783. It was therein determined that the creditors who had furnished material or performed labor had no priority over the claims of general creditors, and that the respective rights of the National Surety Company (the defendant in this action), the original receiver, the ancillary receiver, and the general creditors were involved in other jurisdictions. The ancillary receiver was directed, after paying certain special claims and the cost of the proceeding, to remit to the original receiver, appointed by the District Court for the Northern District of New York, the fund deposited with the Raleigh Savings Bank and Trust Company, to be subject to the order of the court of original jurisdiction upon the determination by that court of the respective rights of the interested parties. This order was made 26 November, 1923, and on the same day another order was signed in the United States District Court sitting in Raleigh reciting that the defendant herein had filed a statement of claims which it had paid on account of its bonds to the State Highway Commission and the Road Commission of Lenoir County; that these claims had been approved by the special master; and that the defendant herein was entitled to be reimbursed as a contractural right out of the retained percentage existing at the time the receiver was appointed.

It is apparent, we think, that the rights of the general creditors of the T. H. Gill Company were to be worked out and finally determined in the court of original jurisdiction. The question of the Surety Company's liability was not involved in the suit referred to, the object of the original and the ancillary proceeding being to wind up the affairs of an insolvent corporation. We find nothing in the record to show that either court undertook to adjudicate the claims now in controversy.

They were still subject to litigation, and the defendant had a right to contest them. Bispham says, in his work on Equity, sec. 282: "Equitable estoppel, or estoppel by conduct, has its foundation in the necessity of compelling the observance of good faith; because a man cannot be prevented by his conduct from asserting a previous right, unless the assertion would be an act of bad faith towards a person who had subsequently acquired the right." *Boddie v. Bond,* 154 N. C., 359; *Patillo v. Lytle,* 158 N. C., 92; *Patterson v. Franklin,* 168 N. C., 75; *Hardware Co. v. Lewis,* 173 N. C., 290. The plaintiffs, therefore, in our opinion are not estopped.

The defendant contends that the plaintiffs delayed their action for more than three years after the labor was performed and the material was furnished and that they are barred by the statute of limitations. The parties admit, as shown by the verdict, that Chappell furnished labor, material, and supplies to the contractor between 1 January and 12 July, 1920, and that the Pratt Lumber Company furnished labor, material, and supplies between 5 December, 1919, and 1 March, 1920. Churchill & Company brought suit on 7 September, 1923, and the other plaintiffs on 16 May, 1924. The work was finished 11 August, 1921.

The bond sued on was executed under the corporate seal of the principal, T. H. Gill Company, and of the defendant, National Surety Company. An action upon a sealed instrument against the principal thereto must be commenced within ten years; and within three years an action upon a contract, obligation, or liability arising out of a contract as to which no other period is prescribed. C. S., 437(2), 441(1). It has been held that the latter section—the three-year limitation—is available to the surety in a common-law bond as distinguished from an official bond, as well as to the surety in a promissory note under seal. *Welfare v. Thompson,* 83 N. C., 276; *Jackson v. Martin,* 136 N. C., 196; *Kennedy v. Trust Co.,* 180 N. C., 225; *Haywood v. Russell,* 182 N. C., 711. The defendant says, however, that as to the alleged causes against the Gill Company the three-year statute applies; that more than three years intervened between the date of the last work done and the last supplies furnished respectively by Chappell and the Pratt Lumber Company and the commencement of the action, and that the statute of limitations, being effectual on behalf of the principal, is in like manner a defense for the surety. The argument is that every contract of suretyship is based upon an obligation of the principal and that the liability of the surety is to be measured by the obligation or contract of the principal. *Blades v. Dewey,* 136 N. C., 176.

There is authority for the position that as a general rule an action, if barred by the statute of limitations as against the principal debtor, is barred also as against the surety. *Spokane County v. Prescott,* 67

A. S. R. (Wash.), 733; *Kepl v. Fidelity Co.,* 142 Pac. (Wash.), 489; *Auchanpaugh v. Schmidt,* 27 N. W. (Ia.), 805; *Phillips v. Hail,* 118 S. W. (Tex.), 190; *Biddle v. Wendell,* 37 Mich., 452; *Barnes v. Bonding Co.,* 172 Pac. (Or.), 95; 17 R. C. L., 966. But if in the present case the defendant's bond should be construed as a guaranty of payment under seal (*Crane Co. v. Longest & Tessier Co.,* 177 N. C., 346), the three-year limitation would not apply. *Coleman v. Fuller,* 105 N. C., 328. If we grant, however, as the appellant argues, that the plaintiffs would be barred at the expiration of three years, it then becomes material to determine when the respective causes of action arose; for if the statute began to run at the completion of the work the suits were brought within three years from the time each cause accrued and neither of them is barred. The solution of this question depends upon the interpretation of 3 C. S., 2445. The first part of this statute was enacted in 1913. It was then provided that every municipal corporation letting a contract for erecting, repairing, or altering any building should require the contractor to execute a bond with one or more solvent sureties conditioned for the payment of all labor done on and material and supplies furnished for the work; also that the laborer and the materialman should have the right to sue the principal and sureties on the bond in the courts of this State having jurisdiction of the amount of the bond, and that any number of laborers and materialmen should have the right to join in one suit for the recovery of the amounts due them respectively. Pub. Laws 1913, ch. 150. In 1915 public roads and streets were included (Public Laws 1915, ch. 191); and in 1923 it was provided that the statute should be conclusively presumed to have been written into the bond and that on the bond only one suit should be brought; that the plaintiffs should give the prescribed notice of the pendency of the suit; that all persons entitled to prosecute an action upon the bond should have the right to intervene and set up their respective claims within twelve months from the bringing of the action; that if recovery on the bond should be inadequate to pay the amount found to be due all the claimants judgment should then be given each claimant "pro rata of the amount of the recovery"; and that the surety should have the right to pay into the court for distribution among the claimants the penalty named in the bond and thereby be relieved from further liability. Public Laws 1923, ch. 100.

By conferring authority upon the laborers and the materialmen to sue both the principal and the sureties in the courts having jurisdiction of the amount of the bond, to intervene within twelve months, and, if the bond be inadequate, to share pro rata in the recovery, and by providing that only one suit shall be brought the General Assembly evidently intended to provide the method by which "the payment of all

labor done and material and supplies furnished" should be secured and enforced. To this end it is necessary to ascertain the whole sum of the principal's indebtedness, and this can be done with satisfaction only after the work is finished. The statute can be given vitality and all its provisions enforced by holding that the plaintiffs' respective causes of action against the defendant accrued at the completion of the work; and this conclusion in our judgment not only observes the provisions of the statute, but results in the adoption of a sound economic policy. But the accrual of the cause of action at the completion of the work is the effect of the statutory provision and applies only to a suit on the bond; it does not interfere with the right of a laborer or materialman to proceed as heretofore against the contractor. The benefits conferred by the statute in the former case do not interfere with the common-law right to sue upon the contract in the latter.

The plaintiffs' causes of action accrued before the act of 1923 went into effect, but their suits were brought afterwards. The provision that the act should not affect pending suits has no application to the present action; but in any event the provisions merely create new remedies for existing rights. *Gillespie v. Allison,* 115 N. C., 542, 548; *Waddill v. Masten,* 172 N. C., 582.

The claim of Churchill & Company is not barred by the statute of limitations; but the appellant contends that feed consumed by the teams worked by the Gill Company in the construction of the road was not such supplies or material as the statute contemplates. The point has recently been discussed in *Plyler v. Elliott, ante,* 54, and decided against the appellant's position. We find

No error.

JOHN F. McNAIR v. THE SOUTHERN STATES FINANCE COMPANY ET ALS.

(Filed 12 May, 1926.)

1. Contracts—Fraud—Misrepresentation—Sale of Stock.

Evidence that plaintiff was induced to purchase shares of stock in a finance corporation being organized by misrepresentations of the agent of defendant corporation as to the value of its shares, and that they should not be sold to others for less than a stated price, that a certain person was to give a large part of his time to the corporation's business, and that the statute for the sale of shares of this character had been complied with, constitutes actionable fraud when the representations were false within the knowledge of the defendant, reasonably relied upon by the plaintiff, and inducing him to purchase the shares so offered him.

2. Fraud—In Pari Delicto—Contract—Sale of Stock—Statutes.

Where the purchase of shares of stock in the forming of a corporation is induced by the fraudulent representations of the seller amounting to actionable fraud, the parties will not be considered as in *pari delicto* when the plaintiff was not in a position to know and did not know of their falsity, and made demand upon the defendant and brought his action within a reasonable time after knowledge thereof.

3. Fraud—Evidence—Promissory Representations—Contracts — Sale of Shares of Stock.

Representations made to a proposed purchaser of stock in the formation of a corporation that as a fact a certain person or persons were to be officers thereof and give a large part of their time to the corporation's business, knowingly falsely made, with the intent to deceive, and which did induce the purchaser of the shares, are of a subsisting fact, and when fraudulent, are not to be disregarded as promissory representations.

4. Same—Statutes—Blue-Sky Law—Burden of Proof.

A purchaser of shares of stock may recover damages upon the false representations of the seller that all of the provisions of the Blue-Sky Law, C. S., 6367, had been complied with, with the burden of proof on the purchaser, the plaintiff in the action, to show his damages arising therefrom.

5. Principal and Agent—Declarations of Agent—Fraud — Knowledge—Evidence—Ratification.

Evidence tending to show that one purporting to act as sales agent for a corporation during its formation, made fraudulent representations to the purchaser of stock to his damage, and that with knowledge thereof the corporation, through its officers, accepted the purchase price, is sufficient *dehors* the agent's declarations, to bind the corporation as principal, it being required that the corporation in order to repudiate the transactions, must reject the benefits in toto.

ADAMS, J., not sitting.

APPEAL by defendant, the Southern States Finance Company, from *McElroy, J.*, and a jury, at November Term, 1925, of SCOTLAND. No error.

The plaintiff brought an action against the Southern States Finance Company (hereinafter called Finance Company) and the other defendants. At the close of the plaintiff's evidence the court below ordered that the action against the individual defendants be nonsuited. The present controversy on appeal is solely between the plaintiff and defendant Finance Company.

The plaintiff's action against the Finance Company is for actionable fraud. The material allegations of the complaint:

"On 9 May, 1923, at Laurinburg, N. C., the defendant corporation, through J. J. Quinby, signed a contract of sale for 4,000 shares of common stock in the Southern States Finance Company for the sum of

$10,000, with James L. McNair, the agent and representative of plaintiff, who acted in said transaction for and in the name of the plaintiff; said contract was not in the form nor did it contain the provisions required by the laws of North Carolina.

On 12 May, 1923, the defendant corporation, by the defendant, J. R. Cherry, as secretary and treasurer, drew upon plaintiff for $10,000 as the purchase price agreed upon for said stock, which said draft was paid.

"The sale of said stock to the plaintiff was conducted upon plaintiff's behalf entirely through his agent, James L. McNair, and the circumstances of said transaction were as follows:

"The defendant, Quinby, approached the said agent of plaintiff and represented and stated to him that the Southern States Finance Company was a new corporation then being organized by Tom G. Taylor & Company for the Finance Company; that none of its common stock had been sold or disposed of or would be sold or disposed of for less than $2.50 per share; that all provisions of law with reference to organization and sale of stock had been complied with, and no greater amount had been used or would be used in organization, promotion and sales expense than allowed by law, and contracting and agreeing that in the event of his failure to dispose of said stock, at a large profit to plaintiff, within six months, plaintiff would be repaid the sum of $10,000 with interest from 9 May, 1923, each of which representations and statements was false to the knowledge of said Quinby and his codefendants; the truth being as defendants well knew, that the Southern States Finance Company had been duly organized for more than two years; that large quantities of its common stock had been given away as bonus, and sold at prices much less than $2.50 per share; said corporation was not a new company being organized by Tom G. Taylor & Company; greatly in excess of the amount allowed by law had been expended and was being expended in stock sales, organization and promotion expense.

"Said stock was practically worthless, and still is practically worthless; the statute constituting the 'Blue-Sky Law' of North Carolina had not been complied with; the stock was not resold to the profit of the plaintiff, and on his demand the defendant corporation failed to take up said stock and repay to him the purchase price with interest thereon. All of aforesaid representations were made with knowledge of their falsity, with intent to deceive and actually did deceive the plaintiff, through his said agent, and caused him to purchase said stock."

The defendant, Finance Company, denied any fraud in the transaction; denied that it had not complied with the "Blue-Sky" statutes of the State, and alleged:

That on or about 9 May, 1923, plaintiff, John F. McNair, by J. L. McNair, his agent, executed and delivered to Tom G. Taylor a certain

written contract for the purchase of 4,000 shares of the common stock of the corporate defendant, for which he contracted and agreed to pay the sum of $10,000, 40 per cent of which was to be paid and the remaining 60 per cent in notes, bearing 6 per cent interest, payable to the Southern States Finance Company and due respectively in three, six and nine months after date thereof; that in the said written contract as aforesaid it was specifically set forth in part and expressed as follows:

"It is understood and agreed that this contract contains the entire agreement between the purchaser, whose signature appears below, and Tom G. Taylor & Company, and no agent, representative or any other person has any power to change, modify or make any new conditions, statements, promises or agreements whatever."

That J. J. Quinby mentioned by plaintiff was not an agent of corporate defendant, or of said Tom G. Taylor, nor was said J. J. Quinby authorized to make any representation or contract in regard to or binding upon defendants, and defendants had and have no knowledge of any alleged act or thing done or said by said Quinby, and are not liable thereon.

That defendants are advised and believe that plaintiff is bound by terms of written contract of purchase before mentioned, and is estopped to deny the terms thereof or controvert same by oral testimony, and defendants specifically plead such estoppel in bar of any recovery herein.

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

"1. Did the plaintiff, on 9 May, 1923, subscribe for 4,000 shares of stock in the Southern States Finance Company for the sum of $10,000, and pay for same on 13 May? Answer: Yes.

"2. Was such subscription procured by means of misrepresentation and fraud, as alleged in the complaint? Answer: Yes.

"3. At the time of said sale was the Southern States Finance Company duly licensed to sell stock in the State of North Carolina? Answer: No.

"4. Did the subscription card signed by the plaintiff contain the language required by section 6367 of the Consolidated Statutes? Answer: No.

"5. Did the defendant, Tom G. Taylor, make the sale of said stock through his agent, J. J. Quinby? Answer: Yes.

"6. Was the said J. J. Quinby, at the date of sale to plaintiff, a duly licensed agent to sell said stock under the laws of North Carolina? Answer: No.

"7. Is the defendant, Southern States Finance Company, indebted to plaintiff, and if so, in what amount? Answer: $10,000 from 13 May, 1923."

Judgment was rendered on the verdict and the Finance Company appealed to the Supreme Court. There are thirty-seven assignments of error in the record. Most of the immaterial ones, under the Rules of this Court, are abandoned in the Finance Company's brief. The material ones and necessary facts will be considered in the opinion.

James A. Lockhart, Preston & Ross, Hueling Davis and W. H. Weatherspoon for plaintiff.

Frank Armfield, T. L. Kirkpatrick, Plummer Stewart and H. L. Taylor for Finance Company.

CLARKSON, J. Succinctly, the main material contentions of plaintiff and defendant, the Finance Company, are: On the part of plaintiff: That prior to 9 May, 1923, J. J. Quinby came to James L. McNair and represented that he was agent of Tom G. Taylor, who was the duly appointed agent of the Finance Company, to organize to sell its preferred and common stock. James L. McNair entered into the negotiations with Quinby and purchased the stock on 9 May, 1923, for his father, the plaintiff. The false and fraudulent representations which he relied on and which induced him to purchase the 4,000 shares of common stock of the company are: (1) That it was a new corporation then being organized by Tom G. Taylor & Co.; (2) that none of the common stock had been sold or disposed of or would be sold or disposed of for less than $2.50 per share; (3) that all the provisions of law with reference to organization and sale of stock had been complied with; (4) contracting and agreeing that in the event of his failure to dispose of the stock at a large profit, within six months, plaintiff would be repaid the sum of $10,000 with interest from 13 May, 1923; (5) all of the representations made by Quinby, agent of Finance Company, were false, with knowledge of their falsity, with intent to deceive and actually did deceive plaintiff, and he was thereby induced to buy the stock; that plaintiff offered frequently to return the stock, as soon as he discovered the fraud, and demand the payment of the purchase price and interest. Plaintiff's evidence abundantly tended to support these contentions.

On the part of defendant, Finance Company: (1) The Finance Company admitted the contract for the purchase of 4,000 shares of the common stock was executed on 9 May, 1923, by James L. McNair, for plaintiff; denied all allegations of fraud; that the books of the corporation show there was no fraud, and that any representation made was true; (2) that in the agreement of purchase of the stock by the plaintiff was the following: "It is understood and agreed that this contract contains the entire agreement between the purchaser, whose signature appears below, and Tom G. Taylor & Company, and no agent, representa-

tive or any other person has any power to change, modify or make any new conditions, statements, promises or agreements whatever." (3) That J. J. Quinby was not the agent of the Finance Company or Tom G. Taylor, and was not authorized to make any representation or contract binding on Finance Company, and it had no knowledge of any alleged act or thing done or said by Quinby and is not liable thereon; (4) that plaintiff is bound by the terms of the written contract and estopped to deny them; "that J. L. McNair was induced to enter into this contract, for that he telephoned Jas. O. Walker, president of the company, and Walker replied that he was going to give the matter his personal attention, and at least one-half of his time. The defendant contends that that was one inducement to enter into the contract, and that another inducement was at the time he entered into the contract for the purchase of the stock and before he ever entered into it he had a contract and agreement with Tom G. Taylor & Company, that they would sell stock for him, for which he was paying ten thousand dollars, would sell it in six months for him for thirty thousand dollars, and upon failure to do that that they would refund him his money, the ten thousand dollars that he had paid for the stock with three hundred dollars, being the interest for six months, from 13 May, making ten thousand and three hundred dollars."

The defendant introduced no evidence, but relied, in part, on plaintiff's evidence and cross-examination of plaintiff's witnesses and the written evidence in the case, to establish its defense.

The record is voluminous, but from a thorough digest we think the only material assignments of error to be considered are to the allegations and proof as to actionable fraud and the agency of J. J. Quinby. These go to the very heart of the action and on which the defendant, Finance Company, predicates its motion, under C. S., 567, at the close of the plaintiff's evidence for judgment as in case of nonsuit.

The issue as to fraud: "Was such subscription procured by means of misrepresentation and fraud as alleged in the complaint?"

The court below charged as follows: "The burden of this issue, gentlemen, is upon the plaintiff to satisfy you by the greater weight of the evidence that such subscription was procured by means of misrepresentation and fraud. Fraud may be defined as 'any trick or artifice where a person by means of false statements, concealments of material facts or deceptive conduct which is intended to and does create in the mind of another an erroneous impression concerning the subject-matter of a transaction whereby the latter is induced to take action or forbears from acting with reference to a property or legal right he has which results to his disadvantage and which he would not have consented to had the impression in his mind not been created and in accordance with the real

facts.'" On this issue the court below states that the defendant asked for the following instructions, which in obedience to the request were given: "The burden is on the plaintiff to prove by the greater weight of the evidence that Quinby not only made such representations, but also made them with the knowledge of their falsity or recklessly and wilfully with intent to deceive and defraud the plaintiff, and unless the plaintiff has proved this by the greater weight of the evidence, you will answer the second issue No. That if the jury should find that the plaintiff was induced to subscribe for said stock by the representation that James O. Walker was president of the company and would devote one-half of his time to the affairs of the company you are instructed to answer the second issue No."

It has been hard for the courts to lay down any exact definition of fraud or rule to apply to the varying cases, but to fit the contested facts in the present controversy, we think the definition as laid down by the court below correct. In fact, the Finance Company made no exception to the rule as to fraud as charged by the court. *Evans v. Davis,* 186 N. C., 43; *Machine Co. v. Feezer,* 152 N. C., 516; *Pate v. Blades,* 163 N. C., 267; *Massey v. Alston,* 173 N. C., 215; *Bank v. Yelverton,* 185 N. C., 318; *Sanders v. Mayo,* 186 N. C., 109; *Oil Co. v. Hunt,* 187 N. C., 159; *Indemnity Co. v. Tanning Co., ibid.,* 190; *Wolf Co. v. Mercantile Co.,* 189 N. C., 322; *Furst v. Merritt,* 190 N. C., 397.

The defendant, Finance Company, relies on *Pritchard v. Dailey,* 168 N. C., p. 332. It is there said: "The material elements of fraud, a commission of which will justify the court in setting aside a contract or other transaction, are well settled. First, there must be a misrepresentation or concealment; second, an intention to deceive, or negligence in uttering falsehoods with the intent to influence the action of others; third, the misrepresentations must be calculated to deceive and must actually deceive; and, fourth, the party complaining must have actually relied upon the representations." In that case the Court said the representations of the defendant seemed to be what are called "promissory representations" or "opinion representations"—not so in the present case. In the *Pritchard case,* the Court says the evidence fails to show that the plaintiff relied upon the representations of the defendant, but his own evidence showed he relied on the paper-writing he had written and mailed to defendant and demanded the execution of it or the return of his check. Defendant complied with the demand. The evidence showed also that plaintiff's act was voluntary and in recognition of the contract.

Bispham's Equity (9 ed.), sec. 211, says: "The representation must not be an expression of intention merely. A man has no right to rely upon what another says he intends to do, unless, indeed, the expression

of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement and for the breach of which the other side has, ordinarily, an adequate remedy at law. *But if a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief." Massey v. Alston, supra,* p. 219.

12 R. C. L., p. 240, states it thus: "The essential elements required to sustain an action for deceit are that the representation was made as a statement of fact, which was untrue and known to be untrue by the party making it, or else recklessly made; that, it was made with intent to deceive and for the purpose of inducing the other party to act upon it; and that he did in fact rely on it and was induced thereby to act to his injury or damage. All of these ingredients must be found to exist, and the absence of any one of them is fatal to recovery; though under the rulings of some courts the rule is generally relaxed as to knowledge and intent, where the relief sought is rescission. . . . Thus, fraudulent representations to avoid a contract need not be such as would sustain an indictment for false pretenses. So, if the original transaction is valid it cannot be rendered fraudulent by subsequent events, as by the nonperformance of a contract, *unless there is a coexisting intention not to perform."*

Under the facts and circumstances of this case, the court below was fully warranted in submitting the facts to the jury and the charge as to fraud was in accordance with the law.

The Finance Company contends: "That the real inducement for execution of subscription contract by plaintiff was the execution of contract with him by Tom G. Taylor & Company, and that if defendant has failed to observe any requirement of law the plaintiff is in *pari delicto* and is not entitled to equitable relief."

The court below fully met the first part of contention and charged the jury: "That if the jury shall find from the evidence and by its greater weight that the plaintiff was induced to subscribe for said stock by the execution of the contract to resell entered into with Tom G. Taylor & Company, that you are instructed to answer the second issue No."

The action here is for fraud and deceit. Plaintiff did not come under the provision of C. S., 6367, in the stock agreement with Tom G. Taylor & Company. That section provides *organizers or promoters or their agents,* should put in the contract of subscription or sale a certain provision. The principle of *pari delicto* does not apply here.

The next contention of the Finance Company is: "The plaintiff having received the stock on 13 May, 1923, and 'slept' until 2 December,

1924, is guilty of laches and is not entitled to equitable relief." In answer to this contention, plaintiff says that the court below stated "In reply to this contention, gentlemen of the jury, the plaintiff contends, and Jas. L. McNair testified, that he did not discover that these representations were false until just a short time—the latter part of 1924—just a short time before the commencement of this action, and that he began suit immediately after discovering that fraud had been perpetrated upon him and that he was guilty of no laches; that he demanded that they cancel the contract and return his money, and they refused to do so, whereupon he brought the suit within a few days, or a very short time after the discovery by him that the representations made by Quinby to him were false." In the charge of the court in regard to this aspect, the court below said: "Unless the plaintiff has failed to satisfy you, gentlemen of the jury, that he has not been guilty of laches or negligence in rescinding this contract, the court charges you, gentlemen of the jury, that it is the duty of the plaintiff, if he intended to rescind this contract, to give the defendant notice of such intention within a reasonable time after discovering the fraud that had been perpetrated upon him, if you find that there was fraud perpetrated upon him, and if he failed to do so within a reasonable time after the discovery of the fraud and was guilty of laches, then, gentlemen of the jury, the plaintiff cannot recover and you would answer this issue Nothing. The court instructs you that the plaintiff is not permitted by law to delay in the enforcement of any remedy he may have for the rescission of the contract, and if you find he has been guilty of unreasonable delay or laches in electing to rescind you will answer the seventh issue Nothing." This was a question of fact on the evidence, and the court below fully complied with the law in the charge.

"No act of a party will amount to a confirmation of a fraudulent transaction, or acquiescence therein, unless done with full knowledge of the fraud and while he is free from its influence. Plaintiff's ignorance of his rights also, as a general rule, negatives any laches on his part, especially where there has been no change in the situation of the parties in respect to the matter in which the relief is sought. It is sufficient that suit is brought without unreasonable delay after discovery of the grounds for rescission." 9 C. J., p. 1205.

In *May v. Loomis,* 140 N. C., p. 359, the Court says: "In order to rescind, however, the party injured must act promptly and within a reasonable time after the discovery of the fraud, or after he should have discovered it by due diligence; and he is not allowed to rescind in part and affirm in part; he must do one or the other. And as a general rule, a party is not allowed to rescind where he is not in a position to put the other in *statu quo* by restoring the consideration passed. Furthermore,

if, after discovering the fraud, the injured party voluntarily does some act in recognition of the contract, his power to rescind is then at an end. These principles will be found in accord with the authorities. Bishop on Contracts, secs. 679, 688; Beach on Contracts, sec. 812; Page on Contracts, secs. 137, 139; Clark on Contracts, pp. 236, 237; *Trust Co. v. Auten,* 68 Ark., 200; *Parker v. Marquis,* 64 Mo., 38."

The Finance Company contends: "That J. J. Quinby, the person alleged by plaintiff to have made the fraudulent misrepresentations was not the agent of defendant, and if any such representations were made by Quinby they were unauthorized, without the knowledge or consent of defendant, and plaintiff was not entitled to rely on them, or prove them as a basis of recovery from defendant."

It is said in *Waggoner v. Publishing Co.,* 190 N. C., p. 831: "With full knowledge of all the circumstances, the defendant has received and still holds the money fraudulently obtained by its agent from the plaintiff. The defendant will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in its behalf. *Starkweather v. Gravely,* 187 N. C., 526. It is a rule too well established to admit of debate that if a principal, with full knowledge of the material facts, takes and retains the benefits of an unauthorized act of his agent, he thereby ratifies such act, and with the benefits he must necessarily accept the burdens incident thereto or which naturally result therefrom. The substance of ratification is confirmation after conduct. 2 C. J., 467. It is also a settled principle of ratification that the principal must ratify the whole of his agent's unauthorized act or not at all. He cannot accept its benefits and repudiate its burdens. *Bank v. Justice,* 157 N. C., p. 375."

We said in *Hunsucker v. Corbitt,* 187 N. C., p. 503: "Admissions by agents, made while doing acts within the scope of the agency, and relating to the business in hand, are admissible against the principal when such admissions may be deemed a part of the *res gestæ,* but such admissions are not admissible to prove the agency; the agency must be shown *aliunde* before the agent's admissions will be received." Lockhart's Handbook on Evidence, sec. 154, and numerous authorities.

The evidence on this aspect, Jas. L. McNair testified: "Well, I don't recall his exact language; he said that Tom G. Taylor & Company, of which he was a partner, were organizing or were organizers of the Southern States Finance Company, and as soon as a certain amount of stock was sold, that the organization would begin business, and he told me who some of the officers of the organization would be. He said Mr. J. O. Walker would be president of the company, and I don't remember all of the officers; he mentioned Rhyne and Dr. Ashcraft as directors.

In consequence of what he told me I called Mr. Walker on the telephone. I know Mr. Walker's voice. Q. What conversation took place between you and J. O. Walker? A. I told Mr. Walker over the phone that *Quinby was down here* wanting to sell some stock in the Southern States Finance Company, which he said they were getting up in Charlotte to do a financing business, and he represented to me that Mr. Walker would be active president, and I asked Mr. Walker if that was true, and Mr. Walker said he was at that time—that it happened that at that time he was right much busy with his campaign; that they were having an election in Charlotte and he had been right busy in the campaign, but that was practically over and he expected he would give it half of his time; one-half of the day to the mayor's office, and half a day to the office of the Southern States Finance Company. *I told him Quinby was there wanting to sell me the stock.*"

Counsel for plaintiff read a number of entries from the stock book of defendant, Finance Company, to the jury, one with the entry "John F. McNair, Laurinburg, N. C., 12 May, 1923, four thousand shares common certificate 1128, ten thousand, on the credit side 16 May, cash book four hundred, 16 May, cash book nine thousand and six hundred." It was in evidence that Dr. Ashcraft became vice-president and in active charge of the company.

Dr. J. E. Ashcraft and Mr. Tolle, officers of the Finance Company, called on Jas. F. McNair, at Laurinburg, who testified: "At the time Ashcraft and Tolle were here I showed them this Tom G. Taylor contract. I told them who sold the stock to me, and the contract showed. I don't recall how long we were conversing, one to three hours—they were in the office some time. I told them I had *bought this stock from Mr. Quinby* and the agreement, and told them the *representations that Quinby made to me.* I told them Mr. Quinby said that the company was being formed and the stock had not been sold to any one for less than two dollars and fifty cents, and they would be selling the stock for ten dollars a share. When I told Dr. Ashcraft and Mr. Tolle the representations that Quinby had made to me they told me they would let me know about taking the stock up; they would let me know right away whether they would give the money back or not, and after they went back I got that letter. They didn't disavow responsibility for Quinby's statement; they didn't say either way."

The issue of agency: "Did the defendant, Tom G. Taylor, make the sale of said stock through his agent, J. J. Quinby?"

The court below on this issue charged: "The burden of this issue, gentlemen, is upon the plaintiff to satisfy you by the greater weight of the evidence that this sale was made by Tom G. Taylor, through his agent, Quinby. The contract, gentlemen of the jury, has been introduced here

before you wherein the following language is used: 'I hereby purchase from Tom G. Taylor & Company four thousand shares of the common stock of the company.' The plaintiff insists that that should satisfy you that this sale was made by Tom G. Taylor through his agent, J. J. Quinby; plaintiff insists, gentlemen, that the evidence shows that Quinby was acting as the agent, and that it was known to the company he was acting as their agent, so, gentlemen of the jury, if you are satisfied from this evidence, and by its greater weight, that the sale was negotiated through Tom G. Taylor, by his agent, Quinby, why then you will answer the fifth issue Yes. If you are not so satisfied, you will answer it No."

Dr. Ashcraft and Tolle, officers of the Finance Company, were informed by Jas. L. McNair of the fact that the stock was purchased through Quinby and the representations Quinby made to him. They told McNair that they would let him know about taking the stock up. They did not disavow responsibility.

1 R. C. L., p. 478, backed by a wealth of authorities, says: "Intimately connected with admissions that are implied by the acts or conduct of the party are admissions by silence or acquiescence. If a statement is made in the hearing of another, in regard to facts affecting his rights, and he makes no reply, it may be a tacit admission of the facts stated." *State v. Evans,* 189 N. C., 235.

We think there was sufficient evidence to be submitted to the jury aliunde of Quinby being an agent of Tom G. Taylor and the Finance Company. (It is admitted that Taylor was.) The evidence of plaintiff: (1) The stock sold by Quinby to plaintiff was issued by the Finance Company and the money received by it; (2) the plaintiff through his agent, Jas. L. McNair, informed Jas. O. Walker, acting president of the Finance Company, that Quinby was trying to sell him stock in the company; (3) the statement of Jas. L. McNair that he informed the two officers of the Finance Company in regard to facts affecting the rights of the company—the representations of Quinby. No reply from the officers. They remained silent. We think all these facts sufficient to justify the court below in its charge. The agency being established by evidence *aliunde,* the testimony of Jas. L. McNair that Quinby told him he was agent, etc., was competent. From the view we take of this action, as to the first, second and fifth issues, it is not necessary to discuss the interesting questions raised on the other issues.

The principle laid down in *Ginsberg v. Leach,* 111 N. C., p. 15, is as follows: "The Supreme Court will not consider exceptions arising upon the trial of other issues, when one issue, decisive of the appellant's right to recover, has been found against him by the jury." *Hamilton v. Lumber Co.,* 160 N. C., 52; *Beck v. Wilkins-Ricks Co.,* 186 N. C., 215; *Sams v. Cochran,* 188 N. C., 734.

The court below tried the case with care and caution.

The other positions taken by the able counsel for defendant on the argument and in the brief, we do not think raises any novel or new proposition of law, and are not material for the determination of the case.

The case is a simple action of actionable fraud. The questions of fact constituting the fraud were for the jury to determine. The charges of fraud were made and abundant evidence, if believed, to sustain them. The probative force was for the jury—not us. The issues were found for plaintiff. There was sufficient evidence to be submitted to the jury, and the overruling of the motion made by defendant, Finance Company, for judgment as in case of nonsuit, by the court below, was proper. The Finance Company introduced no evidence. The court below gave the contentions of both parties clearly and fairly. The law was applied to the facts. We see no error in law to disturb the verdict.

No error.

ADAMS, J., not sitting.

L. W. POOVEY v. INTERNATIONAL SUGAR FEED NUMBER TWO COMPANY.

(Filed 12 May, 1926.)

1. Health—Food—Cattle—Sales—Implied Warranty.

The implied warranty that food stuff sold for human consumption carries an implied warranty that it is wholesome and not deleterious, does not apply to a sale thereof for cattle, unaided by statute.

2. Same—Statutes.

Under the provisions of our statute, C. S., 4724, 4726, 4731, there is an implied warranty that foodstuff sold for cattle is reasonably fit for the purposes intended, and that it is not composed of harmful or deleterious substances that will produce injury or death to the cattle fed therewith.

3. Same—Evidence—Nonsuit.

Evidence to show an implied warranty that foodstuff sold to plaintiff was not harmful for cattle; that he had fed this with other foodstuff to his cattle, and some died of ptomaine poison, together with evidence of a chemical analysis by the State chemist showing that the foodstuff complained of was harmless, etc.: *Held* insufficient to be submitted to the jury upon the issue.

CIVIL ACTION before *Lane, J.*, at January Term, 1926, of CATAWBA.

The plaintiff is the owner of a herd of dairy cattle at Hickory, N. C., and the defendant is engaged in the business of manufacturing and sell-

ing dairy feeds. The plaintiff had been purchasing this same brand of feed from the defendant for about eighteen months prior to December, 1925, and had been feeding it to his cattle. He ordered a car of feed from defendant, which arrived at Hickory on or about 5 December, 1924. He testified that at the time of the arrival the "appearance of the feed did not appear like the stuff I had been getting. The bags were dirty and dusty. I have never had a shipment of that appearance before. The bags had been cleaned and seemed to leave a little grease on the side of the car, but was all dusty and sifted out all over the car."

The plaintiff accepted the feed, paid the draft, and took it out to his dairy barn. He then wrote a letter to the defendant, sending a sample of the feed, and the defendant, in reply thereto, stated that its chemist had examined the feed and there was nothing wrong with it, but that they had made a change in the feed by changing the formula in one ingredient, and had substituted therefor another which was of greater feed value, and that he could go ahead and use it. The plaintiff began feeding from this shipment to his cows at the dry barn, and also fed them some "wheat straw and some roughness." The feed was given to all of his cattle.

Plaintiff testified as follows: "I began feeding it to my cattle just as soon as I heard from this company. I haven't the letter. I suppose in about five days—that would be about 15 or 16 December when I began feeding it. It was some time the last of December or first of January when I noticed the cattle showing symptoms of sickness." Dr. E. J. McCoy, veterinary surgeon, was called in to treat plaintiff's cattle some time in January, 1925, and diagnosed the disease as ptomaine poisoning. He further testified that "we usually notice the symptoms develop rapidly, while I think the time would depend on the amount of poisoning. It is generally violent in a little while after we notice the symptoms. I have never seen ptomaine poisoning demoralize the nerves that control the diaphragm before. I can't account for it any other way. I can't say whether it was that or not. It was unusual following that trouble. I never knew of that particular symptom in a case of ptomaine. Ptomaine is brought on by some poison either in food or drink, but it is usually in the eating."

Two of plaintiff's cows died and some of the others became sick, and this suit was brought to recover for the value of the cows that died.

The agent of the defendant, at the time of the death of the cows, took up the remaining feed of the shipment and stored it in the city market of Hickory, and requested the Department of Agriculture of North Carolina to have the feed inspector for the State inspect it.

The inspector for the State testified as follows: "I made a physical examination of the bags and found it in very good condition. It was

wholesome and sweet, no moisture or mould to it at all that I could detect. Thereafter the feed was subjected to a chemical analysis by the feed chemist in the Department of Agriculture of North Carolina, and the analysis of the feed showed that there was no poisonous or deleterious matter in it, and that the substances actually found by chemical analysis were entirely all right and not injurious to cattle. The analysis agreed with the analysis on the tag attached to the bag by the manufacturer." There was evidence tending to show that the neighbors of the plaintiff had purchased some of this feed and that their cows had become sick, though none died. There was also evidence to show that other neighbors had purchased feed from this particular car and fed it to their cattle with no injurious effects whatever.

There was a verdict in favor of plaintiff and judgment thereon, from which the defendant appealed.

E. B. Cline for plaintiff.

Thomas P. Pruitt, Self & Bagby, W. L. Marshall for defendant.

BROGDEN, J. The merit of this case involves two questions:

(1) Is there an implied warranty in the sale of feed for cattle and the nature thereof?

(2) Is there sufficient evidence of a breach thereof to be submitted to a jury?

"The authorities are numerous that there is an implied warranty that runs with the sale of food for human consumption, that it is fit for food and is not dangerous and deleterious." *Ward v. Sea Food Co.*, 171 N. C., 33.

However, it has been held that this principle does not apply to sales of feed for cattle. For instance, in *Lukens v. Freiund,* 27 Kan., 664, the late *Justice Brewer* reasoned thus: "Upon what ground is an implied warranty rested in the case of the sale of provisions, which does not exist in the case of a sale of other articles? Obviously it is not upon any property grounds, or because thereby the estate of either party is affected; but for reasons of public policy, for the preservation of life and health, the law deems it wise that he who engages in the business of selling provisions for domestic use should himself examine and know their fitness for such use, and be liable for a lack of such knowledge. . . . Regard for human life compels this. If the preservation of human life and health be, as we think it is, the foundation of this exception, then it should not be extended to cases in which human life and health are in no wise endangered."

The *Luken's case* grew out of the fact that a farmer bought a sack of bran. In some way two copper clasps had gotten in the sack of bran. One of plaintiff's cows swallowed the clasps which poisoned and killed her.

The identical principle is held to be the law in *Dulaney et al. v. Jones,* 100 Miss., 835: "It is argued with much ability, by the appellees, that an implied warranty of soundness arises only in cases where the food sold is for human consumption. After a careful consideration of the question, our conclusion is that, according to the weight of authority in this country, there is an implied warranty of soundness in the case of the sale of provisions intended for human food, but with food for other purposes there is no implied warranty of soundness. This is put upon the grounds of public policy, the controlling reason being the regard for human life and for human health."

The facts in the *Dulaney case, supra,* were that the plaintiff sold certain feed stuff for the defendant's mules, and that said feed stuff was decayed, rotten, unfit and unwholesome, causing sickness among the mules and the death of six of them. *National Oil Co. v. Young,* 85 S. W., 92 (cows killed by eating cotton-seed hulls containing nails and pieces of wire); *Newell v. Reid,* 189 Mich., 174 (cows killed by eating bran which contained arsenic); *Coyle v. Baum,* 3 Okla., 695; *Houk v. Byrd,* 105 S. W., 1176; *Piper Co. v. Oppenheimer,* 158 S. W., 777, L. R. A., 1917-F-475; Ann. Cas., 1918-B, 24 R. C. L., 469.

We think that the correct rule of liability governing such cases is thus expressed in the case of *Swift & Co. v. Redhead,* 122 N. W., 140 (Iowa), which involved a sale of cattle feed: "The jury might well have found that the purchase of the blood meal for a particular use known to the seller, and for which the latter assured the buyer it was suitable, and that the buyer relied thereon, and, if so, this amounted to a warranty that the article in question was reasonably fit for the use both contemplated." *Reiger v. Worth,* 130 N. C., 268; *Ashford v. Shrader,* 167 N. C., 45; *Grocery Co. v. Vernoy,* 167 N. C., 427; *Furniture Co. v. Mfg. Co.,* 169 N. C., 41; *Register Co. v. Bradshaw,* 174 N. C., 414; *Farquehar Co. v. Hardware Co.,* 174 N. C., 369; *Swift v. Etheridge,* 190 N. C., 162.

In addition to the implied warranty growing out of such sales, there is also a statutory warranty created by the provisions of C. S., 4724-4726-4731. So that a seller of "commercial feeding stuffs," as defined by law, must supply a product reasonably fit for the use contemplated by the parties, and also such a product as will measure up to the requirements of the statute.

Therefore, the rules of liability in such cases having been established, the vital question to be considered is whether or not, in this particular

case, there was sufficient evidence of a breach of the implied or statutory warranty. The evidence tends to show that in this particular case there were about 400 bags of feed; that plaintiff sold a large portion of the feed to other cattle men, who fed it to their cattle. Some of the cattle in some of the herds, after feeding, showed signs of sickness. In other herds no ill effect was discovered. The plaintiff testified that he began feeding his herd, consisting of about forty head of cattle, about the 15th or 16th day of December, and fed it to all of his cattle. He also testified: "It was some time the last of December or the first of January when I first noticed the cattle showing symptoms of sickness. I can't tell you the exact date." He further testified, referring to the two cows that died, "I also fed them some wheat straw and some roughness." After the cows died the feed then remaining was taken up by the defendant and examined by the feed inspector of the Department of Agriculture of North Carolina. He testified that he found nothing wrong with the bags or with the feed, and that "the analysis agreed with the analysis on the tag." Thereafter a chemical analysis was made and the result thereof described by the witness as follows: "I did not find any poison or deleterious matter in it. As far as the chemical analysis goes the substances that I actually found were entirely all right. I did not find anything that has been found to be injurious to cattle."

The conclusion from the testimony is irresistible that the only evidence of a breach of warranty was the fact that after feeding the product for ten days or more two of plaintiff's cows died from what was diagnosed as ptomaine poisoning. No analysis of the stomach of the dead cows was made, and it appears from the record that the particular cows that died were also fed with "wheat straw and roughness." The mere sickness and death of the cows is not sufficient evidence in itself to establish a prima facie case of breach of warranty. The doctrine of *"res ipsa loquitur"* does not apply to a breach of warranty. *Oregon Auto-Dispatch v. Portland Cordage Co.*, 95 Pac., 499.

There is no more reason to conclude that the cows died from this particular feed than that there was some deleterious or injurious substance in the "wheat straw or roughness" that was fed to them at the same time. "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant the inference of the fact in issue or furnish more than materials for a mere conjecture, the Court will not leave the issue to be passed on by the jury." *Brown v. Kinsey*, 81 N. C., 244; *Liquor Co. v. Johnson*, 161 N. C., 77; *S. v. Prince*, 182 N. C., 790; *S. v. Martin, ante*, 404. This rule is both just and sound. Any other interpretation of the law would unloose a jury to wander aimlessly in the fields of speculation.

We hold, therefore, that the evidence of the breach of warranty was not sufficient to be submitted to the jury, and that the motion for nonsuit should have been allowed.

We are not inadvertent to the contention of the plaintiff that the letter written by the defendant, after the feed had been delivered, advising "there was nothing wrong with the feed . . . go ahead and feed it," constituted an express warranty. Conceding that this amounted to a warranty, it was not made contemporaneously with the sale, and there was neither allegation nor proof of a consideration to support it. Hence, such a contention is not available in this case. *Underwood v. Car Co.*, 166 N. C., 458.

Error.

MALCOLM, ADMINISTRATOR, v. MOORESVILLE COTTON MILLS.

(Filed 12 May, 1926.)

1. Evidence—Pleadings—In Explanation or Modification.

Where in an action to recover damages for the negligent killing of the plaintiff's intestate, the plaintiff has introduced a part of the answer, the defendant may introduce other parts in explanation or modification thereof.

2. Negligence—Evidence—Instructions.

The facts and circumstances of each particular case are to be considered by the jury in passing upon the issues of negligence or contributory negligence arising from the evidence in the case, and an exception to an instruction that the jury should determine the issue as they find the facts and circumstances justify, will not be sustained when from the instruction upon the relevant evidence, they were correct under the application of this principle.

3. Negligence—Contributory Negligence—Evidence.

An instruction of the trial judge upon the issue of contributory negligence that the same caution is required of the plaintiff's intestate that under substantially the same circumstances would be required of the defendant, is not erroneous.

4. Same—Instructions—"Caution"—Words and Phrases.

An instruction upon the issue of contributory negligence that the plaintiff's intestate was required to exercise under the existing circumstances such caution and care as a man of ordinary prudence should have exercised, is not objectionable in the use of the word "caution," the word "caution" meaning substantially the same as the word "prudent," and imposes no higher degree of care to be observed by the intestate.

CIVIL ACTION for damages, tried before *Lane, J.*, and a jury, at August Term, 1925, of IREDELL.

Plaintiff's intestate was employed by the defendant to clean the cloth room and to fill fire buckets which hung on posts in the mill. These buckets were filled with water as a means of fire protection. They were suspended from hangers which were about 6½ feet high and were to be filled every Monday. In filling the buckets plaintiff's intestate used a keg for stepping up to put in water. The post upon which the water bucket hung was between 2½ and 4 feet from the revolving shaft of a tentering machine. On 4 February, 1924, the plaintiff, in the line of his duties in attempting to fill the water buckets, was caught by the revolving shaft and so seriously injured that as a result thereof he died two days later. There was a conflict of testimony as to whether or not there were safe approaches to these posts from which the water buckets were suspended.

There was also evidence from the defendant's witness that plaintiff's intestate in approaching this water bucket, raised a rope and attempted to step over this revolving shaft, and that in doing so his clothing was caught and the injury complained of inflicted.

At the time of his death the plaintiff was about 41 years of age, and had been working at the mill for some time.

The issues and the answers of the jury thereto were as follows:

(1) Was the death of plaintiff's intestate caused by the negligence of defendant as alleged in the complaint? Answer: Yes.

(2) Did plaintiff's intestate by his own negligence contribute to his death as alleged in the complaint? Answer: Yes.

(3) What damages, if any, is plaintiff entitled to recover from the defendant? Answer: .....

Judgment was entered upon the verdict that the plaintiff take nothing by his action, from which judgment the plaintiff appealed.

Buren Jurney, J. W. Sharpe, Marvin L. Ritch, J. F. Flowers for plaintiff.

Z. V. Turlington, Grier & Grier for defendant.

BROGDEN, J. The plaintiff introduced in evidence a part of paragraph five of the answer, as follows: "He was caught in a revolving shaft and received injuries resulting in his death." Thereafter the defendant offered in evidence a portion of the fifth paragraph of the answer, from which said admission was taken, as follows: "Defendant admits that owing to the carelessness and negligence of plaintiff's intestate, as hereinbefore alleged, he was caught in a revolving shaft and received injuries resulting in his death."

The plaintiff excepted to the action of the trial judge in permitting the defendant to offer the portion of paragraph five of its answer re-

ferred to. This exception cannot be sustained. It is true that a plaintiff can offer in evidence the portion of the answer of his adversary which contains an allegation or admission of a distinct or separate fact without introducing qualifying or explanatory matter contained in such portion. But it is also true that, while the plaintiff may not be compelled to offer such explanatory matter, the defendant has a right to do so when such allegation or portion thereof tends to modify or limit the allegations or admissions offered by his adversary. *Weston v. Typewriter Co.,* 183 N. C., 1; *White v. Hines,* 182 N. C., 279; *Jones v. R. R.,* 176 N. C., 268; *Wade v. Contracting Co.,* 149 N. C., 177.

Plaintiff also excepts to the following instruction of the trial judge: "As you find the facts and the circumstances to justify." The whole paragraph from which these words are selected is as follows: "So, upon these allegations and denial three issues arise which are submitted to you. They are questions, in other words, for you to answer, as you find the facts and the circumstances to justify." This exception is untenable for the reason that in substance the judge was instructing the jury that negligence or contributory negligence could be established by circumstantial evidence. "Negligence is necessarily a relative term, and depends upon the circumstances of each particular case. What might be negligence under some circumstances at some time or at some place may not be negligence under other circumstances or at any other time and place. All the surroundings or attendant circumstances must be taken into account if the question involved is one of negligence." *Forsyth v. Oil Co.,* 167 N. C., 182; *Drum v. Miller,* 135 N. C., 215.

The plaintiff further excepts to the following instruction of the trial judge: "The same definition of negligence applies in regard to this issue as it does in the other." The whole paragraph from which these words are selected is as follows: "The second issue is, Did the plaintiff's intestate by his own negligence, contribute to his death as alleged in the answer? Now, the burden of that issue is upon the defendant, Cotton Mill Company, to satisfy you by the greater weight or preponderance of the evidence that the deceased was guilty of contributory negligence, that is of such negligence and lack of care on his own part as contributed to his death. The same definition of negligence applies in regard to this issue as it does in the other."

This exception is untenable. "There is really no distinction or essential difference between negligence in the plaintiff and negligence in the defendant, except the plaintiff's negligence is called contributory negligence. The same rule of due care, which the defendant is bound to observe, applies equally to the plaintiff." *Moore v. Iron Works,* 183 N. C., 439.

Plaintiff further excepts to the following instruction of the trial judge: "Cautious person would have been expected to exercise under all circumstances, and if he failed to exercise such care as that for his own safety and by such failure contributed to his death, if his own negligence, operating and concurring with the negligence of the Mill Company brought about his death, then this administrator could not recover damages for it, it would bar a recovery." The whole paragraph from which these words are selected, is as follows: "The deceased owed the duty to himself, the law says, to use reasonable care for his own safety, that is, such care as a reasonably prudent, cautious person would have been expected to exercise under all the circumstances, and if he failed to exercise such care as that for his own safety and by such failure contributed to his death, if his own negligence, operating and concurring with the negligence of the Mill Company brought about his death, then this administrator could not recover damages for it, it would bar a recovery."

The plaintiff insists that the word "cautious" used in the instruction referred to, imposed a higher degree of care upon the plaintiff's intestate than required by law. In other words, the plaintiff's contention is that the word "cautious" means more than prudent. There may be an infinitesimal shade of difference between cautious and prudent, but a reasonably prudent person and a reasonably cautious person are substantially the same and the words possess identical significance for all practical purposes. Certainly the words "prudent" and "cautious" are used interchangeably in defining negligence. Thus in *Tudor v. Bowen,* 152 N. C., 443, it is said: "A want of caution to avoid injury, where the duty to exercise caution is incumbent, and a reckless or heedless use of a dangerous agency in a locality where the peril from its use is obvious, constitute breaches of duty which may become, when causing injury, actionable negligence. In *Hamilton v. Lumber Co.,* 160 N. C., 53, the jury was instructed as follows: "He (plaintiff) is required to exercise reasonable caution and prudence himself, because it is his duty to take notice of conditions which surround him, and he must exercise the care of a reasonably prudent man."

There are other exceptions in the record as to the arraying of the contentions of the parties, but we find in these exceptions no error. It should be noted, however, that at the conclusion of the charge one of plaintiff's counsel stated to the court that he did not think the court had fully stated the contentions of the plaintiff as to the way the injury happened and as to the way Malcolm went to the post and as to what Thomas (witness) saw him do. The court stated that he had given the contentions as the counsel had argued them to the jury and declined to call the jury back for further instruction, to which the plaintiff excepted. The case on appeal was settled by the judge and the finding of fact

therein appearing that he had stated the contentions of plaintiff as "the counsel had argued them to the jury," is conclusive because the record imports verity. *Allen v. McLendon,* 113 N. C., 320; *S. v. Harris,* 181 N. C., 608.

We have given all the exceptions noted in the record careful examination. There was evidence of negligence and of contributory negligence. The charge of the trial judge substantially declared the rules of law governing the case and correctly applied the law to the facts. Under conflicting evidence the jury has found the facts and the record presents no error sufficient to invalidate the verdict and judgment thereon.

No error.

F. M. ARMSTRONG, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF M. J. BLAYLOCK, BANKRUPT, v. JACOB POLAKAVETZ.

(Filed 12 May, 1926.)

1. Clerks of Court—Judgments—Appeal—Courts—Jurisdiction.

An appeal from the judgment of the clerk upon the pleadings carries the matter *de novo* to the Superior Court.

2. Compromise and Settlement—Consideration — Claim and Delivery—Actions.

A compromise by the parties to an action concerning the disposition of property, the subject of claim and delivery, is upon a valuable consideration and enforceable.

3. Actions—Compromise and Settlement—Contracts—Writing.

A compromise of a disputed matter in litigation is an agreement whereby the parties make concessions among themselves, in consideration of each giving up certain rights claimed by them, and it is not ordinarily required that the agreement be reduced to writing.

4. Appeal and Error—Objections and Exceptions—Issues—Pleadings—Evidence—Trial by Jury.

Where on appeal from a judgment of the clerk of the Superior Court it appears that the appealing party has not answered the allegations, sufficiently alleged, of a compromise and settlement had between the parties, or offered evidence to the contrary, or tendered an issue, etc., no issue of fact is raised requiring the determination of a jury, and the matter presented is one of law or legal inference.

APPEAL from *Lane, J.,* at October Term, 1925, of MONTGOMERY. Affirmed.

The court below rendered the following judgment: "This cause coming on to be heard before me, and being heard, at Chambers, September

Term, of Montgomery County Superior Court, and it appearing to the court that this is an appeal from a judgment rendered in this action by the clerk of this court in favor of the defendant herein, from which the plaintiff herein appealed, and it further appearing to the court from the affidavits and exhibits filed herein and submitted to the court that the controversy between the parties hereto arises out of disputed claim to the title and right of possession of a cut-off wood saw described in the claim and delivery proceeding filed herein, after hearing the contentions of the parties, the court finds the following facts:

1. That prior to the judgment signed by the clerk aforesaid, and from which the plaintiff appealed, the said plaintiff submitted to a voluntary nonsuit in the above-entitled action.

2. That the subject-matter of this suit and the right and title to the same, and the possession thereof, is in the jurisdiction and control of the Bankruptcy Court of the United States District Court for the Western District of North Carolina, Greensboro; that the said court had assumed and acquired jurisdiction of the said property and controversy between the parties before the rendition of the judgment herein appealed from.

3. That the defendant herein has filed his claim, as a creditor of the bankrupt, M. J. Blaylock, for the subject-matter of this suit, with the referee in bankruptcy in the said United States District Court.

It is, therefore, on motion of plaintiff, ordered, adjudged and decreed, that the judgment rendered in this action by the said clerk be, together with this action, dismissed, and that the defendant pay the costs of this action to be taxed by the clerk."

From the judgment rendered defendant excepted, assigned error and appealed to the Supreme Court. The necessary facts will be set forth in the opinion.

Chas. A. Armstrong for plaintiff.
B. S. Hurley and G. V. Fesperman for defendant.

CLARKSON, J. Plaintiff brought action in Montgomery County, before the clerk and against the defendant, on 7 April, 1925, and sued out the provisional or ancillary remedy of claim and delivery, made the usual affidavit and bond and had the sheriff to seize "one wood saw, frame and all attachments thereto belonging, bought from J. Polakavetz by the said bankrupt, M. J. Blaylock." The sheriff, after holding the property three days, defendant giving no undertaking, turned same over to plaintiff.

On 4 May, 1925, the plaintiff before the clerk took a voluntary nonsuit.

On 14 September, 1925, over four months after, the clerk rendered the following judgment:

"This cause coming on to be heard, and being heard before the Honorable Clerk Superior Court of Montgomery County, Edgar Haywood: Whereas the plaintiff, through his attorney, Chas. A. Armstrong, submits to a judgment of voluntary nonsuit: It is therefore adjudged and decreed that the defendant recover the property taken by the said plaintiff in this action, and if the return of property cannot be had, then the value of the property, which is $200, be collected from the sureties in this action, and the cost of this action be taxed by the clerk.

Sureties being J. W. Lemons and Ivey C. Nance.

It is further shown by the court records that no verified complaint has ever been filed by the plaintiff in the above action.

In carrying out the intention of this judgment it is ordered that execution issue against the plaintiff and his sureties if the property cannot be had."

Plaintiff excepted to the judgment and appealed to the judge of the Superior Court on the following grounds:

"1. For the said judgment was rendered without proper and lawful notice to the plaintiff, neither plaintiff nor his counsel being present.

"2. For all the matters and differences in dispute between the parties hereto were duly settled and compromised between the plaintiff and the defendant prior to the rendition of this judgment, as fully appears by affidavits hereto attached and marked Exhibits A, B, and C."

The record shows, uncontradicted:

(1) That on 10 April, 1925, the defendant made out and on 22 April, 1925, filed with the referee in bankruptcy, *In re* M. J. Blaylock, in Bankruptcy, a claim for the very property taken by plaintiff in claim and delivery and in the claim filed by defendant he made oath: "Rent of machine and sale thereof, to wit, wood saw, more particularly set forth in the itemized account hereto annexed and made a part of this proof." In the itemized account is set forth "Sale of machine $237.01."

(2) The affidavits of F. M. Armstrong, corroborated by Ivey C. Nance, were to the effect: That the defendant did not want to contest the claim and delivery proceeding which plaintiff had brought for the machine; that plaintiff was authorized to dispose of same and get what he could out of the machine, and he would relinquish all right and possession to the machine, and that he would file his claim for the value of the machine in the bankruptcy court; that he did not want to go to the expense of paying court costs and employing lawyers; that immediately after the agreement and compromise, plaintiff took a nonsuit in the action with claim and delivery and paid the cost; took the machine and shortly after defendant filed his claim for the "rent of machine and

sale thereof," with the referee in bankruptcy; that the agreement and compromise between the parties, plaintiff and defendant, were carried out long before the judgment of the clerk on 14 September, 1925, now in controversy.

The defendant makes the following assignments of error:

"The trial judge should have overruled motion of the plaintiff to dismiss the judgment as rendered by the clerk of Superior Court.

"That there was error in the order of the court allowing the motion to be made by the defendant to dismiss in this action.

"That the court erred in allowing counsel for plaintiff to introduce an affidavit showing that the case had been entered into a compromise between plaintiff and defendant.

"That there is error in the judgment of the court, in that the same is contrary to the evidence and contrary to the law."

Plaintiff was in his rights in appealing from the clerk of the Superior Court, and when in the Superior Court before the judge the whole matter was properly before that court to make all lawful orders, judgments and decrees. *Trust Co. v. Pumpelly, ante,* 675.

The case when in the Superior Court presented no issue of fact. The plaintiff's affidavits were uncontradicted, no demand for a jury trial.

Defendant says that Constitution of North Carolina, Art. I, sec. 17, is applicable: "No person ought to be taken, imprisoned or disseized of his freehold, liberty or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land."

The affidavits treated in the nature of a complaint alleged a compromise contract, if denied, raised an issue of fact and upon demand made defendant would have been entitled to a jury trial on the issue. No denial was made and no demand for a jury to pass on the issue of fact. Defendant waived his right. By analogy it has been repeatedly held in this jurisdiction that in reference cases this right may be waived as in *Driller Co. v. Worth,* 117 N. C., at p. 520: "Where a party promptly insists upon reserving his right and causes his objection to be entered of record, when the compulsory order of reference is made, he may still waive by failing to assert it in his exceptions to the referee's report. *Harris v. Shaffer,* 92 N. C., 30; *Yelverton v. Coley,* 101 N. C., 248." *Baker v. Edwards,* 176 N. C., at p. 231; *S. v. Lackey, ante,* 571.

In 5 R. C. L., p. 878, it is said: "It is the duty of courts rather to encourage than to discourage parties in resorting to compromise as a mode of adjusting conflicting claims; and the nature or extent of the rights of each should not be nicely scutinized. Courts should, so far as they can do so legally and properly, support agreements which have for their object the amicable settlement of doubtful rights by parties; the consideration of each agreement is not only valuable, but highly

meritorious. They are encouraged because they promote peace, and when there is no fraud, and the parties meet on equal terms and adjust their differences, the court will not overlook the compromise, but will hold the parties concluded by the settlement. Courts of equity, like courts of law, do not discountenance compromises of doubtful claims, much less of suits actually instituted for litigating such claims. Such a rule would tend to defeat and discourage all compromise. Equity favors amicable adjustments, and will not disturb them unless its jurisdictions invoked in favor of one without knowledge at the time, by satisfactory evidence of deception, fraud or mistake."

This has always been the policy of this State borne out by numerous authorities. *Sutton v. Robeson,* 31 N. C., 380; *Williams v. Alexander,* 39 N. C., 207; *Mayo v. Gardner,* 49 N. C., 359; *Barnawell v. Threadgill,* 56 N. C., 58; *York v. Westall,* 143 N. C., 276; *Peyton v. Shoe Co.,* 167 N. C., 280.

In *Beck v. Wilkins-Ricks Co.,* 186 N. C., 214, it is said: "In *Mayo v. Gardner,* 49 N. C., 359, this Court said, by *Chief Justice Nash: 'In re Lucy,* 21 Eng. Law and Eq. Rep., 199, it was decided that, to sustain a compromise, it was sufficient if the parties thought, at the time of entering into it, that there was a bona fide (or real) question between them, though in fact there was no such question.' The law favors the settlement of disputes, as was said in that case. It is stated in 9 Cyc., 345, that 'the compromise of a disputed claim may uphold a promise, although the demand was unfounded,' citing numerous cases in the notes to sustain the text."

We cannot sustain the defendant's assignments of error. There is no law requiring a compromise contract like the one under consideration to be put in writing. A compromise is any agreement by which a controversy is terminated in consideration of mutual concessions. In the present case the contract was executed and the performance by each fully carried into effect. The parties were involved in a law suit and each agreed upon terms satisfactory to themselves to settle the controversy, and each carried out with the other their mutual or reciprocal agreements.

The law encourages and looks with favor on litigants adjusting differences—compromises like the present one have been held binding from time whence "the memory of man runneth not to the contrary." It is constantly done between litigants to their credit and good judgment. The finest exhibition of a generous settlement was made when there was a strife between the herdsmen of Abram's cattle and Lot's cattle. The patriarch Abram said: *"For we be brethren.* Is not the whole land before thee? separate thyself, I pray thee, from me: if thou wilt take the left hand, then I will go to the right; or if thou depart to the right hand, then I will go to the left." Gen., ch. 13, part v. 8 and v. 9.

To the same effect are settlements in cases relating to the adjustment of family disputes. Courts will not closely scrutinize the consideration when the purpose is to protect and preserve the peace and honor of the family or the family property. *Tise v. Hicks, ante,* 609.

As said, the affidavits could have been controverted if untrue, and an issue of fact tried before a jury if demanded. This was not done by defendant. The affidavits were undisputed and, under the facts and circumstances of this case, permissible. If controverted and on demand, an issue of fact could have been submitted to a jury. The case being before the proper tribunal, the parties being *sui juris,* the proof of settlement and compromise was proper.

It may not be amiss to call attention to the proper form of a judgment in cases of this kind—claim and delivery. *Trust Co. v. Hayes, ante,* 542.

We think, for the reasons given in this opinion, the judgment of the court below correct.

Judgment affirmed.

MRS. J. P. THOMAS v. PAUL H. ROGERS.

(Filed 12 May, 1926.)

1. Deeds and Conveyances—Restrictions — Covenants — Development—Corporations.

Where a corporation has developed suburban property and sold it to various purchasers with covenants and restrictions in some of the deeds as to the class of residences to be built thereon, but under no general scheme in this respect, the right to enforce these restrictions rests only with the corporation, and not with the purchasers of lots who have taken title from the corporation.

2. Same—Corporation—Dissolution—Trustees— Survivorship — Releases —Consideration.

Upon the dissolution of a corporation that has developed and sold land into lots without a general scheme for restrictions upon the class of buildings to be erected, but some of the deeds given by it contain restrictions, upon the dissolution of the company, trustees duly appointed to wind up its affairs, may execute a valid release to a purchaser under a deed containing the covenant, and the trustees holding such right as joint tenants in dissolution, the release thereof by the survivor is valid and enforceable. On this appeal, the question of a valuable consideration is not presented.

CLARKSON, J., did not sit.

APPEAL by defendant from *Harding, J.,* at March Term, 1925, of MECKLENBURG. Affirmed.

THOMAS *v.* ROGERS.

Action to enforce, by decree of specific performance, contract in writing, by which defendant agreed to accept from plaintiff, as lessor, a lease conveying to defendant, as lessee, the possession and use of a certain lot of land situate in the city of Charlotte, free and clear of building restrictions, and restrictions affecting the use and occupancy thereof for business purposes, for a period of ten years. The lease, in writing, tendered by plaintiff to defendant, was in all respects sufficient, in form, to comply with the contract between plaintiff and defendant, with respect thereto. Defendant contended that by reason of certain restrictions, contained in a deed under which plaintiff derived title to the said lot of land, plaintiff was unable to comply, and therefore had not complied with her contract with him; that she was, therefore, not entitled to the decree.

Upon facts agreed, judgment was rendered as prayed for by plaintiff. From this judgment defendant appealed to the Supreme Court.

Tillett, Tillett & Kennedy, and Taliaferro & Clarkson for plaintiff.
Carrie L. McLean for defendant.

CONNOR, J. The lot of land involved in this action consists of lot 10, and part of lot 9, in Block 1, as shown on the map of the property of Highland Park Company, recorded in Book 127 at page 47, in the office of the register of deeds of Mecklenburg County. The said lot fronts on the north side of East Fourth Street, about 115 feet, and lies on the west side of Hawthorne Lane, about 111 feet. This lot was originally owned by the Highland Park Company, a corporation. Plaintiff is now the owner of the lot, having derived her title thereto from a deed executed by the Highland Park Company. This deed contains an express covenant that the party of the second part, his heirs and assigns shall use the lot of land therein conveyed for residence purposes only, and that any residence erected thereon shall cost not less than the sum specified therein. There is no provision in said deed providing for a forfeiture, or for a reverter upon breach of the conditions or covenants in the deed.

Block 1, which includes the *locus in quo,* and was originally owned by the Highland Park Company, was laid off into twenty lots by the said company. Some of these lots were conveyed by said company, by deeds, containing no restrictions as to the purposes for which the grantees, their heirs and assigns, might use them, while some of the lots, including the lots which form the *locus in quo,* were conveyed by deeds which contained restrictions that they should be used only for residential purposes and that residences erected thereon should cost not less than sums specified in the deeds. At the time Block 1 was laid off and

platted into lots, the Highland Park Company owned a large body of land, outside the city limits of Charlotte, but adjacent thereto. This tract of land was laid off into blocks, which were divided into lots. These lots have been sold and conveyed, some by deeds with restrictions and some by deeds without restrictions. All except two of the deeds of the Highland Park Company, in which any condition or restriction relative to the use and occupancy of the lands conveyed therein were inserted, contained the following provision, to wit: "The party of the first part expressly reserves to itself all rights, privileges and easements in and upon its said property not expressly granted to the said party of the second part."

On 2 April, 1915, the Secretary of State of North Carolina issued a certificate of dissolution of the Highland Park Company, which has been duly recorded. All of the debts of said company have been paid, and the surplus of its assets distributed among its stockholders. Of the three directors of said corporation, who upon the issuance of the certificate of dissolution became trustees in dissolution, two have since died. The surviving trustee, and the executors of the two who have died, have executed releases to the plaintiff of any and all rights which the Highland Park Company had in and to the *locus in quo* by virtue of the covenants, conditions or restrictions in the deed under which plaintiff owns the same. A similar release has been executed by all the surviving stockholders of said corporation.

The court being of opinion and finding as a matter of law that upon the facts agreed, the plaintiff has and can convey to defendant the unrestricted use and occupancy of said lots 9 and 10 of Block 1, as shown on map recorded in Book 127, page 47, in the office of the register of deeds of Mecklenburg County, free and clear of any conditions and restrictions affecting or limiting the use and occupancy thereof, ordered, adjudged and decreed that defendant specifically perform his contract with plaintiff for the lease of said premises.

The right of plaintiff to maintain an action for the specific performance by defendant, of a contract for the lease of land is not questioned by defendant in this action. The contract, upon which this action is founded, is clear, and the lease tendered is in all respects, as regards form, in full compliance with the provisions of the contract. 25 R. C. L., 284; *Bennett v. Moore* (Neb.), 194 N. W., 802, 31 A. L. R., 495; *Hotel Corp. v. Real Estate Co.* (Fla.), 103 So., 403; *F. & W. Grand Stores v. Eiseman* (Ga.), 127 S. E., 872. If the covenant or restriction in the deed is valid and enforceable by the grantor or his assigns, a lease for ten years must be held to be a breach thereof. *Blue v. Wilmington,* 186 N. C., 324.

All the questions presented by this appeal have been considered and decided by this Court in *Snyder v. Heath,* 185 N. C., 362, except that involving the effect of the releases executed in the instant case by the surviving trustee in dissolution, by the executors of those who are dead, and by the surviving owners of stock in said corporation at time of its dissolution. It is there held upon practically the identical facts appearing on this record that no uniform scheme of development of its property, either as to the blocks or as to the entire tract, had been adopted by the Highland Park Company, and that the grantees of said company in deeds for other lots sold and conveyed by the company, either before or subsequent to the deed to plaintiff, whether such lots were in the same block or not, had no right to insist upon the performance of the conditions in said deed, or to enforce the restrictions contained therein. The trustees in dissolution of the Highland Park Company, the only party who would have had the right to insist upon the performance of said conditions or to enforce said restrictions, had, by proper deed, released plaintiff and the lot from said conditions and restrictions. It was held that plaintiffs in that case had and could convey their lots free and clear of any and all conditions and restrictions affecting or limiting the use and occupancy of the said lots. The decision of this Court in *Snyder v. Heath* is determinative of the questions presented by this appeal unless it shall be held that releases of the rights of the Highland Park Company were necessary, and that the releases set out in the record are not effective for that purpose.

Upon the dissolution of the Highland Park Company, the directors, three in number, became trustees of said company, with full power to settle its affairs, collect the outstanding debts, sell and convey the property, and after paying its debts, divide any surplus money and other property among the stockholders. C. S., 1194. It is clear that a release executed by the three trustees to plaintiff would have been effectual to bar any right which they or the corporation had to enforce the restrictions in the deed under which plaintiff held the *locus in quo.* It is so held in *Snyder v. Heath, supra.* These trustees held as joint tenants, with the right of survivorship incident to their tenancy. C. S., 1736. *Webb v. Borden,* 145 N. C., 188; *Cameron v. Hicks,* 141 N. C., 21; see C. S., 2582. The release of the surviving trustee was effectual to bar the right of the Highland Park Company, or any one claiming under said company, in or to any interest in the *locus in quo* by reason of the covenants, conditions or restrictions in plaintiff's deed.

It is not necessary for us to decide upon this record whether the Highland Park Company, the only party who could have enforced the restrictions, or who could have had any relief for a breach of the covenants by the plaintiff, having been dissolved and having ceased to exist, any

release was required in order to relieve plaintiff or the lot of the burden imposed by the restrictions and conditions in the deed. In order to determine this appeal, it is sufficient to hold, as we do, that the Highland Park Company alone had the right to recover for breach of the covenants in the deed, or to enforce the restrictions; upon its dissolution, all rights in that respect passed to and vested in the trustees in dissolution as joint tenants, with the right of survivorship incident to their title and estate. The releases executed by the executors of trustees who are dead, have no force or effect.

The releases by the surviving owners of stock in the corporation, at the time of its dissolution, while probably not essential, preclude any question as to the validity of the release by the surviving trustee upon the ground that there was no consideration for such release. We do not think the instant case can be distinguished upon the facts from *Snyder v. Heath*. Upon the authority of that case, the judgment is

Affirmed.

CLARKSON, J., did not sit.

MRS. IDA McMANUS v. A. W. McMANUS.

(Filed 12 May, 1926.)

1. Divorce—Alimony—Statutes—Pleadings—Allegations.

The complaint must allege facts sufficient to constitute a good cause of action under the provisions of C. S., 1667, when the wife proceeds thereunder, for the court to allow her from the estate or earnings of her husband a reasonable support and counsel fees, and when the wife alleges only that she has left her husband because he failed to fulfill his promise to supply her with certain conveniences, it is insufficient.

2. Same—Common Law—Husband's Cross-Action—Appeal and Error—Procedure.

The provisions of C. S., 1667, are cumulative to the rights of the wife at common law for alimony *pendente lite*, and when the common-law right thereto is available to her in her husband's cross-action for divorce, C. S., 1666, it is necessary for the trial judge on appeal to the Supreme Court to find the facts upon which he bases his order, and where it does not appear that the order for alimony has been made in the wife's suit under C. S., 1667, or the husband's cross-action, C. S., 1666, and it does not appear that the wife was thereto entitled, the order will be reversed and remanded to be further proceeded with.

3. Same.

The voluntary abandonment by the wife of her husband without legal justification, will not entitle her to alimony in her suit for divorce from bed and board, under the provisions of C. S., 1660(1).

APPEAL by defendant from order of *Bryson, J.*, at September Term, 1925, of MECKLENBURG. Reversed and remanded.

Plaintiff and defendant were married on 25 August, 1924. This action was begun on 12 June, 1925, by plaintiff to have a reasonable subsistence allotted and paid or secured to her from the estate or earnings of defendant, under the provisions of C. S., 1667. Defendant answered plaintiff's complaint and also filed a cross-complaint in which he prayed that he be granted a divorce from bed and board from plaintiff. C. S., 1660(1).

At September Term, 1925, the court, after hearing the pleadings, and the evidence offered by both plaintiff and defendant, ordered that defendant pay to plaintiff on the first day of each month thereafter, until the final adjudication and termination of the cause, the sum of fifty dollars, as alimony *pendente lite;* it was further ordered that defendant pay to the attorneys of plaintiff the sum of one hundred dollars as counsel fees to enable plaintiff to prosecute her action.

Defendant excepted to this order and appealed therefrom to the Supreme Court.

No counsel for plaintiff.
Stewart, McRae & Bobbitt for defendant.

CONNOR, J. It does not clearly appear from the record whether the order from which defendant has appealed to this Court was made in the principal action of plaintiff against defendant, for alimony without divorce, under C. S., 1667, or whether it was made in defendant's cross-action against plaintiff, for divorce from bed and board, upon his allegation that she has abandoned him. C. S., 1660(1).

In an action for alimony without divorce, instituted by the wife against the husband, under C. S., 1667, an order requiring the husband to provide, out of his estate or earnings, for the temporary support of his wife, pending the trial and final determination of the issues involved in the action, may be made by the resident judge, or by the judge holding the courts of the district in which the action is pending. If the husband has separated from his wife, he must support her according to his means and condition in life, taking into consideration the separate estate of the wife, until the issues can be determined by a jury, notwithstanding his contention that he was justified in leaving her; he is not relieved of his legal duty to support her, pending a determination of the truth of such charges, unless he alleges and the judge finds that the wife has committed adultery. Public Laws 1923, ch. 52. It is immaterial what counter charges, other than that she has committed adultery, the husband makes against his wife. There is no specific statutory requirement

that the judge shall find the facts as a basis for his order providing for the temporary support of the wife, except when her adultery is alleged by the husband as a bar to her recovery, or as a basis for his judgment providing a reasonable subsistence, out of the estate or earnings of the husband, after the issues have been determined in her favor by the jury. *Allen v. Allen,* 180 N. C., 465. This rule, however, does not dispense with the necessity of allegations in the wife's complaint of facts sufficient to constitute a good cause of action under the statute. *Price v. Price,* 188 N. C., 640; *Horton v. Horton,* 186 N. C., 332; *Garsed v. Garsed,* 170 N. C., 672. If the facts alleged in the complaint are sufficient to entitle her to relief as provided by the statute, an order for her temporary support, and counsel fees, out of the estate or earnings of the husband, pending the final adjudication, should be made by the judge. If the complaint does not allege sufficient facts to constitute a good cause of action under C. S., 1667, an order for temporary support and counsel fees, pending the trial of the issues, or a judgment requiring the husband to provide reasonable subsistence and counsel fees for the wife after the issues have been determined in her favor, is erroneous.

In an action brought by the wife against the husband, for divorce from the bonds of matrimony, or from bed and board, an order for the payment by the husband to the wife of alimony *pendente lite* may be made by the judge under C. S., 1666; such an order may also be made in an action brought by the husband against the wife for divorce, notwithstanding the statute provides for the payment of alimony *pendente lite* by the husband only when a married woman applies to a court for divorce. The statute is remedial in its nature, affirmative in its terms, and cumulative in its effect; it does not conflict with or abrogate the common law. *Medlin v. Medlin,* 175 N. C., 529. Whether an order for alimony *pendente lite* is made in an action brought by the wife against the husband, under C. S., 1666, or in an action brought by the husband against the wife, by virtue of the principles of the common law, the judge must find the facts upon which he bases his order for alimony *pendente lite. Price v. Price,* 188 N. C., 640; *Easeley v. Easeley,* 173 N. C., 530; *Zimmerman v. Zimmerman,* 113 N. C., 432; *Moody v. Moody,* 118 N. C., 926. An order for the payment by the husband to the wife of alimony *pendente lite,* is subject to review, upon appeal, by this Court, when made either under C. S., 1666, in an action brought by the wife against the husband, or under the principles of the common law, in an action brought by the husband against the wife. An order for the payment of alimony *pendente lite,* made in an action for divorce, either from the bonds of matrimony or from bed and board, without a finding by the judge of the facts upon which he makes the order, is erroneous.

The facts alleged in the complaint filed by plaintiff in this action are not sufficient to constitute a cause of action under C. S., 1667. Plaintiff alleges specifically that she left the defendant—first on 6 September, 1924, after having lived with him for ten days, at his home in Union County, N. C.; secondly, on 11 April, 1925, after she had returned to his home and lived with him again for ten days at his home in the city of Charlotte. She does not allege that defendant separated himself from her, and failed to provide her with necessary subsistence, according to his means and condition in life, or that he was guilty of any misconduct toward her. No facts are alleged which justify or excuse her in leaving defendant. She alleges only that he failed, neglected and refused to buy a home for her in Charlotte, to pay her debts, and to purchase for her an automobile, costing not less than $2,300, and that she left him because of such failure, neglect and refusal. It is true that she alleges that she married him, and after leaving him in September, 1924, returned to him on 1 April, 1925, because of his promise to buy the home, pay her debts, and purchase the automobile made first before the marriage, and again before her return to him. He denies these allegations. If, however, the facts are as she alleges in her complaint, they are not sufficient to entitle her to invoke, in her behalf, the well-settled principle that if a husband by his misconduct or wrongful acts towards his wife, compels or justifies her in leaving him and his home, this, in law, constitutes an abandonment of her by him, and will entitle her to maintain an action against him for divorce from bed and board, under C. S., 1660(1), or for subsistence under C. S., 1667, although in fact she left her husband, and lives separate and apart from him. It is justly held that her conduct in leaving him, under these circumstances, is not voluntary, and therefore not an abandonment by her of her husband. This principle has been consistently recognized and frequently applied by this Court. *Crews v. Crews,* 175 N. C., 178; *Dowdy v. Dowdy,* 154 N. C., 558; *Setzer v. Setzer,* 128 N. C., 171; *High v. Bailey,* 107 N. C., 70. It is not applicable, however, to the facts alleged by plaintiff in her complaint in this action. The failure, neglect or refusal of a husband to comply with promises made to his wife, whether made before or after marriage, with respect to property or property rights, although the wife was induced by such promises to marry him, or to return to her husband, after she had voluntarily left him, subsequent to the marriage, cannot be held to justify the wife in leaving her husband, or if she does leave him, because of such failure, neglect or refusal, to entitle her to relief under C. S., 1667. While the law recognizes and enforces the rights of a wife in and to her husband's property, both during his lifetime and after his death, and will compel the husband so long as he lives to support a faithful and deserving wife according to

his means and condition in life, it will not encourage marriages based solely upon mercenary considerations. The interest of the State and of society in the status resulting from marriage is too vital to permit a husband or a wife to absolve himself or herself from the performance of duties incident to and arising out of the marriage relation, merely because of disappointment as to the pecuniary results of the marriage.

Defendant's contention that the order, if made in plaintiff's action against defendant, for alimony without divorce, was erroneous for that the complaint does not allege facts sufficient to constitute a good cause of action under C. S., 1667, must be sustained.

If the order was made in defendant's cross-action against plaintiff, for divorce from bed and board, it must likewise be held to be erroneous, for no facts are found to support the order. The order must therefore be reversed. Plaintiff may renew her application for alimony *pendente lite* in the cross-action of defendant against her for divorce from bed and board. No order, however, should be made in this action for the payment of such alimony, without a finding of the facts by the judge.

Reversed and remanded.

WESTERN CAROLINA POWER COMPANY v. JANE MOSES, GRAYSON MOSES AND WIFE, MARY MOSES, MARVIN SMITH AND WIFE, FLORENCE SMITH, MARY MOSES, WIDOW, BERTHA MOSES, BEN LEE MOSES, R. E. MOSES, JANIE MOSES, ALTA MOSES, AND LYDA MOSES.

(Filed 12 May, 1926.)

1. Easements—Condemnation—Rights of Way—Statutes—Prerequisite—Procedure.

It is not required of a *quasi* public-service corporation authorized to condemn land under the provisions of C. S., 1706, that it first endeavored to agree with the owners, when it is made to appear that infants have an interest therein, and otherwise that a title to the lands could not be acquired in this way.

2. Appeal and Error—Questions of Law.

An appeal will lie from the conclusions of law by the trial judge from the facts found by him, though the facts found upon sufficient legal evidence may be conclusive.

APPEAL by plaintiff from *Wright, Emergency Judge,* at January Special Term, 1926, of BURKE.

Ervin & Ervin, Spainhour & Mull, W. S. O'B. Robinson, Jr., for plaintiff.

L. E. Rudisill, Avery & Patton for respondents.

ADAMS, J. The petitioner is a corporation authorized and empowered to conduct the business of an electric power company and invested with the right of eminent domain. 3 C. S., 1706. On 10 March, 1925, it instituted a proceeding against the respondents before the clerk of the Superior Court of Burke County for the purpose of acquiring an easement in a tract of land described in its petition. The respondents filed answers, the clerk appointed commissioners to assess damages, and the commissioners in due time made their report. All the parties filed exceptions, but the clerk confirmed the majority report, and the petitioner and respondents again excepted. Thereupon the cause was transferred to the civil docket and was afterwards heard in term. The respondents moved to dismiss the proceeding and the motion was allowed on the following ground: "This action or proceeding was not brought in conformity with the statutes and laws relating to the condemnation of land, in that the petitioner made no effort, prior to the institution thereof, to acquire title to the land sought to be condemned without resorting to the expense of condemnation proceedings, thereby arbitrarily, irregularly and prematurely forcing respondents into court in violation of their rights as guaranteed by the Constitution and the laws of the State of which they are citizens."

When the proceeding was instituted Grayson Moses and Florence Smith were over twenty-one years of age and owned each a one-eighth undivided interest in the land as the heirs at law of Waits Moses, deceased; Bertha Moses, Ben Lee Moses, R. E. Moses, Janie Moses and Alta Moses were under the age of twenty-one years and owned each a one-eighth undivided interest in the land as the heirs of Waits Moses; Lyda Moses was the infant daughter of John Moses, a deceased son of Waits Moses, owning as an heir a one-eighth undivided interest in the land, and Mary Moses was his widow. Jane Moses was the widow of Waits Moses and entitled to dower in the lands of her deceased husband.

The petitioner alleged that the land in question was necessary and indispensable for the proper construction of its hydro-electric development, and that it was unable to acquire title thereto; also that Jane Moses had refused to sell or convey a part of the land, and that they had not been able to agree on a price for the whole tract; that six of the tenants in common were infants without power to make a valid conveyance of their title, and that resort to the right of eminent domain was the only means of acquiring the desired easement. The trial court found as a fact that no effort had been made in good faith to purchase any interest or easement in the property from either of the infants or from Grayson Moses, Florence Smith or Jane Moses.

There is error in the judgment dismissing the proceeding. If a corporation possessing the right of eminent domain is unable to agree with the owner for the purchase of any real estate required for the purpose of its incorporation it shall have the right to acquire title in the manner prescribed. C. S., 1715. The petition must contain the requisite allegations, including an averment that the petitioner has not been able to obtain the title and the reason of such inability. C. S., 1716. This allegation is necessary because it is the statement of a preliminary jurisdictional fact. It presents a question to be decided in the first instance by the clerk, whose ruling is subject to review at the proper time by the judge on appeal; but a denial of it in the answer does not raise an issue of fact to be tried by the jury. *Abernathy v. R. R.,* 150 N. C., 97; *Durham v. Rigsbee,* 141 N. C., 128; *Hill v. Mining Co.,* 113 N. C., 259; *Allen v. R. R.,* 102 N. C., 381.

The judge found as a fact that the petitioner's agent offered Jane Moses $7,500 for the whole tract and, though she was entitled to dower which had not been assigned, she named $12,000 as the price and informed the agent that she would not sell a part; and upon these facts it was held as a conclusion of law that Jane Moses had no authority to sell any interest in the land except her right of dower, and as a fact that no other effort had been made in good faith to agree on a price with the owners or to purchase the premises.

We adhere to the principle that except in cases relating to equitable matters the facts as found by the trial court are ordinarily conclusive on appeal. *Howard v. Board of Education,* 189 N. C., 675; *Cameron v. Highway Commission,* 188 N. C., 84; *Plott v. Comrs.,* 187 N. C., 125. But this principle does not preclude the review of inferences or conclusions of law; and upon the record such inferences are presented both as to infancy and the widow's right of dower. It is true that dower, until assigned, is a mere right and not an estate in the land of the deceased husband; but the widow's sale of her right constitutes an equitable assignment sufficient to sustain a proceeding to have the contract established and specifically executed. *Harrison v. Wood,* 21 N. C., 437 (see, however, *Moore v. Shields,* 68 N. C., 327, 331); *S. v. Thompson,* 130 N. C., 680; *Fishel v. Browning,* 145 N. C., 71. We are of opinion that the clause, "the corporation has not been able to acquire title thereto" (sec. 1716), has no reference to the pecuniary resources of the corporation; it may apply to the owner's refusal to sell except at a price which in the judgment of the corporation is excessive, to cases in which the owner by reason of some disability cannot convey his title, and likewise in other instances. It is only reasonable to say that no attempt need be shown to purchase from one who is under disability. If the price had been agreed on the conveyance of the infants would have been

voidable, and they would have tendered a title which the petitioner would not have been required to accept. The statute does not contemplate this useless formality. *Baggett v. Jackson,* 160 N. C., 26. In *Railway Co. v. Oakes,* 20 Ind., 9, it is said: "The owners of the property being infants were, for that reason, not of legal capacity to give a valid relinquishment or to agree upon a fair compensation. And the defendants were therefore excused from the demand and offer, which in ordinary cases are required by the charter." See, also, *Davis v. R. R.,* 48 N. E. (Ill.), 1058; *Balch v. Comrs.,* 103 Mass., 106; *Public Service Co. v. Recktenwald,* 8 A. L. R., 466, and annotations.

This conclusion is not affected by C. S., 1726, which is intended to enable a trustee, or guardian, or committee to proceed as therein directed, or by the fact that some of the tenants are of full age. Inability to acquire the title of some of the owners makes it unnecessary to negotiate with the others. *Hill v. Mining Co., supra; Rogers v. Cosgrave,* 153 N. W., 569. The judgment is

Reversed.

SUSAN WEAVER ET AL. v. CONRAD PITTS ET AL.

(Filed 12 May, 1926.)

Easements—Cartways—Adverse User—Obstructions—Actions—Damages.

The use of a cartway over the lands of another, although for more than twenty years, is not sufficient, alone, to vest title thereto, and in the absence of evidence that such use was adverse, an action against the owner of the land for damages for the obstruction of the cartway will not lie.

APPEAL by plaintiffs from judgment of *Walter D. Siler, Emergency Judge,* at December Term, 1925, of CATAWBA. Affirmed.

Action to recover damages for the obstruction by defendants of a private road, or way, leading from the lands of plaintiffs over and across the lands of defendants, to a public highway, and for judgment that plaintiffs are entitled to have said private road, or way, kept open for their uninterrupted use of the same. At close of plaintiffs' evidence, motion of defendant for judgment of nonsuit was allowed. From judgment of nonsuit plaintiffs appealed to the Supreme Court.

J. L. Murphy and John W. Aiken for plaintiffs.

A. A. Whitener and Wilson Warlick for defendants.

CONNOR, J. Plaintiffs allege that they have acquired, by prescription, the right to use, for the purposes of ingress and egress, to and

from their dwelling-house, situate on their lands described in the complaint, a private road, or way, leading from their lands, over and across the lands of defendants, to the public highway; that defendants have wrongfully obstructed said private road, or way, and prevented the use of the same by plaintiffs; and that plaintiffs have been endamaged by such wrongful acts of defendants. Defendants deny these allegations.

The evidence set out in the case on appeal tends to show that plaintiffs and those under whom they claim have used the private road, or way, described in the complaint, for more than fifty years; that said private road, or way, passes over and across the lands of defendants; that it originally passed through the wooded or uncultivated land of defendants, and that it was first used for the purpose of hauling coal to a forge located on or near the lands of plaintiff off the public road during the years from about 1860 to 1875. This forge has long since been abandoned; plaintiffs have used the road continuously, but have never worked it. About twenty-six years ago this road was obstructed by defendant for a few hours; the obstructions were removed by plaintiffs in order that they might use the road. In 1908 defendants cut a tree, standing by the road-side, so that it fell across the road and obstructed it. One of the plaintiffs requested one of the defendants to remove the obstruction, asking him if he was willing for the road to be opened, and saying to him that if he was not, an action would be brought at once to have the road opened. Defendant agreed to have the road opened, and the obstruction was removed by plaintiffs. Plaintiffs continued to use the road from that time until January, 1924, when defendants closed the road by placing obstructions to its use therein. Since that time a public cart-way has been laid off and opened across the lands of plaintiffs and defendants, over which plaintiffs have full egress and ingress from and to their lands. This cart-way is a good, improved road, wide enough for two automobiles to pass.

"It is well established in this State," says *Allen, J.*, in *Snowden v. Bell,* 159 N. C., 497, "that the right to a private way may be acquired by a continuous adverse use for twenty years, and that a mere user for the required period is not sufficient to confer the right." *Ingraham v. Hough,* 46 N. C., 43; *Mebane v. Patrick,* 46 N. C., 23; *Ray v. Lipscombe,* 48 N. C., 186; *Boyden v. Achenbach,* 79 N. C., 539, and same case, 86 N. C., 397. This statement of the law has been cited and approved in *Snowden v. Bell,* 166 N. C., 208; *S. v. Haynie,* 169 N. C., 277; *Jones v. Swindell,* 176 N. C., 35. In *S. v. Norris,* 174 N. C., 808, the principle is stated in the following words: "While it is well established in this State that the right to a private way over the land of another may be acquired by a continuous adverse use for twenty years, it is equally well settled that the mere use of a highway without being

adverse, for the required period is insufficient to create the right." There is no evidence on this record from which the jury could have found that plaintiffs or those under whom they claim entered upon defendant's lands adversely under a claim of right, and have used the private road, or way, adversely for twenty years. All the evidence tends to show a permissive use of the road as a private way.

In the absence of evidence of an adverse user, the judgment of nonsuit, entered by his Honor, is well supported by the authorities. The law should, and does encourage acts of neighborly courtesy; a landowner who quietly acquiesces in the use of a path, or road, across his uncultivated land, resulting in no injury to him, but in great convenience to his neighbor, ought not to be held to have thereby lost his rights. It is only when the use of the path or road is clearly adverse to the owner of the land, and not an enjoyment of neighborly courtesy, that the land owner is called upon "to go to law" to protect his rights.

In view of the disposition of this appeal, it is not necessary to pass upon plaintiff's exception to the order, made after the judgment of nonsuit, relative to the order made by consent at a former term of court, apparently for the purpose of procuring a continuance at that time on account of the absence of one of the defendants, due to sickness. We find no error. The judgment of nonsuit is

Affirmed.

J. S. DEESE v. ELLISON COLLINS.

(Filed 12 May, 1926.)

Slander—Damages—Actionable per se—Negro Blood—Special Damages.

In order to sustain an action for damages for slanderous words falsely spoken, etc., it is necessary for the plaintiff to show special damages, unless they amount in effect to a charge of an infamous crime, or with his having an infectious disease, or relate to his trade or profession; and utterances that only charge him with having negro blood in his veins, are not actionable *per se*.

APPEAL by plaintiff from judgment of *McElroy, J.*, at October Term, 1925, of UNION. Affirmed.

Action to recover damages for slander. Plaintiff is a white man. He alleges that defendant spoke of and concerning him words by which he intended to charge, and did charge, that plaintiff, along with other members of his family, had negro blood in his veins; that said charge was false and malicious, and was made with the intent and purpose to damage plaintiff. He neither alleged, nor offered evidence tending to prove

special damages resulting from said charge. At close of plaintiff's evidence defendant moved for judgment as of nonsuit. Motion allowed. From judgment rendered dismissing the action, plaintiff appealed to the Supreme Court.

Julian C. Brooks and Vann & Millikin for plaintiff.
John C. Sikes for defendant.

CONNOR, J. The sole question presented by this appeal, as stated in appellant's brief, is whether a false statement made by defendant that plaintiff has negro blood in his veins, is actionable *per se* under the law of this State. Unless this question be answered in the affirmative, no action for damages can be maintained therefor, without allegation and proof of special damages resulting from the false statement. On the contrary, if the words are actionable *per se* the plaintiff is required neither to allege nor prove damages; the law presumes damages, as necessarily resulting from the false statement. If words falsely spoken of and concerning the plaintiff by the defendant charge him with an infamous offense, or with having an infectious disease, or impeach his trade or profession, such words are *per se* actionable, because these words necessarily tend to his degradation and injury, and the plaintiff may recover as a matter of course, without showing that he has actually sustained damages. But when the words spoken are such as do not on their face import such degradation as will of course be injurious, then plaintiff must aver some special damages, which is called laying his action with a *per quod,* and he must show by proof that he has in point of fact sustained a loss before he can recover. *Pegram v. Stoltz,* 76 N. C., 350. This distinction between an action founded upon words which are actionable *per se,* and an action founded upon words which are not actionable *per se,* based upon the common law (3 Bl. Com., 123), has been uniformly recognized in this State. *Baker v. Winslow,* 184 N. C., 1; *Cotton v. Fisheries Products Co.,* 177 N. C., 56; *Payne v. Thomas,* 176 N. C., 401; *Jones v. Brinkley,* 174 N. C., 23; *Hadley v. Tinnin,* 170 N. C., 84.

Plaintiff offered evidence tending to show that defendant spoke of and concerning him the words as alleged in the complaint. If these words are not actionable *per se,* under the law of this State, there was no error in allowing defendant's motion for judgment as of nonsuit, plaintiff having neither alleged nor proved any damages resulting from the words spoken by defendant, cannot recover in this action.

In *McDowell v. Bowles,* decided at the December Term, 1860, and reported in 53 N. C., 184, this Court, in an opinion written by *Manly, J.,* and concurred in by *Pearson, C. J.,* and *Battle, J.,* held that it was not

actionable *per se* to charge, by spoken words, that a white man was a free negro. In that case there was evidence that defendant said of plaintiff, "He is a free negro." No special damages, resulting from these words, were alleged or proved. A judgment of nonsuit, rendered by the trial judge, was, upon appeal to this Court, affirmed. Upon the authority of that case we must hold that under the law of this State, words charging that a white man has negro blood in his veins are not actionable *per se*. In order to maintain an action for damages resulting from such words, the plaintiff must allege and prove special damages. The law does not presume damages which can be compensated by a sum of money to be assessed by a jury and recovered by plaintiff of defendant. The words do not impute a crime or a misdemeanor punishable by an infamous penalty; they do not impute a contagious disease by which plaintiff will be excluded from society; nor are they derogatory to plaintiff in respect to his trade or profession. There was no error in allowing the motion for judgment as of nonsuit. The judgment is

Affirmed.

STATE v. MARVIN CORPENING.

(Filed 12 May, 1926.)

1. Criminal Law—Indictment—Proof—Variance—Amendments—Courts.

In a criminal action the defendant has the constitutional right to be informed of the offense for which he is to be tried, and a conviction may not be had when there is a fatal variance between the charge in the indictment and the proof; and the court is without power to permit the State to amend the indictment to conform to the evidence on the trial, without consent of defendant.

2. Same—Worthless Checks—Statutes.

An indictment charging the defendant with obtaining money on a day named by the issuance of a worthless check in violation of our statute, and evidence that it was given for the hire of an automobile, ten days later, are at fatal variance, and will not support a conviction.

APPEAL by the State from a judgment for defendant upon a special verdict, of *Shaw, J.*, at November Term, 1925, of CALDWELL.

Criminal prosecution tried upon an indictment charging the defendant with drawing and delivering to another a worthless check in violation of chapter 14, Public Laws 1925.

It is charged in the bill of indictment, *inter alia,* that the defendant, Marvin Corpening, did, on 10 August, 1925, unlawfully and wilfully issue and deliver to The Lenoir U-Drive-It Company a worthless check,

drawn on the Bank of Lenoir, for the amount of $15, and then and there secured and obtained from the said Lenoir U-Drive-It Company the sum of $15.00 in money, the goods and chattels of the said Lenoir U-Drive-It Company.

It was shown on the hearing, and the special verdict establishes, *inter alia,* that the defendant, Marvin Corpening, did, on 20 August, 1925, hire an automobile from the Lenoir U-Drive-It Company, and, in settlement for the hire of said automobile, the defendant issued and delivered to the Lenoir U-Drive-It Company a worthless check, drawn on the Bank of Lenoir, in the sum of $15.00, etc.

Upon the facts found and declared by the jury, a special verdict of not guilty was rendered under appropriate instructions from the court; and, from the judgment entered thereon the State appeals, assigning error. C. S., 4649.

Attorney-General Brummitt and Assistant Attorney-General Nash for State.

No counsel appearing for defendant.

STACY, C. J. The primary purpose of this appeal is to test the constitutionality of chapter 14, Public Laws 1925, known as the Worthless Check Act of 1925. But the record will not permit a determination of the question sought to be presented. *S. v. Edwards,* 190 N. C., 322. The courts never anticipate a question of constitutional law in advance of the necessity of deciding it. *Person v. Doughton,* 186 N. C., p. 725.

There is a fatal variance between the indictment and the proof. The charge is that the defendant issued and delivered to the Lenoir U-Drive-It Company on 10 August, 1925, a worthless check in the amount of $15.00 and obtained therefor the sum of its equivalent in money. The proof is that the defendant issued and delivered to the Lenoir U-Drive-It Company on 20 August, 1925, a worthless check in the amount of $15.00 to pay for the hire of an automobile. The charge relates to one transaction, the proof to another. *S. v. Harbert,* 185 N. C., 760.

In every criminal prosecution the defendant has a constitutional right to be informed of the accusation against him; and it is a rule of universal observance in the administration of the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. "The allegation and proof must correspond. It would be contrary to all rules of procedure, and violative of his constitutional right to charge him with the commission of one crime and convict him of another and very different one. He is entitled to be informed of the accusation against him and to be tried accordingly."—*Walker, J.,* in *S. v. Wilkerson,* 164 N. C., 444.

In *S. v. Davis,* 150 N. C., 851, the defendant was charged with obtaining a clay-bank mare by means of a false pretense as to the qualities of a "sorrel horse," and the proof was that he obtained the clay-bank mare in exchange for a bay "saddle horse." This was held to be a material variance, *Hoke, J.,* saying that "under the authorities there would seem to be a clear case of variance between the allegation and the proof, and the jury should have been so instructed." The charge related to one trade, the proof to another. Again, it was held to be a fatal variance in *S. v. Hill,* 79 N. C., 656, "where the defendant was charged with injuring a cow, and the proof was that the animal injured was an ox." See, also, *S. v. Snipes,* 185 N. C., 743; *S. v. Gibson,* 169 N. C., 318; *S. v. McWhirter,* 141 N. C., 809; *S. v. Lewis,* 93 N. C., 581; *S. v. Miller, ibid.,* 511; *S. v. Ray,* 92 N. C., 810; *S. v. Sloan,* 67 N. C., 357; *S. v. Corbitt,* 46 N. C., 264.

Where there is a fatal variance, or a total failure of proof, the State is not permitted to amend the indictment so as to make the allegation fit the proof, at least not without the consent of the defendant. The State is supposed to know its evidence before the indictment is drawn, and it must abide by its terms and prove the charge as laid in the bill, or else fail in the prosecution. *S. v. Gibson, supra.* Proof without allegation is as unavailing as allegation without proof. *S. v. Hawley,* 186 N. C., p. 438.

The court was clearly correct in directing a verdict of not guilty on the facts found by the jury. *S. v. Walker,* 32 N. C., 234.

No error.

STATE v. FRED JONES.

(Filed 19 May, 1926.)

1. Homicide—Murder—Insanity—Burden of Proof—Preponderance of Evidence.

The presumption of the continuance of previous insanity relied upon by the prisoner as a defense on his trial for murder, does not relieve him of the burden of proving that he was insane when the homicide was committed, by the preponderance of the evidence.

2. Homicide—Murder—Insanity—Presumptions—Adjudication of Lunacy.

Where the prisoner pleads insanity as a defense for murder, and relies upon the presumption that when previously shown to exist it continues to the time of the homicide, the fact that on a former occasion when imprisoned for a felony in another state, the prison physician confined him with the criminal insane, does not meet our requirements as to an adjudication of lunacy, and is insufficient alone to raise the presumption.

STATE *v.* JONES.

APPEAL by defendant from *Stack, J.*, at October Term, 1925, of FORSYTH. No error.

Indictment for murder. Verdict: guilty of murder in the first degree. From judgment upon the verdict, that defendant be punished with death, by means of electrocution, as provided by statute, defendant appealed to the Supreme Court.

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

Hastings & Booe, H. M. DuBose, Jr., and J. S. Fitts for defendant.

CONNOR, J. The evidence offered at the trial below, by the State, and submitted to the jury by the court, without objection from defendant, was sufficient to support the State's contention that defendant killed deceased, with a deadly weapon, and that such killing was deliberate and premeditated, done in the perpetration of a felony, unless defendant was insane at the time of the killing. No exceptions appear in the record to the instructions of the court, given in the charge to the jury, relative to the contentions of the State that defendant killed deceased, by shooting him with a pistol, and that the homicide was committed, after deliberation and premeditation, in the perpetration of a felony. All the exceptions are to the admission or exclusion of evidence, relied upon by defendant to sustain his defense, based upon his contention that he was insane at the time of the killing, or to instructions given, or refused relative to this defense.

The evidence tends to show that on Saturday night, 13 June, 1925, at about 9 o'clock, deceased, J. M. King, G. C. Messick, P. C. Johnson and J. L. Lawrence were at work, as employees, in the Winston-Salem Laundry, in the city of Winston-Salem. They were settling the cash register and preparing to close up after the day's work. Suddenly a man appeared in the room where they were at work, with a pistol in his hand. He called out, "Up with your God damned hands, every one of you, or I will kill every one of you." He shot the deceased, J. M. King, before any one in the room realized his purpose. King fell, mortally wounded, and the man stepped over his body and went at once to the cash register. He took the currency from the cash register, leaving the silver money. Then with the pistol in his hand, he turned to each of the other three employees and compelled each to give him the money which he had on his person. When the man entered the room, he had a blue handkerchief over his face; his cap was pulled down on the left side of his head. While in the room the handkerchief fell off his face; he picked it up from the floor, and with his arm over his face, and the pistol still in his hand, backed out of the door, commanding the men in the room to

keep their hands up, saying that if they did not, he would kill them. J. M. King had two wounds on the left side of his face, resulting from the pistol shots. He was taken to a hospital, where he died the next morning. The wounds resulting from the pistol shots were the cause of his death.

Defendant, Fred Jones, according to the evidence, was first seen in Winston-Salem on Tuesday before the Saturday night on which deceased was killed. He is a negro, and with a companion, went to a club room maintained in the city for negroes. Although a stranger to its members, he was admitted to membership in the club. He rented a room from the manager of the club, paying a part of the rent in cash, and saying that he would pay the balance on Saturday night. On Saturday morning he went from his room to the club; later in the day he went out into the city, and remained away until about 4 p.m. He then returned to the club and remained there until night. He returned about 8 p.m. and asked the manager to serve him a lunch, saying that he had no money with which to pay for it. After eating, he again left the club, having put on his overalls, and saying that he was going to leave that night for New York; that he would have to beg his way. He put a blue handkerchief in his pocket and left the club at ten or fifteen minutes to nine.

The manager of the club, upon his return home, found Fred Jones in the room which he had rented to him. There was a woman in the room with him. When told that "everybody down town says you killed that man," Fred Jones replied, "They can't prove it." He was told that people were saying that they saw him going into and coming out of the building in which the man was killed. He then said, "What must I do? I am going to the woods." He was taken by the witness to a room in another part of the city, in order that he might avoid arrest. He was later arrested in this room. He offered the witness who took him to the other room ten dollars.

The day after he was arrested, Fred Jones made a statement. He said that he had talked to the manager of the club on Thursday and Friday about the laundry and discussed with him whether or not there was a watchman there, and whether or not they had money in the laundry. He said that he went to the laundry and there shot Mr. King because he thought Mr. King was going to strike him; that he searched all the men there except Mr. King and got forty dollars in all. He declined to tell the name of the woman found in the room with him after he left the laundry, saying that she was not implicated. He related his past life to the witness, saying that he had been in a penitentiary upon a conviction for manslaughter.

Dr. Albert Anderson, superintendent of the State Hospital for the Insane at Raleigh, testified that he first saw defendant, Fred Jones, some time in June, 1925, after the homicide. Dr. Anderson examined defendant, at the request of his counsel, first in the jail at Winston-Salem, and later in the State's prison at Raleigh. He saw him at different times, over five or six weeks. He said, "My opinion is that defendant is suffering from a mental disease, known as dementia præcox, of the paranoid type. This disease manifests itself in early childhood by peculiarities which differentiate the patient from normal children. It develops through childhood, and manifests itself by definite symptons in early manhood. The patient is irregular in his habits, and when the disease is of the paranoid type, it frequently manifests itself in criminal tendencies. Persons suffering with the disease have outbursts of passion; they manifest hate and desire to accomplish immoral and illegal things of great variety. It is a chronic and progressive disease, and is frequently accompanied by a tendency to commit murder. In my opinion, this defendant is insane. The type of the disease with which this defendant is suffering is incurable. In my opinion, based upon my examination of defendant, in jail at Winston-Salem, and in the State's prison at Raleigh, defendant was insane on the night of 13 June, 1925, the time of the homicide. At intervals the paranoid type of dementia præcox know the difference between right and wrong in a simple way, but I do not think they fully appreciate the nature and consequences of their acts. I do not say that defendant did not have sufficient mental capacity on the night of 13 June, 1925, to know right from wrong. He may have known right from wrong, but I do not think he knew the full significance or nature of his act. I think he knew when he presented the pistol at the man, and pulled the trigger, that the natural consequence of the act would be to kill the man. I do not think he appreciated the nature and consequences of his act in shooting the deceased, as a normal man would."

Rev. George W. Lee, pastor of the North Winston Presbyterian Church, testified that he saw defendant on Sunday afternoon, after the homicide; that he talked with him then and subsequently saw and talked with him when he went to the jail, on Wednesday and Sunday afternoon to visit the prisoners confined there. Defendant wrote him a letter, after he was taken to the State's prison, in regard to his spiritual condition, expressing his joy in the assurance of God's help in his trouble, and in the hope of the salvation of his soul. This witness was of the opinion that defendant is insane. He talked to him, more or less.

Defendant offered evidence tending to show that on 4 March, 1921, he was committed to the Connecticut State prison, from Hartford County, Connecticut, upon a sentence of not less than three, nor more

than five years for the crime of assault with intent to murder. On 6 July, 1922, upon an examination by the prison physician, defendant was declared insane, and on the next day thereafter he was removed to the insane ward of the State prison. He remained continuously in the insane ward until his discharge, upon the expiration of the maximum term of his sentence, on 7 May, 1925. He was delivered into the custody of the Connecticut Prison Association, as provided by the statute of that state.

Between the date of his discharge from the insane ward of the Connecticut State prison, and the date of the homicide, defendant served a short term on the roads of Rowan County, this State, upon conviction of a misdemeanor; after the completion of said term, he was employed in work at a quarry by the Hardaway Construction Company, at Woodleaf. He left the quarry on Tuesday, the same day that he was first seen in Winston-Salem, preceding the Saturday on which the homicide was committed.

The testimony of many witnesses, who testified that they saw and talked with defendant, while he was at work on the roads in Rowan County, and while he was at work at the quarry, was offered by the State. They expressed the opinion that defendant was sane. There were also witnesses who testified that they saw and talked with defendant, while he was confined, first in the jail, and then in the State's prison, and that in their opinion he was sane.

We have given careful consideration to defendant's exceptions to the admission and exclusion of evidence. Assignments of error based upon these exceptions cannot be sustained. We do not deem it necessary to discuss these assignments of error. It is manifest that defendant has not been prejudiced in the trial by the admission or exclusion of evidence. Much of the evidence excluded was merely cumulative and that admitted over defendant's objection could not have affected the result of the trial. However this be, his Honor's rulings upon these matters are well supported on principle and by the authorities. We find no error in these rulings.

Defendant assigns as error the refusal of the court to instruct the jury, as requested by him, in writing, "that if the defendant, Fred Jones, was insane at the time he was confined in the insane department of the State prison of Connecticut, the presumption is, not as it is in the ordinary case, that is that the defendant is sane until he proves his insanity, but the presumption is that he is still insane, and the burden of proving his sanity is upon the State, and the State must satisfy you by a preponderance of the evidence that he is sane."

The court instructed the jury as follows: "The insanity which would be available to the defendant must be a mental disease such as renders

the defendant incapable of knowing the nature and quality of the act he was committing. The law does not recognize as a defense emotional insanity, brainstorm, temporary or transitory insanity, but it must be some kind of a disease of the mind, such a defendant claims his mind was diseased with. The test is, gentlemen of the jury, as to whether or not he was responsible, is a knowledge between right and wrong. If he knew the act he was engaged in was wrong, and that it was unlawful, then in the eye of the law he would be sane and his plea would not avail him, but if at the time of the act he did not know that his act was wrong, and did not know the difference between right and wrong, then in law he would be insane, and he would not be responsible for his act, but if he did know so at the time of the act, then his plea of insanity cannot avail him, and as stated before, the burden of proof is on the defendant on that issue." Defendant excepted to this instruction and assigns same as error.

By these assignments of error, defendant presents his contention that having shown that he was insane prior to the killing of deceased by him, there is a presumption that such insanity continued up to and included the moment he killed deceased; that by reason of his previous insanity and of the presumption of its continuance, the burden of proving that he was sane and therefore responsible, in law, for his act, when he killed deceased, was on the State; that the general rule established as law in this jurisdiction that insanity, being a matter of defense, must be proved by the defendant, who relies upon insanity as his defense in a criminal action, is not applicable to the facts in this case.

This contention cannot be sustained. *S. v. Vann,* 82 N. C., 631, is an authority to the contrary. It was there held by this Court that matters of extenuation and excuse, or of discharge by reason of insanity, must be shown by those who set them up; that the prior insanity of the defendant in that case having been admitted by the State, upon his trial for murder, it was incumbent on defendant to prove an habitual or permanent insanity before the homicide. "If the fact of its existence, originally, or its presumed continuance at the time of the killing was controverted by the evidence of the State, defendant would have to show and that by evidence satisfactory to the jury, at least the fact of a continuance of insanity at the time he slew the deceased; or failing so to do, the legal conclusion, from malice implied, would have still remained, and his offense would have still been murder." In *S. v. Terry,* 173 N. C., 761, *Justice Brown* says: "We understand it to be well-settled in this and other states that in a criminal prosecution, where the defense is insanity, the burden of proof is always on the defendant to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury." *S. v. Campbell,* 184 N. C., 765. In *S. v. Hancock,* 151 N. C.,

699, *Clark, C. J.*, says: "By the uniform rulings in this State, the burden of proving insanity in a criminal case is on the defendant who sets it up. *S. v. Norwood,* 115 N. C., 793; *S. v. Potts,* 100 N. C., 457; *S. v. Payne,* 86 N. C., 610; *S. v. Vann,* 82 N. C., 637; *S. v. Starling,* 51 N. C., 366, and there are many others in our Reports. This is sustained by the great weight of authority elsewhere, though there are some states which hold a different doctrine."

Evidence of previous insanity, admittedly competent upon the question of defendant's sanity at the moment of the killing of deceased by him, may well have determined the burden, so-called, of proceeding with the evidence, but it cannot be held that such evidence, although accompanied by the presumption of the continuance of the insanity, affected the rule as to the burden of proof upon the question involved in the issue. *Hunt v. Eure,* 189 N. C., 382; *Speas v. Bank,* 188 N. C., 524. Where a totally independent defense in a criminal action is set up, as insanity, the burden is upon the defendant upon the question involved in the issue, as in this case, of the sanity of defendant at the time he shot and killed deceased. The fact of previous insanity, if admitted or proved, accompanied by the presumption of its continuance, may be relied upon by defendant to sustain prima facie the burden which he assumes by his plea of insanity, as a defense, but it cannot be held that the mere fact of insanity, prior to the commission of the act, alleged to be a crime, although such condition is presumed to continue, relieves the defendant of the burden, imposed upon him by the law of this State, to offer evidence sufficient at least to satisfy the jury that he was insane at the time of the commission of the act, and therefore not responsible for his act as a crime. The presumption is merely evidentiary, and is not conclusive.

There is no evidence on this record that defendant had been adjudged insane by a court which recognizes the same standard of sanity as that recognized and enforced in this State; there is evidence that he had been declared insane by the prison physician of the State prison of Connecticut, and in consequence of such declaration had been confined in the insane ward of the State prison. It cannot be held that the declaration of the prison physician, although made in the performance of his official duty, that defendant was then insane, has the force and effect of an adjudication by a court of competent jurisdiction that he was insane and therefore not responsible, under the law of this State, for his acts subsequently committed herein. It is manifest from this record that the standards and tests of sanity adopted and acted upon by members of the medical profession who are admitted experts on the subject of mental diseases, differ so radically from those recognized and enforced by the courts of this State, that it cannot be held as a matter of law, that a

defendant who has been declared insane by a physician, in accordance with standards and as the result of tests recognized and approved by his profession, is exempt from responsibility to the law for his acts, subsequently committed, because of the presumption of the continuance of the mental condition of the patient, at the time of the declaration to the time when the subsequent act was committed in this State. Such declaration, although made in the performance of official duty, can be no more conclusive than the opinion of a physician, given by him as a witness at the trial, that defendant is insane. It is evidence only to be submitted to the jury. The physician deals with his patient, solely, from the standpoint of the individual, while the courts, in administering the law, must consider the interests of society as well as of the individual. The physician would heal those who are sick, in mind as well as in body, and where the disease is, in his opinion, incurable, and may cause his patient to injure himself or others, his duty is to protect the individual as well as others by isolation and confinement only; the courts, however, are required to act upon the philosophy underlying the right and duty of the State to punish offenders against its laws, and thus not only undertake the reformation of the offender, but also endeavor to deter others from the commission of crime by the fear of like punishment. Whether or not a prior adjudication that a person is insane, within the meaning of the term "insanity," as defined by the law in this State, accompanied by the presumption of the continuance of such insanity, should be held to affect the rule as to the burden of proof upon the question of sanity, when involved in an issue of guilt or innocence of crime, alleged to have been subsequently committed by the person so adjudged insane, is not presented by this appeal.

It should be noted that defendant in this action, although contending that when he killed deceased he was insane because of an incurable mental disease, which is progressive in its nature, does not contend that he was insane at the time of his arraignment and trial. His plea was "not guilty"; not that he was unable to plead because of insanity. Dr. Anderson, superintendent of the State Hospital for the Insane, an admitted expert, whose long experience in his profession, and whose high personal character were doubtless considered by the jury, in passing upon the question of defendant's responsibility for his act, testified that in his opinion, while defendant is insane, because suffering from a disease known as dementia præcox of the paranoid type, he knew that his act in shooting deceased was wrong and unlawful, and would probably result in the death of Mr. King. This opinion is well sustained by facts and circumstances which the evidence tends to show.

We have examined all the numerous assignments of error appearing in this record. Counsel, assigned by the court to advise and aid defend-

ant upon the trial of the issue involving his life and death, have been diligent in the performance of their duty to him and to the court. However, we find no error upon this record. The charge of the court was full, accurate and correct; his instructions as to the law are fully supported by the authorities, and we must affirm the judgment. There is

No error.

W. B. ELLIS, JOHN W. WEBB, JOHN M. WASHBURN, CONSTITUTING THE BOARD OF ROAD COMMISSIONERS OF MITCHELL COUNTY, v. D. A. GREENE.

(Filed 19 May, 1926.)

1. **Municipal Corporations—Government—Agencies—Highways—Statutes —Constitutional Law.**

   The Legislature has the constitutional authority to create a highway commission for a county, and give it control over its bridges and highways, their maintenance and supervision, etc., or subdivide this agency into several parts over defined territory. Const. of N. C., Art. VII, secs. 2, 14.

2. **Municipal Corporations—Cities and Towns—Roads and Highways—Statutes—Taxation.**

   Where a county board of highway commissioners is created by statute and given authority among other things to issue bonds for the payment of construction by the various townships, including past, present and prospective construction, the power to levy a tax for this purpose is necessarily implied from the power given to issue the bonds.

3. **Same—Constitutional Law—Uniformity of Taxation.**

   Where a county board of highway commissioners is given statutory power to issue bonds for the various townships for road construction, the constitutional requirement of uniformity forbids the taxation of one township for the highways of another, included in a general scheme of highway construction in the county.

4. **Roads and Highways — Taxation — Statutes —Constitutional Law—Bonds—"Necessary Expenses."**

   The building of public highways by a county is a "necessary expense" within the meaning of our Constitution, and does not require, for the validity of the statute, that it be approved by the voters. Const., Art. VII, sec. 7.

5. **Statutes—Interpretation—Caption—Highways—Taxation—Bonds.**

   A statute providing a general scheme for the issuance of bonds, etc., for the various townships of a county, and giving jurisdiction thereof to a board of road commissioners, will be construed in *pari materia* as to its related parts to preserve the legislative intent, under a correct interpretation of the terms of the statute, and in case of ambiguity in the body of the act, the caption thereof may be considered.

6. Constitutional Law—Statutes—Constitutional in Part.

An act will not be declared unconstitutional *in toto* when by correct interpretation it appears that it was the intent of the Legislature that a part thereof, constitutional and complete in its subject-matter, and separable, was to become the law, though other portions should be unenforceable.

7. Municipal Corporations—Highways — Highway Commissioners — Implied Powers—Bonds—Taxation.

Where a political subdivision of a county of a state is given valid statutory general authority to issue bonds for highway purposes, the life of the bonds, or the time for which they are to run, with the rate of interest they are to bear, not exceeding six per cent, and all necessary details in exercising the power conferred, is left to the discretion of the board upon which it is conferred, the bonds so issued to be signed by the chairman of the designated board and attested under the corporate seal of the corporation.

8. Constitutional Law—Statutes—Interpretation — Independent Parts—Municipal Corporations—Taxation—Townships.

Where under a statute creating a board of highway commissioners under a general scheme of road construction, a township is taxed for its improvements, etc., the county cannot bear the burden, but the township alone.

APPEAL by defendant from *Finley, J.*, of MITCHELL. Modified and affirmed.

This is a controversy without action pursuant to C. S., 626.

The court below rendered the following judgment:

"This cause coming on to be heard before his Honor, T. B. Finley, resident judge of the Seventeenth Judicial District, and being heard upon the agreed case and after argument of counsel for plaintiff and defendant, it is:

"Ordered, adjudged and decreed by the court that the $18,000 of road bonds by Bradshaw Township, Mitchell County, N. C., and described in Exhibit 'A' in said agreed case when issued and delivered, constitute the legal and valid obligation of said Bradshaw Township, Mitchell County, North Carolina, and that the said defendant shall carry out and perform the conditions and stipulations of the contract for the purchase of said bonds in accordance with the terms thereof.

"It is further ordered, adjudged and decreed by the court that the $25,000 of road bonds by Red Hill Township, Mitchell County, North Carolina, and described in Exhibit 'B' of said agreed case when issued and delivered constitute the legal and valid obligations of said Red Hill Township, Mitchell County, North Carolina, and the said defendant shall carry out and perform the conditions and stipulations of the contract for the purchase of said bonds in accordance with the terms thereof.

"It is further ordered and adjudged and decreed that the $15,000 of road bonds of Bakersville Township, Mitchell County, North Carolina, and described in Exhibit 'C' of the said agreed case when issued and delivered constitute the legal and valid obligation of said Bakersville Township, Mitchell County, N. C., and the said defendant shall carry out and perform the condition and stipulations of the contract for the purchase of said bonds in accordance with the terms thereof.

"It is further ordered, adjudged and decreed that the board of road commissioners of Mitchell County have ample legal authority to issue, sell and deliver that said three issue of bonds by the said Bradshaw Township, Red Hill Township, and Bakersville Township, all in Mitchell County, pursuant and in conformity with chapter 172, Public-Local Laws 1915, as amended by chapter 326, Public-Local Laws 1921, as amended by chapter 64, Public-Local Laws, Extra Session, 1921, as amended by chapter 231, Public-Local Laws, Extra Session, 1921, and pursuant to other laws of the General Assembly as may be applicable to the issuance and sale of said bonds on behalf of said townships by said road commissioners.

"It is further adjudged, ordered and decreed by the court that the board of county commissioners of Mitchell County have ample authority pursuant to said statutes above referred to, to levy annually a special tax in each of the said three townships of sufficient rate and amount to pay the principal of said bonds and the interest thereon as the same may become due."

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

McBee & Berry for plaintiffs.
Chas. N. Malone for defendant.

CLARKSON, J. Under Public-Local Laws 1915, ch. 172, "An act for the construction and maintenance of the public roads and bridges of Mitchell County," a body corporate was created, known as "The Board of Road Commissioners of Mitchell County," with full power over the roads and bridges of Mitchell County. This act was amended by chapter 326, Public-Local Laws 1921, also amended by chapter 64 (Extra Session), Public-Local Laws 1921; also amended by chapter 231 (Extra Session), Public-Local Laws 1921. The construction of these acts are now before us.

It is well settled that the Constitution of the State recognizes as governmental agencies the existence of counties, townships, cities and towns. They can at the will of the Legislature be changed, divided and abolished.

Constitution, Art. VII, sec. 14: "Powers of General Assembly over Municipal Corporations"—"The General Assembly shall have full power by statute to modify, change or abrogate any and all of the provisions of this article, and substitute others in their places, except sections seven, nine and thirteen." The exceptions: Sec. 7, no debt, etc., can be contracted without vote of the people except for necessary expenses. Sec. 9, taxes to be *ad valorem*. Sec. 13, debts in aid of rebellion not to be paid. *Board of Trustees v. Webb,* 155 N. C., 379; *Tyrrell v. Holloway,* 182 N. C., 64; *S. v. Jennette,* 190 N. C., 96; *Day v. Comrs. of Yadkin, post,* 780.

In *Huneycutt v. Comrs.,* 182 N. C., p. 321, it is held: "We have also repeatedly upheld acts of this character incorporating boards of road commissioners and giving them full control and authority over the construction, maintenance, laying out, altering, and discontinuing of the public roads and highways. *Comrs. v. Comrs.,* 165 N. C., 632, and cases there cited. In *Highway Commission v. Webb,* 152 N. C., 710, the Court decided that the Legislature, in its discretion, might create a board of road commissioners and vest them with such authority over the roads as the county commissioners had theretofore possessed. 'It is no objection to this legislation that the issuing of the bonds and the control and ordering of road work are given to the local authorities, while the county commissioners are directed to levy and collect the taxes.' *Trustees v. Webb,* 155 N. C., 383. Again, in *Hargrave v. Comrs.,* 168 N. C., 626: 'The questions presented in this case are almost identical with those considered in *Comrs. v. Comrs.,* 165 N. C., 632, in which a similar act was upheld. In that case, and also in *Trustees v. Webb,* 155 N. C., 379; *Pritchard v. Comrs.,* 159 N. C., 636, affirmed on rehearing, 160 N. C., 476; *Tate v. Comrs.,* 122 N. C., 812; *Herring v. Dixon, ibid.,* 420, and in other cases, this Court has held that the construction and maintenance of public roads are a necessary public expense, and that the General Assembly may provide for the construction and working the same, and may create a board to do this, distinct from the county commissioners, and fix and authorize the levy of taxes for that purpose, as in this act, without a vote of the people. We know of no reason to question the correctness of those decisions.'"

Bakersville Township Bonds. The only authority for the issuance of bonds by Bakersville Township is contained in the latter part of section 23 of ch. 326, Public-Local Laws 1921: "That said board of road commissioners *are hereby authorized, empowered* and directed to issue *any necessary amount of bonds, chargeable to any township* or to Mitchell County as the case may be, to cover any outstanding indebtedness now owing by said county for any roads already constructed, *or now under construction or which may be under contemplation of construc-*

tion." Public-Local Laws 1921, ch. 231 (Extra Session) is a confirmatory and validating act. Latter part of section 1 is as follows: "A bill to be entitled an act to amend chapter three hundred and twenty-six, Public-Local Laws nineteen hundred and twenty-one, relating to the public roads of Mitchell County and to authorize bond issues and special taxes therefor, be and the same is hereby enacted, reënacted, and confirmed."

In *Commissioners v. Boring,* 175 N. C., p. 109, it is held: "We have frequently held, at least in principle, that where the roads of the different townships or districts are set apart and a scheme is devised whereby they can be planned, laid out, constructed or improved entirely under the township's control and management, and without reference either to State or county benefit, it is not within the legislative power to tax one community or local district for the exclusive benefit of another. *Harper v. Comrs.,* 133 N. C., 106; *Faison v. Comrs.,* 171 N. C., 411; *Keith v. Lockhart,* 171 N. C., 451, and numerous cases in other jurisdictions collected in *Comrs. v. State Treasurer* (Lacy), *supra* (174 N. C., 141), are to the same effect. 'The taxing district through which the tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. The district for the apportionment of the State tax is the State, for a county tax the county, and so on. Subordinate districts may be created for convenience, but the principle is general, and in all subordinate districts the rule must be the same.' Cooley on Taxation (3 ed.), 430. 'The constitutional requirement of uniformity of taxation forbids the imposition of a tax on one municipality, or part of the State, for the purpose of benefiting or raising money for another.' 37 Cyc., 749."

The language of the statutes under consideration is not full and explicit, but by construing them together *in pari materia,* we think a reasonable construction and intent is that the board of road commissioners of Mitchell County had a right to issue the *bonds chargeable to Bakersville Township* for road purposes. "Now under construction or *which may be under contemplation or construction,*" with power given to issue the bonds, it necessarily follows that authority is given to levy sufficient taxes to pay such bonds and the accruing interest thereon. This position is strengthened by the caption of the act, chapter 64, "and to authorize *bond issues and special taxes therefor.*"

In *Parvin v. Comrs.,* 177 N. C., p. 511, *Walker, J.,* said: "It would seem that as the people voted for the issue of bonds, they virtually or impliedly voted for the tax, as the bonds would be of no market value without some adequate provision for discharging the principal and interest of the debt, but this is not necessary to be decided, and is merely referred to incidentally in passing, and constitutes no part of the judgment of the court upon the questions submitted to us."

The bonds being for road purposes, they were for a necessary expense, and no vote under the Constitution, Art. VII, sec. 7, required. The proper body authorized the issue of the bonds, as it had a right to do, and the implied power to levy a tax to pay the principal and interest automatically followed. The title or caption to the act may be considered in aid of construction to show intent—"and special taxes therefor." *Freight Discrimination Cases,* 95 N. C., at p. 447; *Cram v. Cram,* 116 N. C., 288; *S. v. Woolard,* 119 N. C., 779; *S. v. Patterson,* 134 N. C., 612; *In re Chisholm,* 176 N. C., 211.

On rehearing in *Charlotte v. Shepard,* 122 N. C., 603, it was said: "When such corporation has thus acquired the right to create the debt and to issue the bonds, this power carries with it the power to levy the taxes necessary to pay said bonds and the accruing interest thereon. *Rawls County Court v. U. S.,* 105 U. S., 733; *U. S. v. New Orleans,* 98 U. S., 381."

Const. of North Carolina, Art. VII, sec. 2, is as follows: "It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, *levying of taxes* and finances of the county, as may be prescribed by law. The register of deeds shall be, *ex officio,* clerk of the board of commissioners."

The Legislature gave the board of road commissioners of Mitchell County the authority to issue bonds for road purposes for Bakersville Township. The burden is on this township alone to repay the bonds with interest. So far as liability of the whole of Mitchell County is concerned, the act is unconstitutional. *Comrs. of Johnston Co. v. Lacy, supra; Comrs. v. Boring, supra.* The taxes necessary to pay the bonds and interest must be levied for the purpose and, construing the act authorizing the bond issue *in pari materia* with Art. VII, sec. 2, the burden is imposed on the county commissioners of Mitchell County, to levy and collect the necessary tax from Bakersville Township to pay the bonds and interest. *S. v. Jennette, supra,* 101; *Day v. Comrs. of Yadkin County, post,* 780.

It follows, as a matter of course, that the board of road commissioners of Mitchell County, having authority to issue the bonds, it is in their discretion how long bonds shall run, provision for payment, the rate of interest they shall bear, not exceeding the legal rate of 6%. The bonds shall be signed by the chairman of the board and duly attested by the secretary, under the seal of the corporation, and all necessary details carried out by the board in its discretion. When this is done, the bonds will be a legal obligation on Bakersville Township and the county commissioners of Mitchell County are required and authorized to levy the

taxes on all the taxable property in Bakersville Township sufficient and necessary to pay the bonds, principal and interest, so issued by the board of road commissioners of Mitchell County.

We think the statute valid as herein declared, that the bonds are a charge on Bakersville Township and not a county charge. *Comrs. of Johnston County v. Lacy, supra; Comrs. v. Boring, supra.* The legislative authority is sufficient to levy the tax to pay the principal and interest on the bonds. *Spitzer v. Comrs.*, 188 N. C., 30.

"Where a part of a statute is invalid, the remainder, if valid, will be enforced, provided it is complete in itself and capable of being executed in accordance with the apparent legislative intent; but if the void clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole of it must fall. 26 A. & E. Enc. of Law (2 ed.), 570; Black on Const. Law, p. 64; *Lowery v. School Trustees,* 140 N. C., 42-43; *Keith v. Lockhart,* 171 N. C., 451." *Comrs. v. Boring, supra.*

Red Hill Township Bonds: The plaintiff relies upon section 23, ch. 326, Public-Local Laws 1921, as amended by chapter 64, sec. 7, Public-Local Laws, Extra Session, 1921, as authority for the issuance of the $25,000 of bonds by Red Hill Township.

Section 23 referred to says the board of road commissioners of Mitchell County "shall have the power to issue the necessary amount of bonds chargeable to Red Hill Township not to exceed $15,000 under the same conditions and regulations stipulated in this act for the other townships of Mitchell County," etc. Chapter 64, Public-Local Laws, Extra Session, 1921, sec. 7, amends sec. 23 by striking out $15,000 and inserting in lieu $30,000 of bonds for Red Hill Township. The "other townships of Mitchell County" mentioned in section 23 of ch. 326, are bonds of Snow Creek Township mentioned in section 21 of said chapter, and bonds of Cane Creek Township mentioned in section 22 of said chapter, and sufficient authority is given in said sections 21 and 22, substantially the same, to levy special tax to pay the principal and interest of the bonds, as follows: "And the county commissioners of Mitchell County are hereby required to meet at the times and places set forth in section 18 of this act and levy a tax on all real and personal property in Snow Creek Township sufficient to pay the interest on said bonds, and to create a sinking fund with which to retire said bonds at their maturity, and shall pledge the full faith and credit and all taxable property, not only of Snow Creek Township, but of Mitchell County as well for the payment of said bonds and interest." The authority for Cane Creek is practically the same as for Snow Creek, section 22, *supra.* Under section 18, above referred to, the taxes levied shall be solely in the township and not against the property of the whole county.

The pledging of the full faith and credit and all taxable property of Mitchell County is unconstitutional. *Comrs. of Johnston v. Lacy, supra; Comrs. v. Boring, supra.* This does not affect the validity of the township bonds.

We think the legislative power and authority ample for the board of road commissioners of Mitchell County to issue the bonds for Red Hill Township, as set out in the controversy without action (except as hereafter modified), and provision is made for the payment of the principal and interest on the bonds.

Bradshaw Township Bonds: As to the $10,000 of bonds to be issued by Bradshaw Township, we think ample power and authority to issue the bonds is given pursuant to chapter 64, sec. 23(c), Public-Local Laws (Extra Session) 1921, which gives specific authority for the issuance of bonds by that township not to exceed $50,000. The board of county commissioners has ample authority in section 23(g) of said chapter 64, to levy and collect a special tax to pay the principal and interest of bonds issued on behalf of Bradshaw Township. "The board of county commissioners of Mitchell County shall annually thereafter levy in each of the said townships issuing the said bonds a special tax upon all property in said township sufficient to provide funds for the payment of interest on the bonds of said township, and to provide a sinking fund adequate to retire the said bonds of said township at their maturity. The said special taxes shall be levied and collected as the other county taxes are levied and collected, and the proceeds arising from the collection thereof shall be kept separate and apart from the other county and township funds and shall be used for the purpose of paying the interest and retiring the bonds of the respective townships and for no other purpose whatsoever."

We think the legislative power and authority ample for the board of road commissioners of Mitchell County to issue the bonds for Bradshaw Township, as set out in the controversy without action, and provision is made for the payment of the principal and interest on the bonds.

Under chapter 326, Public-Local Laws 1921, sec. 21 and 22, require that the bonds shall mature in not less than 20 nor more than 30 years. This applies to Red Hill Township. We do not think it applies to the other townships. Defendant in his brief says, "As the bonds have not yet been issued, this could probably be corrected by changing the maturities of the bonds." The judgment as to Red Hill Township is modified to meet this legal situation.

From a full investigation of the law, we think the judgment of the court below should be modified as indicated and affirmed as to Red Hill Township, and affirmed as to the other townships. The judgment below is

Modified and affirmed.

F. M. SHANNONHOUSE, JR., ADMINISTRATOR, v. J. K. WOLFE.

(Filed 19 May, 1926.)

1. Trusts—Deeds and Conveyances—Conditions Subsequent—Charitable Trusts.

A deed to lands sufficient to create a trust therein for designated purposes, will not be construed as upon condition subsequent, in the absence of a clause of forfeiture.

2. Trusts—Courts—Equity.

While equity may decree a sale of lands conveyed in trust for certain designated purposes, in order to preserve the estate therefor, it will not do so with express or clearly implied powers in the instrument when its effect will be to defeat the purposes of the trust, as gathered from the terms of the deed creating it.

3. Same—Trustees—Power of Sale—Mortgage—Foreclosure—Purchaser—Title—Deeds and Conveyances.

Where a deed to lands to trustees clearly creates a charitable trust therein for designated purposes, and confers on them no power of sale except by the word "dispose" thereof, this word, construed with the other words expressing the trust, does not confer upon the trustees the power to mortgage the entire subject of the trust, and thus defeat its object, and the purchaser at the mortgage sale can acquire no title. Cases wherein an estoppel has been created, designated by *Brogden, J.*

4. Trusts—Deeds and Conveyances.

A deed to lands is sufficient to create a trust therein when the words are adequate, the subject is definite, the subject-matter defined, and the beneficiaries designated.

CLARKSON, J., did not sit.

CONTROVERSY without action before *Harding, J.*, at March Term, 1926, of MECKLENBURG.

On 22 January, 1920, J. K. Wolfe executed and delivered the following deed:

STATE OF NORTH CAROLINA—COUNTY OF MECKLENBURG.

This deed, made and entered into this 22 January, 1920, by and between J. K. Wolfe and wife, Julia W. Wolfe, of the county of Mecklenburg and State of North Carolina, parties of the first part; Mrs. Beunah E. Creswell, Mrs. Mary B. Hunter, Mrs. Jennie G. Kirkpatrick, Mrs. Mattie E. Washam, H. G. Ashcraft, W. F. Graham, and B. J. Summerow, all of the county of Mecklenburg, State of North Carolina, parties of the second part, witnesseth:

That the said parties of the first part, in consideration of $1 to the said parties of the first part paid by the parties of the second part, the

receipt of which is hereby acknowledged, have bargained and sold, and by these presents do grant, bargain, sell and convey unto the said parties of the second part and to their successors, all that certain lot or parcel of land, situate, lying and being in Charlotte Township, Mecklenburg County, State of North Carolina, and more particularly described as follows:

Located on the west side of the Park Road, commencing at a stake in the center of said road 270.6 feet from H. B. Hunter's corner, and runs thence south 75 degrees, 45 minutes west 480 feet to a stake; thence north 14 west 210 feet to a stake; thence north 75 degrees and 45 minutes east 480 feet to a stake in the center of said Park Road; and thence south 14 degrees east 210 feet with the center of said road to the beginning corner, and being parts of lots 6 and 7, as appears on the map of J. K. Wolfe's property duly recorded in the office of the register of deeds for Mecklenburg County in Book 230, pages 154 and 155.

To have and to hold the said parcel of land, and all right, privileges and easements thereunto in anywise appertaining, unto the said parties of the second part aforementioned and to their successors chosen as hereinafter specified, in trust and confidence, nevertheless that the said parties of the second part and their successors shall hold, use, occupy and enjoy the same for the purpose of establishing, maintaining and carrying on as a community building, buildings and grounds for the benefit of persons of the white race owning land or living within the community lying between the present southerly limits of the city of Charlotte on the north and including the J. Watt Kirkpatrick farm or homeplace on the south, and such lands and white persons living to the east and to the west of the said Park Road as may be determined from time to time by the said parties of the second part, under such rules and regulations as may be established for the government thereof by the said parties of the second part and their successors.

And the said parties of the second part and their successors may, in addition to the uses hereunto before provided, use the said grounds and buildings, or permit the same to be used for school purposes for persons of the white race under rules established by the said parties of the second part: *provided, however,* that such use for school purposes shall not deprive the white persons living in said community from the reasonable use of said premises and building for community purposes under the rules established for the maintenance and operation thereof.

And the following conditions are hereby made a part of this indenture, viz.: (1) The said premises shall be called "The Park Road Community House"; (2) the control, government and entire management of and responsibility for the said community house shall be vested in the aforesaid parties of the second part and their successors, who shall be persons

of the white race living in the said community and entitled to the use and enjoyment of the said community house; (3) the said parties of the second part or their successors shall have entire control of said property and premises for the purposes hereinbefore stated, and they shall also have entire control, disposal and management of any and all property whether real or personal, which shall at any time be given or conveyed to the said parties of the second part for the said community house, or of the income or profits of such money or property as may be given for the endowment or furtherance of any of the activities of the said community house; (4) in case of death or resignation of any of the aforesaid parties of the second part, such vacancy or vacancies shall be filled by election or appointment of the remaining parties, nominations of persons for such vacancies to be posted or advertised in some conspicuous place at least 30 days before election or appointment; (5) the said parties of the second part and their successors may elect or appoint such officers and committees as in their judgment may be necessary; provided, that they shall elect or appoint a secretary, one of whose duties shall be to keep proper minutes and records of all proceedings, vacancies and elections; (6) if at any time it shall become impossible or impracticable to carry on the trust hereby created according to the true intent and purpose thereof, then the said premises shall be used for public playgrounds or recreation grounds for the white persons living in the said community until such time as the parties of the second part or their successors may find it possible and to resume the use of said premises for the purposes herein stated.

In witness of all which the said J. K. Wolfe and his wife, Julia E. Wolfe, parties of the first part, have hereunto set their hands and seals the day and year first above written.

This deed was duly recorded 24 January, 1920, and at the time of recording thereof the land described was vacant and unimproved. Thereafter, 8 April, 1921, for the purpose of securing funds in part with which to erect a building on the land, the trustees borrowed from B. J. Summerow the sum of one thousand dollars and executed and delivered a deed of trust to the plaintiff's intestate as trustee for said Summerow, securing said money, said deed of trust being duly recorded in April, 1921. The deed of trust contained the usual power of sale in default of payment of principal or interest on said loan. Default having occurred in the payment of the indebtedness secured by said deed of trust, the plaintiff, as administrator of the trustee named in the deed of trust, sold the land at public auction in accordance with the terms of said deed of trust, at which sale the defendant became the last and highest bidder for the sum of four thousand dollars. The sale was duly reported and no advanced bid was placed upon the purchase price within

the time limited by law. Plaintiff thereupon tendered a deed to the defendant and demanded the purchase money. The defendant declined to accept the deed upon the ground that the deed would not convey to him a fee-simple title to the lands therein described, for the reason that the trustees had no power to execute a deed of trust or mortgage upon the property. It is admitted that the purchase price offered by the defendant is fair and reasonable.

Upon the record, as presented, Judge W. F. Harding held that the deed made by the plaintiff and thereafter tendered the defendant did not convey an indefeasible fee-simple title to the land therein described, and further, that the defendant was not required to accept said deed or to pay said purchase price.

From the judgment so rendered the plaintiff appealed.

Carswell & Ervin for plaintiff.
Pharr, Bell & Pharr for defendant.

BROGDEN, J. The determinative question is this: Did the trustees named in the deed have the power to execute a mortgage or deed of trust upon the property, and, by sale thereunder, convey a fee-simple title?

The deed does not create an estate on condition subsequent, for the reason that there is no clause of forfeiture, reverter or reëntry and other controlling indicia of such an estate. *Hall v. Quinn,* 190 N. C., 326.

However, the deed does create a trust in favor of the designated beneficiaries because the essential elements of a valid trust concur, to wit: (a) Sufficient words to create it; (b) a definite subject-matter; (c) an ascertained object; (d) designated beneficiaries. *Witherington v. Herring,* 140 N. C., 497; *Thomas v. Clay,* 187 N. C., 778.

An examination of the deed discloses two dominant purposes, to wit: (1) That said land should be used for the purpose of establishing, maintaining and carrying on as a community building, buildings and grounds for the benefit of white persons in the area designated. (2) That if it were impracticable or impossible to carry on the community building idea, the land should be used "for public playgrounds or recreation grounds" for the beneficiaries designated in the deed. In order to execute these purposes it therefore becomes necessary to ascertain the extent of the power delegated by the deed to the trustees. This power is contained in the following words: (a) Hold, use, occupy and receive the same for the purpose of establishing, maintaining and carrying on as a community building, buildings and grounds, etc.; (b) "shall have entire control of said property and premises for the purposes hereinbefore stated"; and (c) "they shall also have entire control, disposal and management of any and all property whether real or personal, which shall at any time be given or conveyed to the said parties of the second part

for the said community house or of the income or profits or *furtherance of any of the activities of said community house.*"

The vital point raised by this language is whether or not the words used are sufficient to authorize the execution of a mortgage upon the property for the purpose of building a house thereon.

It must be conceded that the only language importing the power to mortgage would be the words "entire control, disposal and management"; and it must also be conceded that of these words "disposal" is the broadest and most comprehensive. The various definitions and shades of the meaning of the word "disposal" or its equivalent "disposed of" is set out in *Page v. Covington,* 187 N. C., 621. In that case it was held that the words "disposed of," construed in the setting in which they occurred, indicated sufficient intention on the part of the donor that a portion of the property should be sold and the proceeds derived therefrom used in preserving the trust; and it will be further noted that the power of sale was restricted to a portion of the trust property, and that, in addition, the beneficiaries of the trust authorized the sale.

Sales of property impressed with a trust for charitable uses have been a fruitful source of litigation. The following principles relating to charitable trusts are deducible from the authorities. Sales may be made: (1) When the instrument creating the trust delegates the express power of sale; (2) if no power of sale is given in the trust instrument, but a sale of a portion of the property is necessary to preserve the trust. *College v. Riddle,* 165 N. C., 211; *Page v. Covington,* 187 N. C., 621. (3) If no power of sale is given, the trustees and beneficiaries, if capable of doing so, may dispose of the property and hold and use the proceeds for carrying out the dominant purposes of the trust according to its terms. *Hall v. Quinn,* 190 N. C., 326; *Page v. Covington,* 187 N. C., 621. (4) If the power of sale is prohibited in the trust instrument, but, if at the same time a sale of the trust property is indispensable to the preservation of the interests of the parties in the subject-matter of the trust. "We think it is well settled that a court of equity, if it has jurisdiction in a given cause, cannot be deemed lacking in power to order the sale of real estate which is the subject of a trust, on the ground, alone, that the limitations of the instrument creating the trust expressly deny the power of alienation. It is true, the exercise of that power can only be justified by some exigency which makes the action of the court, in a sense, indispensable to the preservation of the interests of the parties in the subject-matter of the trust, or, possibly, in case of some other necessity of the most urgent character." *Trust Co. v. Nicholson,* 162 N. C., 257; *St. James v. Bagley,* 138 N. C., 384; *Church v. Bragaw,* 144 N. C., 126; *Church v. Ange,* 161 N. C., 314; *College v. Riddle,* 165 N. C., 211; *Middleton v. Rigsbee,* 179 N. C., 440.

However, the mere naked power of sale implied in the word "disposal," or, for that matter, language of like import, does not necessarily imply or delegate power to mortgage. "A sale of property presumably brings its full value. A mortgage of property presumably brings but a part of its value, and yet may result, by foreclosure, in the loss of the rest." *O'Brien v. Flint,* 74 Conn., 502.

A clear expression of the proper construction of power to mortgage occurs in the case of *Hamilton v. Hamilton,* 149 Iowa, 329, and is as follows: "Question is further raised whether, under the power given in the will, the plaintiff may mortgage the property. That a mere naked power to sell given to an agent or attorney or to the trustee of any ordinary trust does not include the power to mortgage is well settled by the weight of authority. In such case the power is to be strictly construed and will not be extended to cover an act not clearly within the terms of the instrument by which it was created; but a different rule has often been applied where a testamentary power has been given, not for the benefit or profit of the donor, but in the furtherance of some benefit which the donor confers upon the donee. The language creating such a power is to be liberally construed to promote the purpose or intent of its creation, and, if the power to sell is amplified by other words of broader or more general meaning, and the circumstances under which the gift is made be not such as to forbid that construction, the authority to mortgage for the purpose expressed in the writing may be inferred."

In the *Hamilton case* the language of the will under construction was "full power to sell, transfer and dispose of the same or as much thereof as may from time to time be needed for his support and maintenance during his said lifetime." It is further pointed out that the real estate devised in the will was encumbered by an outstanding mortgage. *Price v. Courtney,* 87 Mo., 387; *Hoyt v. Jaques,* 129 Mass., 286; *Parkhurst v. Trumbull,* 130 Mich., 408; *Bloomer v. Waldron,* 3 Hill (N. Y.), 364; (*Aaron Burr case*); *Arlington State Bank v. Paulsen,* 57 Neb., 717; *Stokes v. Kennedy,* 58 Miss., 614; *Hicks v. Ward,* 107 N. C., 392.

If the mortgage in the case now under consideration can be upheld, its validity must rest upon principles announced in *Hall v. Quinn, supra.* An analysis of the case of *Hall v. Quinn* will disclose: (1) That the donors of the property procured the incorporation of the donee by the Legislature, and the legislative act, incorporating the donee, conferred and delegated full, ample and comprehensive powers "to use and enjoy, alien, exchange, invest, convert and reinvest all of its property and assets in as full and ample manner as other institutions of the State similarly chartered." Having participated in procuring this charter, the donors, therefore, were estopped, and could not question the exercise

of the power conferred, and the power to mortgage is fully conferred by the provisions of the charter.

(2) The beneficiary in the deed of gift duly authorized the execution of the mortgage. The result was that there was no person who could raise the question or challenge the validity of the mortgage so given. "The parties who can maintain a suit to enforce a trust must be either a *cestui que trust* or a trustee, or must sue in right of one of these or must have some legal interest in the subject-matter of the trust either granted or reserved, or by reverter." *Shields v. Harris,* 190 N. C., 520.

It is obvious, therefore, that the principle announced in *Hall v. Quinn* is not applicable to the facts here.

The language of the deed under consideration, the weight of authority, and the clear logic of the principles involved, compel the conclusion that the mortgage in this particular case was not properly authorized, and therefore invalid. It necessarily follows that a sale thereunder could not vest an indefeasible title. The judgment must be

Affirmed.

CLARKSON, J., did not sit.

SMITH ET ALS. v. BOARD OF COUNTY COMMISSIONERS OF BLADEN COUNTY.

(Filed 19 May, 1926.)

Appeal and Error—Highways—Bonds—Taxation—Counties—Injunction—Evidence—Facts Found—Remanding Case.

Upon appeal from the judge in a suit to restrain the county commissioners from issuing highway bonds under a contract with the State Highway Commission, presenting the question of taxation in excess of that allowed by statute, C. S., 1291(a), the facts found thereon by the Superior Court judge is not conclusive; but where the record evidence of the county is conflicting and inconsistent, a judgment in its favor will not be sustained and the case will be remanded.

CIVIL ACTION heard by *Dunn, J.,* at November Term, 1925, of BLADEN.

Plaintiffs instituted an action against the board of commissioners of Bladen County, alleging that said commissioners have unlawfully entered into a contract with the State Highway Commission to issue bonds in the sum of two hundred and seventy-five thousand dollars ($275,000), and lend said amount to said Highway Commission for the purposes set out in the contract. Plaintiff further alleged that if these bonds were

issued the indebtedness of the county would exceed the limit provided by section 1291(a), Consolidated Statutes, and amendment thereto. The trial judge found as a fact that the bond issue did not exceed the limit prescribed by law.

From a judgment declaring the bond issue to be valid the plaintiffs appeal.

E. F. McCulloch for plaintiffs.
H. H. Clark, McLean & Stacy for defendant.

BROGDEN, J. Under section 1291(a), Consolidated Statutes, as amended by chapter 97, Public Laws, Extra Session, 1924, Bladen County cannot incur a bonded indebtedness in excess of seven per cent of the assessed valuation of taxable property as shown by the last assessment previous to the incurring of any new bonded indebtedness. It was the evident purpose of this act to limit the indebtedness of counties in order to protect the taxpayers from increasing and oppressive tax rates.

In the present state of the record it is impossible for us to determine the question as to what constitutes the bonded indebtedness of Bladen County. The defendant attaches to its answer an unsigned statement purporting to be made by the county auditor, in which statement the bonded indebtedness of the county is listed at $438,000, but attached to the statement is a list of notes which the auditor apparently does not include as bonded indebtedness. There is also in the record another detailed statement from the auditor listing other notes not appearing in the defendant's purported exhibit. In other words, the statement from the auditor, attached to the defendant's answer, if correct, would indicate that the bond issue comes within the limit. Upon the other hand, the other statement from the auditor would tend to indicate that the bond issue would exceed the limit.

The question involved is of too much importance to be determined by the present record. For instance, there is an item of $16,800 listed as a note in the statement marked "Exhibit B," same being plaintiffs' exhibit, with a notation that this same amount "is allowed board education should there be need above budget." We cannot say what this language means for the reason that it does not appear whether or not the county commissioners have actually made an order to this effect, or whether any note is outstanding evidencing this amount.

There is another item of $86,600 appearing on the auditor's statement as "Exhibit B," with the following notation: "State Notes." It does not appear whether these notes were signed by the county board of education or by the county commissioners or for what purpose the notes were issued.

In suits 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; *Advertising Co. v. Asheville,* 189 N. C., 739.

The controlling facts cannot be ascertained in the present state of the record and the case is remanded to the Superior Court from whence it came, to the end that an accurate and definite statement of the indebtedness of Bladen County may be submitted. *Advertising Co. v. Asheville,* 189 N. C., 739.

Remanded.

E. L. STONE ET AL. v. P. B. LEDBETTER.

(Filed 19 May, 1926.)

1. Appeal and Error—Rules of Court—Record—Docketing.

An appeal taken before the commencement of a term of the Supreme Court must be docketed by appellant fourteen days before the call in its order of the district to which it belongs.

2. Same—Certiorari—Laches.

Where the appellant asserts that he is not in default in docketing his appeal in the time required by the rule, he may apply for a certiorari to bring up the transcript of the case, or the omitted part, and thus only have the question of his laches therein passed upon.

3. Same—Mandatory—Agreement of Parties—Courts.

The rules of the Supreme Court regulating the time of docketing appeals are mandatory, and uniformly enforced by the court, without authority to the judges or parties to the action to change them by agreement or otherwise.

4. Same—Dismissal Ex Mero Motu.

Where the rules of the Supreme Court regulating the docketing of appeals have not been observed, and the appellant has lost his right, the Supreme Court may dismiss the appeal *ex mero motu.*

APPEAL by defendant from *Harding, J.,* at August Term, 1925, of TRANSYLVANIA. Appeal dismissed.

Welch Galloway for the plaintiffs.
D. L. English for the defendant.

ADAMS, J. The plaintiffs brought suit against the defendant to recover a tract of land and to remove a cloud from their title. The cause was tried at a term of the Superior Court which convened 27 July, 1925, and judgment was rendered in favor of the plaintiffs. The defendant gave notice of appeal and his case and the plaintiffs' counter-

case were served in due time. The Supreme Court was not then in session, and under the fifth and seventh rules of practice (185 N. C., 288) the transcript of the record on appeal should have been docketed here at the Fall Term, 1925, seven days (now fourteen) before the docket of the eighteenth district was called; but the parties agreed in writing to extend the time for settling the case on appeal until the December term of the Superior Court of Transylvania. This agreement was made 23 November, more than three months after the trial, and one week before the docket of the district was to be called, and owing to this agreement the case on appeal was not settled until 10 December, 1925. One month later, 10 January, 1926, the appeal was filed in this Court.

"It is the established rule of our procedure that an appeal from a judgment rendered prior to the commencement of a term of this Court must be brought to the next succeeding term of this Court, and in order to a hearing in regular order, the same shall be docketed seven days before the calling of the docket of the district to which it belongs . . . In numerous decisions of the Court dealing directly with the subject, it has been held that these rules governing appeals are mandatory and must be uniformly enforced, the only modification permitted or sanctioned by these decisions being to the effect that where from lack of sufficient time or other cogent reason, the case on appeal may not be in shape for docketing in the time required, the appellant may within such time docket the record proper and move for a *certiorari*, which may be allowed by the Court on sufficient showing made." *S. v. Farmer,* 188 N. C., 243.

In *Haynes v. Coward,* 116 N. C., 840, it is said: "If there is delay in sending up the transcript on appeal in time to be docketed for hearing during the call of the district to which it belongs at the first term of this Court beginning after the trial below as required by Rule 5, and such delay is caused by the neglect of the clerk or judge, all the authorities are to the effect that the appellant, if without laches himself, is entitled to a *certiorari* to bring up the transcript or the omitted part of it as the case may be. But the writ must be applied for regularly at such term, Rule 41 (now 34), and before the appeal is dismissed." To the same effect is *Brown v. House,* 119 N. C., 622: "The appellee makes the objection to the petition for *certiorari* that the appellant has not filed a transcript of the record proper (or shown why he could not do so) as a basis for the motion for a *certiorari* for the 'case on appeal.' The objection is fatal. *Pittman v. Kimberly,* 92 N. C., 562; *Owens v. Phelps,* 91 N. C., 253; *S. v. Freeman,* 114 N. C., 872; *Shober v. Wheeler,* 119 N. C., 471. The petitioner for *certiorari* must show himself free from laches by doing all in his power towards having the appeal perfected and docketed in time." Also, *S. v. Trull,* 169 N. C., 363, 370: "It appears in

the record that the solicitor agreed with the prisoner's counsel that the case might be postponed and docketed at this term. This was an irregularity, and was beyond his authority. The statute must be complied with and the cause docketed at the next term here after the trial below. If in any case there is any reason why this cannot be done, the appellant must docket the record proper and apply for a *certiorari,* which this Court may allow, unless it dismisses the appeal, and may then set the case for trial at a later day at that term or continue it, as it finds proper. It is not permitted for counsel in a civil case, nor to the solicitor in a State case, to assume the functions of this Court and allow a cause to be docketed at a later term than that to which the appeal is required to be brought by the statute and the rules of this Court."

From the decisions and the rules of practice in the Supreme Court the following conclusions, as applicable to this appeal, may be deduced: 1. The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed fourteen days before the calling in its order of the docket of the district to which it belongs. Rule 5 as amended, 185 N. C., 788; 189 N. C., 842. 2. If without the appellant's negligence the transcript is delayed so that it cannot be docketed for hearing during the call of the district to which it belongs at the first term of this Court beginning after the trial, the appellant may apply for a *certiorari* to bring up the transcript or the part of it which has been omitted. *Haynes v. Coward, supra.* 3. The rules of practice in the Supreme Court are mandatory, not directory, and must be uniformly enforced. *S. v. Farmer, supra.* 4. Neither the judges, nor the solicitors, nor the attorneys, nor the parties have any right to ignore or dispense with the rules requiring such docketing within the time prescribed. *Herndon v. Ins. Co.,* 111 N. C., 384; *Mimms v. R. R.,* 183 N. C., 463; *S. v. Butner,* 185 N. C., 731. 5. If the rules are not observed the Court may *ex mero motu* dismiss the appeal.

These conclusions are supported by the following additional authorities: *S. v. Dawkins,* 190 N. C., 443; *Hamby v. Construction Co.,* 189 N. C., 747; *Byrd v. Southerland,* 186 N. C., 384; *Cooper v. Comrs.,* 184 N. C., 615; *S. v. Johnson,* 183 N. C., 730; *S. v. Ward,* 180 N. C., 693; *Burrell v. Hughes,* 120 N. C., 277.

Under the circumstances disclosed by the record the appeal must be dismissed; but we have examined the appellant's exceptions and in our opinion the case was tried in substantial compliance with the law and is free from reversible error. The chief controversy involved questions of fact, such for instance as the adverse possession of the defendant and those under whom he claimed.

Appeal dismissed.

F. W. DAY ET AL. v. COMMISSIONERS OF YADKIN COUNTY AND COMMISSIONERS OF SURRY COUNTY.

(Filed 19 May, 1926.)

1. Highways—County Commissioners—Discretionary Powers—Statutes.

The powers given to county commissioners over public highways, Const., Art. VII, sec. 2, may be taken away from them and conferred by statute upon other political agencies of the State, and such agencies may be deprived of the discretionary powers conferred by C. S., 1297, etc.

2. Same—Constitutional Law—Local and Special Laws.

While authority given by statute to a county or other political agency of a state, to issue bonds or impose taxation for highways in aid to their maintenance or construction, is not direct, local or special legislation as is prohibited by the amendment to our Constitution, Art. II, sec. 29, it is otherwise where the statute directs the building of a bridge at a specified place across a stream between two counties, and as an incident permits the issuance of bonds or the levying of taxes for the purpose, pledging the faith and credit of the State.

APPEAL by defendants from *Lane, J.* Petition for writ of mandamus. Reversed.

At the session of 1925 the General Assembly passed an act for the building of a bridge across the Yadkin River at Rockford between Yadkin and Surry counties. The first, second, and third sections provide that the defendants, acting jointly, shall construct or cause to be constructed a serviceable and satisfactory bridge at the place designated; shall make contracts; shall refer their material differences to arbitration; and unless and until otherwise directed by the General Asssembly, shall charge and collect tolls for the privilege of using the bridge. In section 3 the defendants are authorized and directed to issue and sell the bonds of their respective counties in such amount as may be necessary, up to and not exceeding $15,000 for each county, the proceeds of which shall be used for building the bridge and its approaches. In section 4 it is provided that if the tolls are not sufficient to maintain the installments of principal and interest, "the full faith and credit of the two counties is pledged to the validity of said bonds, and the commissioners of said counties are hereby authorized to levy sufficient tax to carry out this provision." Section 5 provides that the total cost shall be covered by the bonds of the two counties as contemplated by C. S., 3767. Public-Local Laws 1925, ch. 580.

The plaintiffs brought suit to compel the defendants to issue the bonds and build the bridge. The defendants filed separate answers setting up the following defenses: 1. The act is inhibited by Art. II, sec. 29 of the Constitution. 2. It does not provide a sufficient amount of money.

3. It requires the counties to engage in the business of maintaining a toll bridge. 4. No time is named for levying the tax. The cause was heard at Chambers, and it was ordered that a writ of mandamus issue to the defendants commanding them to build the bridge as prayed in the petition. The defendants excepted and appealed.

W. L. Reece, D. M. Reece, and H. H. Barker for plaintiffs.
W. F. Carter for Commissioners of Surry County.
Williams & Reavis for Commissioners of Yadkin County.

ADAMS, J. The Constitution enjoins upon the commissioners of the several counties the duty to exercise a general supervision and control of penal and charitable institutions, schools, roads, and bridges, of the levying of taxes, and of the finances of the counties, as prescribed by law. Constitution, Art. VII, sec. 2. After the adoption of the Constitution the Legislature conferred upon the counties, not only the functions of a corporate body, but certain statutory powers which could be exercised only by the commissioners, or in pursuance of a resolution approved by them. Among such powers are those of building, repairing, and keeping up bridges whether entirely in one county or over a stream dividing one county from another. C. S., 1297, (18), (20), (22); 3750, 3751, 3767. True, the powers conferred and the duties imposed on the commissioners by these and other statutes have in some instances been transferred to the board of road commissioners, or to the board of highway commissioners or other "bridge governing board" (C. S., 3778); but as distinguishable from a ministerial duty, these powers when exercised by the county commissioners under the general law involve judgment and discretion, which as a general rule the courts will not attempt to control. *Brodnax v. Groom,* 64 N. C., 244; *Glenn v. Comrs.,* 139 N. C., 413; *Davenport v. Board of Education,* 183 N. C., 570; *Person v. Watts,* 184 N. C., 499, 506; *Lee v. Waynesville, ibid.,* 565; *Parks v. Comrs.,* 186 N. C., 490.

The defendants say that the avowed purpose of the act is to take away their discretion, to deprive them of the right to exercise their judgment, and thus to destroy their jurisdiction over a matter of local self-government. In proof they cite the imperative language of the act: they "shall construct . . . a bridge"; they "shall make contracts"; they "shall arbitrate their disagreements"; they "shall charge and collect tolls"; and "the credit of the counties is pledged." In reply it may be said that a mandatory statute which shuts out the exercise of discretion is not for that reason in conflict with the Constitution. Counties are agencies of the State and in the exercise of governmental functions, unless directed or restrained by the organic law, are subject practically to the unlimited control of the Legislature. *S. v. Jennette,* 190 N. C., 96.

In *Tate v. Commissioners,* 122 N. C., 812, it is said that the legislative authority can direct them to do as a duty all such things as it can empower them to do; and in *Glenn v. Comrs., supra,* in reference to the building of a bridge: "If the Legislature had directed a bridge to be built and maintained in proper condition for public travel as a part of a public highway, and provided the money or directed that a special tax be levied for that purpose, we would not hesitate to direct the writ (of mandamus) to issue, commanding the board to discharge the imposed duty. The county, being an agency of the State, and the commissioners being, in respect to the opening and maintaining of highways, state officers, may be compelled by mandamus to discharge such duty when no discretion is vested in them." *McCormac v. Comrs.,* 90 N. C., 441; *Harriss v. Wright,* 121 N. C., 172; *Jones v. Comrs.,* 137 N. C., 579; *Withers v. Comrs.,* 163 N. C., 341. These decisions were rendered before the adoption of Art. II, sec. 29, and we are therefore face to face with the question whether the act of 1925, *supra,* is inconsistent with this provision of the Constitution.

This amendment went into effect 10 January, 1917. *Reade v. Durham,* 173 N. C., 668; *Mills v. Comrs.,* 175 N. C., 215. It provides that the General Assembly shall not pass any local, private, or special act relating to ferries or bridges; if therefore, the act in question is local, private, or special within the contemplation of this section it cannot be upheld. Our solution of the question may be worked out by reference to former decisions. In *Brown v. Comrs.,* 173 N. C., 598, the plaintiffs sought to enjoin the defendants from issuing bonds and levying a tax "for road purposes in North Cove Township in McDowell County" on the ground that the act under which the defendants were proceeding was within the constitutional restriction; but the Court held that this restriction applies to direct legislation and not to the incidental operation of statutes, constitutional in themselves, upon subjects other than those with which they directly deal, and that as the direct legislation there was the bond issue the fact that the proceeds should be used for road purposes did not bring the act within the constitutional inhibition. Likewise in *Mills v. Comrs.,* 175 N. C., 216, it was shown that the commissioners of Iredell County had been authorized by a public-local act to issue bonds in the sum of $40,000 "for the purpose of building bridges over the Catawba River jointly with the county of Catawba," and the question was whether this act was in conflict with the constitutional amendment. It was held that there is nothing in the amendment which prohibits the Legislature from authorizing county commissioners to raise money by the issuance of bonds or by current taxation to enable them to carry out the measures necessary for the orderly government of their counties, and in consequence injunctive relief was denied. See, also, *Comrs. of Surry v. Trust Co.,* 178 N. C., 170; *Davis v. Lenoir, ibid.,* 668;

Comrs. v. Bank, 181 N. C., 347; *Emery v. Comrs, ibid.,* 420; *Hill v. Comrs.,* 190 N. C., 123. The act construed in *Parvin v. Comrs.,* 177 N. C., 508, was applicable to any county in the State and the proposed tax was intended for all the roads in a county (Public Laws 1917, ch. 284); and in *Honeycutt v. Comrs.,* 182 N. C., 319, it was made to appear that the road commissioners had the control and management of all their public roads and bridges. There are other decisions in which bonds and the levy of a tax were sustained under acts construed to be permissive—their primary object being the raising of revenue or other such purpose and not the direct and explicit legislation exhibited in the present appeal. Thus in *Martin County v. Trust Co.,* 178 N. C., 26, 34, it is said that the object of the amendment was not to prohibit the Legislature from granting such permission in cases where under our Constitution legislative permission is necessary; and in *Comrs. v. Pruden, ibid.,* 394, there is noted a distinction between the permissive power to issue bonds and the direct legislative authority to lay out, open, alter, or discontinue a particular road or highway.

None of these cases is finally decisive of the present appeal. As we have seen, the amendment prohibits the passage of any local, private, or special act relating to ferries or bridges. If we pass by the sale of the bonds and the levy of the tax, we are confronted with the question whether the legislative mandate in the first section of the act under consideration is local, private, or special. The language is: "The board of county commissioners of Yadkin County and the board of county commissioners of Surry County shall construct or cause to be constructed a serviceable and satisfactory bridge across the Yadkin River between Yadkin County and Surry County at Rockford at a cost not to exceed twenty-five thousand dollars." In *Mills v. Comrs., supra,* it is said that the word "local" has received no fixed or generally recognized meaning and must be defined by reference to the context; that the General Assembly had previously been urged many times to authorize a particular highway or to establish a bridge or ferry at a specified place by direct legislation; and that it was in reference to local, private, and special measures of this character that the amendment was adopted. *Mr. Justice Holmes* observed, "The phrase 'local law' means, primarily, at least, a law that in fact; if not in form, is directed only to a specific spot." *Gray v. Taylor,* 227 U. S., 51, 57 Law Ed., 413. Local Laws are special as to place, and special laws are those made for individual cases. Lewis Sutherland on Statutory Construction (2 ed.), sec. 199 *et seq.; In re Harris,* 183 N. C., 633; *Armstrong v. Comrs.,* 185 N. C., 405. The first section of the act before us commands the commissioners of Surry and Yadkin counties to construct one bridge across the Yadkin River at a place which is pointed out and particularly defined; it is

direct legislation addressed to the accomplishment of a single designated purpose at a "specific spot"; it is therefore a local and special act, and as such is expressly prohibited by Art. II, sec. 29, of the Constitution. In further elucidation of this provision the following additional cases may be consulted: *Trustees v. Trust Co.*, 181 N. C., 306; *Sechrist v. Comrs., ibid.*, 511; *Robinson v. Comrs.*, 182 N. C., 590; *Galloway v. Board of Education*, 184 N. C., 245. The judgment is

Reversed.

H. H. BRIGGS ET AL. v. ASHEVILLE DEVELOPERS.

(Filed 19 May, 1926.)

1. Appeal and Error—Trial by Jury—Waiver—Agreement of Parties as to Facts—Evidence—Remand.

Where upon the trial of an action, as distinguished from the submission of a controversy without action under C. S., 626, the parties have assumed to agree upon the essential facts, waived a trial by jury, and submitted the matters of law to the trial judge, on appeal the judgment will be remanded to be proceeded with when the facts agreed upon are insufficient for the determination of the controversy, but are only evidence of a determinative fact.

2. Same—Deeds and Conveyances—Mortgages—Resale—Statutes—Prima Facie Case—Facts Agreed.

Where the question in controversy in a suit for specific performance against the purchaser, is whether there had been a compliance with our statute as to a resale under a mortgage upon the raise of a bid at a prior sale, the recitals relating thereto in the deed tendered by the mortgagor are only prima facie evidence of such facts, and alone are insufficient to sustain the judgment.

3. Clerks of Court—Mortgages—Resale—Statutes — Tender of Deed—Orders Nunc Pro Tunc.

Where a resale of lands under mortgage has been made under the provisions of our statute, the clerk may enter an order accepting the mortgagor's deed *nunc pro tunc* as to the time it should have been tendered, when otherwise the observance of the statute has been made.

4. Mortgages—Statutes—Resales—Title.

Under the provisions of our statute as to resale of mortgaged lands upon a raised bid, it is required that the matter be kept open by the clerk for ten days thereafter, in order that the purchaser thereat may acquire title. C. S., 2591.

5. Same—Deposit with Clerk—Appeal and Error.

Held, under the facts of this case presenting the question of a valid resale of mortgaged land under the provisions of C. S., 2591, objection that only two per cent of the proposed advanced bid was deposited with the clerk was untenable.

BRIGGS *v.* DEVELOPERS.

APPEAL by defendant from *McElroy, J.*, at April Term, 1926, of BUNCOMBE.

Civil action for specific performance, submitted on an agreed statement of facts.

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

On the facts agreed the court, being of opinion that the deed tendered was sufficient to convey a good title, gave judgment for the plaintiffs, from which the defendant appeals, assigning errors.

Ruffner Campbell for plaintiffs.
Jones, Williams & Jones for defendant.

STACY, C. J. This is not a controversy without action submitted on an agreed statement of facts for the determination of a question in difference between the parties, as authorized by C. S., 626, but it is a suit to compel the specific performance of a written contract to buy land and to recover the purchase price agreed to be paid therefor. Certain facts having been agreed upon by the parties, a jury trial was waived and the matter submitted to the court for its decision, on the facts agreed, as to the validity of the title offered by the plaintiffs.

The only alleged defect in the title offered by the plaintiffs relates to a foreclosure sale, had in 1918.

It is agreed that the property in question was sold by H. H. Briggs and wife to the Happy Valley Country Club, Inc., on 11 April, 1917, and on the same day the Happy Valley Country Club, Inc., executed and delivered to the Wachovia Bank & Trust Company, trustee, a deed of trust on said property to secure an indebtedness of $15,808 due H. H. Briggs as a part of the purchase price of said land; that under the power of sale contained in said deed of trust and in strict compliance with the terms of foreclosure contained therein, default having been made in the payment of principal and interest, the property was sold at the courthouse door in Buncombe County, 9 September, 1918, when and where Jake M. Chiles became the last and highest bidder for $12,200; that the trustee immediately reported this sale to the clerk of the Superior Court, and on 11 September, 1918, a resale was ordered on an increased bid of $12,860, but only 2% of the proposed advance bid was deposited with the clerk; that thereafter the Wachovia Bank & Trust Company, trustee, delivered to H. H. Briggs a deed for said property, duly executed and acknowledged on 11 October, 1918, but said

deed recites that it was made and entered into 28 September, 1918, and contains, among other recitals, the following:

"Whereas, within ten days after sale (to J. M. Chiles on 9 September, 1918), and the report thereof, said bid was duly raised, and said clerk of the Superior Court of Buncombe County thereupon ordered and directed said Wachovia Bank and Trust Company to again advertise and sell said property; and,

"Whereas, in pursuance of said order and direction, said Wachovia Bank and Trust Company, after due advertisement according to law, again offered said land described in, and conveyed by, said deed in trust, and hereinafter described, at public auction in front of the county courthouse door in Asheville, North Carolina, at 12 o'clock noon, on 28 September, 1918, when and where said H. H. Briggs became the last and highest bidder for said lands at the sum of $13,000, and was declared such last and highest bidder at said sum; and,

"Whereas, said H. H. Briggs has paid said sum so bid by him:

"Now, therefore, in consideration of the premises said sum of $13,000 so bid and paid by said H. H. Briggs, the receipt of which is hereby acknowledged, the said Wachovia Bank and Trust Company, trustee, has given, granted bargained, sold and conveyed, and by these presents does give, grant, bargain, sell and convey unto said H. H. Briggs, his heirs and assigns," etc.

It is further agreed that this deed was duly registered in the office of the register of deeds for Buncombe County on 30 December, 1918; that up until 28 April, 1926, there was no record of any report of the resale and no order by the clerk requiring the trustee to make title to the purchaser, but on the said 28 April, 1926, the Wachovia Bank and Trust Company, trustee, did file with the said clerk a report, reciting that in accordance with the order of resale, made by the clerk on 11 September, 1918, the said property was again sold on 28 September, 1918, at which time H. H. Briggs became the last and highest bidder for $13,000, and asked that said report be considered as if made on 28 September, 1918. The clerk thereupon entered an order, *nunc pro tunc,* directing the Wachovia Bank and Trust Company, trustee, to make title to the purchaser, H. H. Briggs, upon receipt of the amount of the bid, the said order "to be of the same force and effect as if made on 28 September, 1918."

H. H. Briggs and wife sold a one-half interest in the property to the Kenilworth Realty Company on 8 November, 1924.

Upon these, the principal facts established by agreement of the parties, his Honor entered judgment for the plaintiffs, being of opinion that they were the owners in fee of the property described in the com-

plaint and that the deed tendered was sufficient to convey a good and indefeasible fee-simple title thereto.

We think the facts agreed upon are insufficient to warrant the court in declaring, as a matter of law, that the title offered is good and indefeasible. It nowhere appears, except from recitals in the deed and report of the trustee, filed *nunc pro tunc,* which constitute only prima facie evidence of the fact, that a resale of the property was had on 28 September, 1918, and that H. H. Briggs became the last and highest bidder at said sale. *Shaffer v. Gaynor,* 117 N. C., 15; *Lunsford v. Speaks,* 112 N. C., 608. The facts agreed, had they been adduced as evidence on the hearing, nothing else appearing, would have warranted a verdict in favor of the plaintiffs, but we are not dealing with a jury verdict, and the crucial facts have not been established on the record. Furthermore, the *nunc pro tunc* order of the clerk, entered on 28 April, 1926, provides that it shall have the same force and effect as if made on 28 September, 1918. If the resale took place on 28 September, it is provided by C. S., 2591, that all such sales shall remain "unclosed for ten days." *In re Sermon's Land,* 182 N. C., p. 128. Hence, the clerk's order should not have been made until the expiration of ten days after the sale and without any increased bid in the meantime. *Trust Co. v. Powell,* 189 N. C., 372.

There can be no objection to the clerk's order simply upon the ground that it was entered *nunc pro tunc. Lawrence v. Beck,* 185 N. C., 196.

Nor can the order of resale, made on 11 September, 1918, under the facts of the present record, be impeached upon the ground that only 2% of the proposed advance bid was deposited with the clerk. *Pringle v. Loan Asso.,* 182 N. C., 316.

Let the cause be remanded, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error and remanded.

WACHOVIA BANK AND TRUST COMPANY, EXECUTOR OF GWYN EDWARDS, v. W. L. MILLER.

(Filed 19 May, 1926.)

1. Judgments—Entry—Payment—Cash Deposit in Lieu of Appeal Bond—Evidence—Questions for Jury—Burden of Proof.

Where there appears an entry on the docket of a judgment in the Superior Court of "Paid in full," upon conflicting evidence as to whether the payment was of the judgment or a cash deposit in lieu of appeal bond, the question at issue is one of fact for the jury, with the burden on defendant asserting that it was a cash deposit only.

2. Rules of Court—Appeal and Error—In Forma Pauperis—Briefs.

The rule of practice in the Supreme Court requiring appellant in appeals *in forma pauperis* to file seven typewritten copies of his brief and of the transcript, in addition to the original transcript, is mandatory, and a compliance with its provisions is necessary to entitle the appellant to have his appeal decided on its merits.

CIVIL ACTION tried by *Stack, J.*, at February Term, 1925, of BUNCOMBE.

This action was begun before a justice of the peace by the plaintiff's testator, Gywn Edwards. Edwards secured a judgment on 21 June, 1920, against Miller for $85.00. Miller appealed to the Superior Court and docketed his appeal on 29 June, 1920. On 25 June, 1920, the defendant paid the judgment, and the judgment docket shows this entry: "Paid in full, this 25 June, 1920." G. Edwards, by Sale & Pennell, Attys." The defendant contends that this payment, pending his appeal, was not a voluntary payment, but was made in lieu of bond to stay execution. The facts are set out in full in the same case reported in 184 N. C., 593.

No counsel for plaintiff.
F. W. Thomas for defendant.

BROGDEN, J. The only question in the case is whether or not the payment of a judgment, pending an appeal, produces an abandonment of the appeal.

This question was under consideration in this same case reported in 184 N. C., 593.

The opinion of the Court, by *Walker, J.*, states the proposition thus: "The question raised by the defendant's answer or affidavit may be submitted to a jury, if the plaintiff takes issue with the defendant upon it, or the question thus raised may be otherwise determined by a finding of the court or a referee as the parties may agree or the court may decide. As the plaintiff alleges that the defendant had abandoned his appeal by the payment of the amount of the judgment, the burden necessarily is on him to show it. The mere payment of the money is not of itself sufficient under the facts and circumstances of this case, so far, at least, as developed, to show the abandonment."

In other words, the decision was to the effect that the intention to abandon the appeal by reason of the payment of the judgment, under the circumstances, was a question for the jury and not a question of law for the court. In the present case and in conformity with the former opinion, the trial judge submitted this issue: "Was the payment by the defendant of the judgment intended as an abandonment of his

appeal at the time of such payment?" The jury answered the issue, "Yes." The trial judge charged the jury as follows: "The court charges you that the burden of proof is upon the plaintiff to satisfy you by the greater weight of the evidence that the payment was a voluntary one, and the defendant intended to abandon his appeal." The contentions of the parties were arrayed fairly and the law correctly applied to the facts. The judgment rendered must be upheld.

Although we have examined the case and find no reversible error, yet the appeal must be dismissed. This is a pauper appeal, and Rule 22 of the Supreme Court requires the appellant to file seven typewritten copies of his brief and seven typewritten copies of the transcript in addition to the original transcript. The appellant has filed only three copies of the transcript. These rules are mandatory and must be complied with.

Appeal dismissed.

S. M. COMBS ET UX. v. F. T. PAUL ET UX.

(Filed 19 May, 1926.)

Deeds and Conveyances—Restraint on Alienation—Title.

Restrictions contained in a clause in a deed to lands that they should not be conveyed to any one during the life of two of the grantees, are void as an attempted restraint upon alienation, and the grantees may convey an absolute fee-simple title, upon the principle that an unqualified restraint on alienation, annexed to a grant in fee, is void, being repugnant to the estate granted.

APPEAL by defendants from *Grady, J.*, at Chambers, Edenton, N. C., 31 March, 1926, from BEAUFORT.

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

Plaintiffs, being under contract to convey a certain house and lot to the defendants, duly executed and tendered a deed therefor and demanded payment of the purchase price as agreed. The defendants declined to accept the deed and refused to make payment, alleging that the title offered is defective.

On the facts agreed the court, being of opinion that the deed tendered was sufficient to convey a good title, gave judgment for the plaintiffs, from which the defendants appeal, assigning error.

J. D. Paul for plaintiffs.

A. W. Bailey for defendants.

STACY, C. J. On the hearing the title offered was properly made to depend upon the validity of the following restrictive clause in a deed conveying the property in question from David J. Roberts to Mary D. Roberts and John A. Roberts, her husband, for life, remainder to Allen Roberts in fee, executed 14 May, 1914, said deed forming a link in plaintiff's paper chain of title:

"This deed is made with the distinct understanding that said Allen Roberts shall not dispose of said lot during the life of either said Mary D. or John A. Roberts, by any means whatsoever, whether he be authorized to do so by said Mary D. Roberts and John A. Roberts by deed or otherwise, it being the distinct understanding and meaning hereof that said lot shall be held for the term of their natural life of Mary D. and John A. Roberts and shall not be reconveyed until both are dead."

On 21 January, 1916, all the grantees in the above-mentioned deed reconveyed the property described therein to their original grantor, David J. Roberts, by full warranty deed, and, by mesne conveyances, the present plaintiffs are now the owners in fee of said house and lot, unless their title is affected by the restriction contained in the deed above mentioned.

His Honor held the restriction void, because in restraint of alienation, but, if not invalid for this reason, that it was revoked by the reconveyance of 21 January, 1916.

The judgment must be upheld on authority of *Latimer v. Waddell,* 119 N. C., 370. An absolute restraint on alienation, though for a limited time, annexed to a grant in fee, is void. *Wool v. Fleetwood,* 136 N. C., 460.

Affirmed.

J. H. BLANKENSHIP AND WIFE, LANIE B. BLANKENSHIP, v. R. J. DOWTIN AND WIFE, AGNES L. DOWTIN, AND F. E. PRESNELL.

(Filed 27 May, 1926.)

Deeds and Conveyances—Easements—Water Supply—Land Development—Reservation in Deed—Auction—Sales.

Where land is subdivided into lots and sold with reference to a recorded plat, reserving in the owners a lot on which there is a water supply, and it is announced at the public sale that this water supply was available to the purchasers of the other lots, and conveyances are made with reference thereto, and recorded, and thereafter the reserved lot is also conveyed by deed reciting that the water supply thereon was available to the other purchasers, the reserved lot so acquired is subject to the condition imposed thereon.

BLANKENSHIP *v.* DOWTIN.

APPEAL by plaintiffs from *McElroy, J.*, at January Term, 1926, of BUNCOMBE. Reversed.

The facts will appear in the opinion.

Wells, Blackstock & Taylor for plaintiffs.
No counsel for defendants.

CLARKSON, J. The defendants, R. J. and Agnes L. Dowtin, were owners of a tract of land, 18.6 acres, on Brevard road in Buncombe County, N. C. On 4 July, 1924, they had the same subdivided into approximately 65 lots. The plat of the land was duly recorded in the office of the register of deeds of Buncombe County, the plat is entitled: "Pine Lane subdivision, property of R. J. Dowtin, Esq., Brevard road, Buncombe County, N. C., subdivided for Horney Brothers, Asheville, N. C., 4 July, 1924."

One of the lots in the plat had on it marked "reserved," and this was shown on the map which was recorded. At the public sale of the lots on 7 August, 1924, public notice was given that the purchasers of the lots would have the right, privilege and option, of using the water from the springs situated on the property marked "reserved." At the time of the sale, two dwelling-houses were on lot 64. These dwelling-houses were situated on a hill and the springs furnished water from the lot "reserved" nearly 200 yards away. There was at the springs on the lot marked "reserved" a hydraulic ram with pipes to lot 64 and water was forced into the houses by means of the hydraulic ram. Plaintiffs purchased lot 64 at the auction sale with the houses equipped for use of water to be supplied from said springs and pipes, etc., connected with same. Full notice of the water rights was given by the auctioneer to lot purchasers at the public sale. A deed was made, dated 7 August, 1924, the date of the public auction sale from R. J. Dowtin and Agnes L. Dowtin to J. H. Blankenship and wife (Lanie B.), the plaintiffs. After describing the land by metes and bounds, the following is in the deed: "Containing four (4) acres, and being lot No. 64, as shown on the plat of Pine Lane subdivision made by C. V. Verner, surveyor, 4 July, 1924, and recorded in the office of the register of deeds for Buncombe County, North Carolina, in Book ....., page ..... This also conveys to the party of the second part, heirs and assigns, the right to use the water from the tract marked "reserved" so long as the springs shall be kept in shape, or until water can be secured on the property from the city of Asheville, or other source."

This deed shortly after, on 27 August, was duly recorded in the register of deeds office for Buncombe County.

The auctioneer, at the time plaintiffs purchased lot 64 stated—the defendant, F. E. Presnell, being present and hearing the announcement—that the springs were connected with the houses on lot 64 by a pipe line and that the houses were being supplied with water from the springs on the "reserved" lot, by means of a hydraulic ram, and that the houses were being sold fully equipped with water supply, bathrooms and electric fixtures.

Plaintiffs took possession of lot 64, on which was situated the dwellings, immediately after receiving the deed for same, and on 3 June, 1925, almost one year thereafter, defendant, Presnell, purchased from defendant, R. J. Dowtin and wife, the lot marked "reserved," on which is situated the springs, hydraulic ram, etc. It was in evidence that plaintiffs had no other water, that they considered pure, upon lot 64 purchased at said sale, and that for almost a year before defendant, Presnell, purchased the lot marked "reserved" that the said dwellings on lot 64 were being supplied with water by the pipe line, hydraulic ram, etc., from the springs on said lot marked "reserved."

The deed from the Dowtins to Presnell for the lot, on which the springs, hydraulic ram and *quasi*-water system is located, after describing it by metes and bounds, has this in it: "And being all of that tract of land marked 'reserved,' as same is shown on a plat of the Pine Lane subdivision, property of R. J. Dowtin *et al.*, on the Brevard road. . . . This conveyance is made subject, however, to the right of the abutting property owners to obtain water at a spring on the property until water is available otherwise."

The defendant, Presnell, after purchasing the lot built a fence around the lot "reserved" and turned it into a pasture for his cow. The "*quasi*-water system," which was intact with lot 64 when the lot was sold the plaintiffs, and the hydraulic ram from the springs on the lot marked "reserved" were disconnected by the defendant, Presnell, which cut off plaintiffs' water supply. It is in evidence that Presnell struck with a hammer two or three blows to the ram and made the assertion "he would fix it so that the people on the hill could not get water." It was in evidence that Presnell put up a notice on the lot marked "reserved" forbidding any one to enter on the land. It was in evidence that after defendant, Presnell, had removed the pipes from the springs to the dwelling and disconnected same from the hydraulic ram, the only means of water supply for the plaintiffs' dwellings on the said lot 64 was such water as was carried in buckets from wells and neighbors' springs, and that the city of Asheville had never extended its water lines any nearer to the residences of the plaintiff than at the time of the sale, in August, 1924. It was in evidence that the water from Asheville had not been put in that locality for plaintiffs to secure same, and no other sufficient supply was available.

On this state of facts at the close of plaintiffs' evidence, defendants moved for judgment as in case of nonsuit. C. S., 567. The motion was allowed. Plaintiffs excepted, assigned error and appealed to the Supreme Court.

We think, under all the facts and circumstances of this case, taking the evidence in the light most favorable to plaintiffs, giving them the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom, the motion should not have been granted.

In the case of *Hunstock v. Limburger,* 115 S. E. (Texas), p. 327, the facts were that Dora Dozier was the owner of a lot in San Antonio, Texas, on the premises was a dwelling-house, outhouses and a *certain private water main* owned by the said Dozier. The water main, 2-inch pipe, 30 inches underground, ran from the dwelling-house to the San Antonio waterworks. She conveyed the lot to two parties "together with all the improvements, rights and appurtenances thereto, in any wise appertaining or belonging." Subsequently, the plaintiff acquired the land under the same language as in the Dozier deed to the two parties. The main carried the water for domestic purposes to the dwelling-house from the waterworks. Dora Dozier afterwards sold the water main along the street to defendant, who owned land along the street, who in turn sold and was selling to others the privilege of connecting with the water main and using water. She also sold to five others and the supply when it reached plaintiff was about exhausted. The Court said: "If the capacity of the main was more than sufficient to furnish the parties who had obtained rights to connect with it an adequate supply, with sufficient force of flow, of water for use on their premises, Mrs. Dozier, as the owner of the pipes in the street, had the right as against such parties to sell to others the right to connect with the main and take water therefrom, so long as its exercise did not interfere with the prior rights acquired by others to a sufficient supply and force of flow of water from the main. Having this right, she could sell the pipes composing the main to any one she pleased; and her vendee could, to the same extent, subject to the same limitations, sell the right to connect with, and take water from the main. It is, however, hardly necessary to say that her vendee would have no right whatever to remove the pipes or do anything towards them that would in any way impair the rights acquired by others to their use as a media of obtaining a sufficient water supply upon their premises."

In Gould on Waters (3 ed.), part sec. 354, it is said: "The general rules relating to severance of tenements are that a grant by the owner of a tenement or part of that tenement, as it is then used and enjoyed, passes to the grantee by implication, and without the use of the word 'appurtenances' or similar words, all those easements which the grantor

can convey, which are necessary to the reasonable enjoyment of the granted property, and have been, and are, at the time of the grant, used by the owners of the entirety for the benefit of the granted tenement; and that, except in the case of ways or easements of necessity, there is no corresponding implication in favor of the grantor, who, if he wishes to reserve any right over the granted part, should reserve it expressly in the grant." And the same author, part section 356, speaking to the subject, says: "In *Nichols v. Chamberlain* (Cro. Jac., 121) it was held upon demurrer 'that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary *et quasi* appendant thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require.'" Washburn Easements and Servitudes (3 ed.), p. 76.

In *Spencer v. Kilmer,* 151 N. Y., 390, 398, *O'Brien, J.,* speaking to the question, says: "When the owner of a tract of land conveys a distinct part of it to another, he impliedly grants all these apparent and visible easements which at the time of the grant were in use by the owner for the benefit of that part so granted, and which are essential to a reasonable use and enjoyment of the estate conveyed. The rule is not limited to continuous easements or to cases where the use is absolutely necessary to the enjoyment of the thing granted. It applies to those artificial arrangements which openly exist at the time of the sale, and materially affect the value of the thing granted.'"

Smith, C. J., in *Hair v. Downing,* 96 N. C., p. 175, said: "We are of the opinion that the servitude of the one to the other, existing when both belonged to one owner, remained when the severance was effected by the different conveyances. The easement passed with the legal estate in the tract to which it adhered, and in the like plight was the servient tenement conveyed to the plaintiff, whose rights, especially after full notice, cannot be superior to those of his grantor. 'Where one having two tenements, and a gutter from one of them ran over or across the other, sold one tenement to one and the other to another, it was held that the easement and servitude of the gutter passed with the respective estates by the form of the grant.' *Copes case,* Year Book II, Hen. VII, 25." *Bowling v. Burton,* 101 N. C., p. 176; *Lamb v. Lamb,* 177 N. C., 150; *Craft v. Lumber Co.,* 181 N. C., 29; *Meroney v. Cherokee Lodge,* 182 N. C., 739.

Lord Mansfield, in an early case (*Roberts v. Karr,* 1 Taunt, 495), observed: "If you (the lessor) have told me in your lease, this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road."

It is held in *Moose v. Carson,* 104 N. C., 434: "When by laying off streets, third parties have been induced to buy lots adjacent to them and build on the lots, by an individual grantor, the dedication to the public use has been held irrevocable, although the streets may not have been formally accepted by the authorities of a town in which they lie. *Grogan v. Town of Hayward,* 4 Fed. Rep., 161." *Green v. Miller,* 161 N. C., p. 30; *Sexton v. Elizabeth City,* 169 N. C., 385; *Draper v. Conner,* 187 N. C., 18; *Davis v. Robinson,* 189 N. C., 589; *Durham v. Wright,* 190 N. C., 568.

"Where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties. Ang. Water Courses, sec. 363, and cases cited in note 1, and among them *Jonnison v. Walker,* 11 *Gray,* 426; and *Woodcock v. Estey,* 43 Verm., 522." *Hair v. Downing, supra,* 176.

In *Brooklyn Life Ins. Co. of N. Y. v. Dutcher,* 95 U. S., 270 (24 L. Ed.), p. 412, it is said: "The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case."

The defendants, Dowtins, had caused 18.6 acres of land near Asheville to be subdivided into 65 lots, one of these lots on the record and sales map used by the auctioneer showed that it was marked "reserved." The "reserved" lot had on it springs and *quasi*-water system; hydraulic ram that pumped water to lot 64. The auctioneer for the Dowtins at the public sale, in the presence of defendant, Presnell, who afterwards bought the "reserved" lot from the Dowtins, stated publicly at the time of the sale to the prospective purchasers, including plaintiffs, that the houses were being sold fully equipped with water supply, bath-rooms, and electric fixtures. The plaintiffs purchased lot 64 from the Dowtins at the public sale, containing four acres with two houses on the land. The houses were equipped with pipes, etc., the water being used in them at the time was pumped into the houses from the springs on the lot "reserved." The deed from the Dowtins gave the right to plaintiffs to use the water from the tract marked "reserved," so long as springs shall be kept in shape or until water could be secured

on the property from the city of Asheville or other source. There is nothing wrong with the springs and water could not be secured from Asheville or sufficient supply from other sources, for the use of plaintiffs on lot 64. The Asheville water supply was not more available than when the deed to plaintiffs was made. The only pure water obtainable was from the springs on the lot "reserved." The Dowtins' deed to plaintiffs conveyed the lands and premises *with all the appurtenances thereunto belonging or in anywise appertaining.* The deed from the Dowtins to their codefendant, Presnell, for the "reserved" lot, had a condition in it that the conveyance was made subject to the right of abutting property owners to obtain water at a spring on the property until water is available otherwise. The defendant, Presnell, bought from the Dowtins with full notice of the rights of plaintiffs. The deed to plaintiffs when he purchased was on record granting *them* the water rights and referring to the recorded map showing the lot marked "reserved." The *quasi*-water system Presnell could see was in operation pumping water to lot 64 on the day of the land sale, and he heard the auctioneer announce that the lot was sold fully equipped with water supply. Any ambiguity in the terms of the grant, cotemporaneous acts and conduct of the parties, can be shown to make clear the intent. Under all the facts and circumstances of this case, plaintiffs have, by grant duly recorded, acquired easement, to the extent contemplated, in the *quasi*-water system.

The acts and conduct of the parties lead to but one interpretation of the grant, under such circumstances: plaintiffs' *quasi*-water system cannot be disconnected from the springs or rendered unfit for use. It is a matter of common knowledge that land for residential purposes on a hill in a mountainous country is of little value for home purposes without water in easy reach. The lot with the houses on it was sold with the distinct representation by the auctioneer that plaintiffs should have the same, equipped with water supply and they were equipped at the time of the sale. The deed to plaintiffs, by language and implication, gives the right to the *quasi*-water system, and this construction is bourne out by the cotemporaneous acts and conduct of the parties. It is important in these land sales that the representations of the agents and auctioneers in the scope of their employment to innocent and confiding purchasers who rely on them and make contracts be fulfilled.

For the reasons given there is error in the judgment sustaining the motion of defendants for judgment as in case of nonsuit.

Reversed.

RICHMOND GUANO COMPANY v. H. H. WALSTON, JR., AND BRITTON HARRELL.

(Filed 27 May, 1926.)

Bills and Notes—Guarantors of Payment—Enlarged Liability—Endorsers—Title—Due Course.

While an endorsement upon negotiable note "Demand, notice and protest waived, payment guaranteed by the undersigned," is a guaranty of payment by those over whose signature it appears, and enlarges their liability under the law merchant, it is sufficient under our statute to pass title to the transferee, who, taking before maturity and without notice, acquires the instrument free from the equities that may be binding upon the original parties thereto. C. S., 3017, 3018, 3019, 3020, 3044.

APPEAL by defendants from *Cranmer, J.*, and a jury, at November Term, 1925, of WILSON. No error.

The necessary facts will be considered in the opinion.

Bryce Little, W. A. Finch, and Manning & Manning for plaintiff.
Connor & Hill for defendants.

CLARKSON, J. Plaintiff brought an action against the defendants, who gave a negotiable note 23 February, 1921, to Tomlinson Guano Company, due 1 November, 1921, with interest from 1 January, 1921. Credit $150, 22 November, 1921. Plaintiff claimed it was the owner in due course. As a defense to the note, defendants allege that they stored with Tomlinson Guano Company, or Tomlinson & Co., Inc., 79½ bales of cotton upon certain terms to be sold and applied on the note. This was not recited in the note. They further allege that Tomlinson Guano Company, or Tomlinson & Co., Inc., were one and the same concern. Both are insolvent and have been adjudged bankrupts. The defendants further allege "that without their knowledge, consent and acquiescence, the said 79½ bales of cotton were sold and the proceeds converted to the use of Tomlinson & Co., Inc., or Tomlinson Guano Company, and was not applied to the discharge of the notes to secure which the same were deposited."

The plaintiff's evidence was to the effect that the note was purchased 15 March, 1921, for full value, before maturity and without notice of any equities. We do not discuss the evidence introduced by defendants and that excluded by the court below tending to fix plaintiff with notice so that defendant's equities could be considered. We think the court below made no error in excluding that to which exception was taken. We think the evidence on this aspect not sufficient to be submitted to the jury. *We pass on what we consider the main assignment of error.*

The note, with all endorsements, is as follows:

"$6,000.00. Wilson, N. C., 23 February, 1921.

1 November, 1921, after date, we promise to pay to the order of Tomlinson Guano Company six thousand dollars at 6% int. from 1 January, 1921. Value received.

H. H. WALSTON, JR. (Seal.)
BRITTON HARRELL. (Seal.)

No. 82.

Demand, notice and protest waived; payment guaranteed by the undersigned.

TOMLINSON GUANO COMPANY.
N. L. Finch, Partner.

Pay to the order of
Tomlinson Guano Company,

For collection and return of proceeds to Powhatan Chemical Company, Richmond, Va.

(This latter endorsement was stricken out, lines drawn through after it was recalled in February, 1922.)

Cr. 11/22/21 by cash, $150.00."

The note is negotiable in form. Defendants contend that the note was not negotiated in accordance with the law of merchants or the negotiable instrument law. The language on the note being *"Demand, notice and protest waived, payment guaranteed by the undersigned,"* the plaintiff contends it is an endorsement with an enlarged liability.

The defendants contend the language only showed a guarantee and nothing more, and does not constitute commercial negotiation in due course.

If the language makes plaintiff a holder in due course, it takes same free from equities and defenses which the maker has against the payee. The cases of *Gillam v. Walker,* 189 N. C., 189, and *Dillard v. Mercantile Co.,* 190 N. C., 225, cite C. S., 3044 on a different aspect.

We can find no decision bearing on the question in this State. We must look elsewhere. The language *"payment guaranteed by the undersigned,"* would indicate, as contended by defendants with much force, only a guarantee and not a commercial negotiation in due course. It is contended that especially is this true from the fact that the guarantor had cotton in its possession of defendants to sell, pledged to pay this note, which would further indicate that it would not, by the language, intend to make the note such a one—in due course—as to cut off the right of defendants to have the cotton, as agreed upon, applied on the

note when sold according to the terms. This position is borne out to a great extent by *Mr. Justice Strong* in *Trust Co. v. National Bank,* 101 U. S. Reports, p. 68 (October Term, 1879); the gist of this opinion is: "The defenses of the maker of a promissory note can be cut off only by the payee's endorsement of it before maturity. A guaranty written upon it by the payee is not such an indorsement." The learned *Justice* says at p. 70: "That a guaranty is not a negotiation of a bill or note as understood by the law merchant, is certain."

We have given this case thorough consideration, appreciating the hardship on defendants, but, under our negotiable instrument law and the great weight of authorities, we must hold that the writing on the negotiable note is an indorsement in due course, so far as to transfer to and vest title in the plaintiffs, and the guarantee is "An indorsement with an enlarged liability." Negotiable papers being so important to the life of trade that the decision of *Mr. Justice Strong* has not been to any extent followed, and numerous states of the nation have, to a great extent, passed uniform negotiable instrument laws. In this State, C. S., ch. 58 (1899), "Negotiable Instruments," sec. 3014, is as follows:

"An indorsement may be either in blank or special, and it may also be either restrictive or qualified or conditional."

"C. S., 3017. An indorsement is restrictive which either (1) prohibits the further negotiation of the instrument; or (2) constitutes the indorsee the agent of the indorser; or (3) vests the title in the indorsee in trust for, or to the use of, some other person. But the mere absence of words implying power to negotiate does not make an indorsement restrictive."

C. S., 3018. Effect of restrictive indorsement; rights of indorsee.

C. S., 3019. Qualified indorsement.

C. S., 3020. Conditional indorsement.

C. S., 3044. "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."

The language of these sections indicate that to make an indorsement, as in the present case, restrictive, some language must indicate it or the consequence is that the indorsement is with an enlarged liability. The weight of authorities, whether under negotiable instrument laws or by the law merchant, take this view.

The case of *Ireland v. Floyd,* 42 Okla., 609, which followed the case in U. S. Supreme Court, was overruled in *Mangold v. Utterback,* 54 Okla., p. 655. L. R. A., 1917-B., p. 368. *Mathews, J.,* for a unanimous Court in overruling the *Ireland case,* not only puts it on the better reasoning and greater weight of authority, but also on Oklahoma

Statute, sec. 4113 (Laws 1910), which is the exact language of C. S., 3044, *supra.* The Court says, at p. 661: "It will be observed from section 4113 that the tendency of the law, when the status of a party who places his name upon the back of a negotiable instrument is under consideration, is to resolve all doubtful cases towards holding the same to be a commercial indorsement in due course. This rule is founded upon commercial necessity. The unshackled circulation of negotiable notes is a matter of great importance. The different forms of commercial instruments take the place of money. To require each assignee, before accepting them, to inquire into and investigate every circumstance bearing upon the original execution and to take cognizance of all the equities between the original parties, would utterly destroy their commercial value and seriously impede business transactions." This decision was rendered 11 January, 1916.

In *Douglass v. Brown,* 56 Okla., 6, 155 Pac. Rep., 887, rendered 29 February, 1916, the facts were as in *Mangold v. Utterback, supra.* The transfer and execution of the note, it will be noted, took place prior to the taking effect of the Negotiable Instrument Act (1910). The unanimous Court held the note was subject to equities and defenses and cites the *Ireland case.*

In *First Nat. Bank v. Cummings,* 69 Okla., 216, decided 26 March, 1918, the principle in the *Mangold case, supra,* was affirmed, and *Ireland v. Floyd, supra,* overruled, the Court going back to *McNairy v. Farmers National Bank,* 33 Okla., p. 1, rendered 14 May, 1912, which held the writing constituted an indorsement with an enlarged liability.

In *Delk v. City National Bank,* 85 Okla., 238, 205 Pac., 753, *Bank v. Cummings* is approved and it is stated that the *Ireland case, supra,* was overruled by *Bank v. Cummings.* After various and sundry changes, Oklahoma held that the indorsement is an enlarged liability.

Lumpkins, J., in a well thought out opinion, with numerous authorities, in *Hendrix v. Bauhard,* 138 Ga., p. 473, 75 S. E., 588, held: "Where the payees in a promissory note payable to order wrote on the back of it the words 'For value received, we hereby warrant the makers of this note financially good on execution,' and signed their names after such entry, and negotiated and delivered the note for value, such indorsement was sufficient to transfer title to the note; and if made before maturity to a bona fide purchaser for value, without notice of any defense, he would be protected from any defenses which the maker might have, except those expressly allowed by statute." *Lowry National Bank v. Maddox* (1908), 4 Ga. App., 329, 61 (S. E., 296), an early decision, is not wholly in accord with the *Hendrix case.* Reliance in that case is placed upon *Central Trust Co. v. First National Bank,* 101 U. S., *supra,* this case is disapproved in the *Hendrix case.*

The Massachusetts cases seem to be in conflict on the question.

"The fact that an indorsement includes a guaranty or is in form a guaranty does not prevent the passing of title, such a writing according to the weight of authority amounts to an indorsement which transfers title to the note." 21 A. L. R., 1375. Digesting the cases—Anno. Cases, 1913 D., 688; 36 L. R. A., 232.

1 Joyce on Com. Papers (2 ed.), sec. 666, says: "The determination of the question whether equities and defenses between original parties are available against a bona fide holder in case of contract of guaranty, must rest largely upon the construction placed upon that contract in the different jurisdictions, and where it is determined that a payee or holder, who writes above his indorsement of negotiable paper a guaranty of payment, stands in the position of an indorser with an enlarged liability, such a transfer constitutes an indorsement of the paper."

Brannan's Negotiable Inst. Law, Anno. (14 ed.), 1926, sec. 38, p. 323, says: "Where the payee of a negotiable note indorses it, 'I hereby guarantee the payment of the within note and waive demand and notice of protest,' he is liable not as a mere guarantor, but as an indorser with an enlarged liability. The N. I. L. (Negotiable Instrument Law) was not cited on this point. *First National Bank v. Baldwin,* 100 Neb., 25, 158 N. W., 371. See other cases under sections 21, 34, 63."

The decisions years ago on this important question were chaotic. In more recent years, and especially since the passage among the states over the nation of the negotiable instrument laws to make the laws more uniform, the decisions are more in accord and the great wealth hold that the indorsement, as in the present case: "Demand, notice and protest waived, payment guaranteed by the undersigned," is an indorsement with an enlarged liability. The language makes the holder one in due course and the instrument is taken free from equities and defenses which the maker has against the payee. The great importance in commerce and trade has forced uniform legislation in regard to negotiable instruments, and the courts have now, with few exceptions, held that the holder, under the facts in the present, is one in due course with enlarged liability.

"The Illinois Act adds, 'and the addition of the words of assignment or guaranty shall not negative the additional effect of the signature as an indorsement, unless otherwise expressly stated.'" *Chance v. Hudson,* 233 Ill. App., 542.

Dunham v. Peterson, 5 N. D., 414, holds that when the payee of negotiable note transfers it by indorsing thereon a guaranty of payment, the purchaser is an indorsee, within the rule protecting an innocent purchaser of such paper for value, and before maturity, against defenses good between the original parties. Full authorities are cited in the opinion.

The indorsement is an enlarged liability. This is now held to be so by the great weight of authorities, both by the law merchant and the Negotiable Instrument Laws. The endorsement in some cases are "I hereby guarantee the payment of the within note," and others are as in the present case with the addition *"Demand, notice and protest waived,* payment guaranteed by the undersigned." *Myrick v. Hasey* (1847), 27 Me., 9, 46 Am. Dec., 588; *Robinson v. Lair* (1870), 31 Iowa, 9; *Kellogg v. Douglas County Bank* (1897), 58 Kan., 43, 62 Am. St. Rep., 596, 48 Pac., 587; *Helmer v. Commercial National Bank* (1890), 28 Neb., 474-44 N. W., 482; *Bank of Woodstock v. Kent,* 15 N. H., 579; *Nat. Ex. Bank v. McElfish Clay Mfg. Co.,* 48 W. Va., 406, 37 S. E., 541; *First Nat. Bank v. Shaw* (1909), 157 Mich., 192; 133 Am. St. Rep., 342; 121 N. W., 809; *Elgin City Bank Co. v. Zelch* (1894), 57 Minn., 487, 59 N. W., 544; *Mullen v. Jones,* 102 Minn., 72, 112 N. W., 1048. The states that *now* hold that the indorsement passes title free from defenses, are: Georgia, Iowa, Maine, Michigan, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, and many others.

The reason of the conflict and chaos we think perhaps the question by the law merchant made the matter doubtful, although the weight of authorities do not so indicate; but, under our Negotiable Instrument Act, we think it clear that the indorsement carried the title and the holder was one in due course with an enlarged liability. For the reasons given, there is

No error.

JENNY FLEETWOOD WESTFELDT ET AL. v. CHRISTINE REYNOLDS ET AL.

(Filed 27 May, 1926.)

1. Wills—Bequests—Cumulative Bequests.

Where a testator by will in different items or writings or codicil, bequeaths moneys in different amounts, they are to be construed as cumulative and not substitutional, unless a contrary intent is manifested.

2. Wills—Interpretation—Devises—Revocations—Statutes.

To effectuate the intent of the testatrix, each clause of her will will be presumed to have been intended to take effect under a reasonable interpretation, and where in one clause or part there is a gift to designated beneficiaries and later a general disposition to them of the whole of the testatrix's property, the property conveyed by the special devise will pass thereunder rather than under the universal disposition, and where the specific devise is of the fee of the lands, the beneficiary will take accordingly. C. S., 4162.

3. Estates—Contingent Limitations—Vesting of Estates—Statutes.

Where at the time of the execution of her will the testatrix has two nieces, the special objects of her bounty, J. and L., the latter an invalid, and gives them her property by will, one-half to each, both unmarried, and who survived the testatrix, J.'s half to "revert" to L. upon her death, and should L. die "without heirs" her part to "go over" to the children of P.: *Held*, the provision as to the time of the "reversion" of J.'s half of the property has reference to the death of J. in the testatrix's lifetime, and thereupon the property vests in them, one-half each, it appearing also as to L. that, under the terms of the will and existing circumstances, it was the testatrix's intent.

4. Same.

Where there is ambiguity in a will as to the vesting of an estate devised for life with contingent limitation over, shall be at the death of the testatrix or that of the first taker, under the principle that the law favors the early vesting of estates, the former will be taken; and where it clearly appears from the terms of the will and surrounding circumstances that this was the intent of the testatrix, it will not be affected by C. S., 1737, by which a contingent limitation depending upon the dying of a person without heir, etc., is to vest at the death of such person.

ADAMS and CONNOR, JJ., dissent.

APPEAL by defendants from *McElroy, J.*, at Chambers in Asheville, 12 April, 1926, from HENDERSON.

Civil action to construe the will of Jenny Westfeldt, deceased, submitted on an agreed statement of facts.

The will consists of three paper-writings, executed at different times, and contains the following material provisions:

"1. Rugby Grange, 22 December, 1914. If anything happens to me take care of Lulie and Jenny and let my portion of the Rugby Grange property go to them equal parts for each."

"2. Frankfort, Ky., 22 May, 1915, and 30 September, 1915. I leave to Lulie Westfeldt, daughter of Patrick Westfeldt, the half of my property and to Jenny Fleetwood Westfeldt the other half—to revert to Lulie Westfeldt in case of Jenny Fleetwood Westfeldt's decease—and should Lulie Westfeldt die without heirs the property to go over to Overton Westfeldt Price's children—I leave to Christine Price $1,000 and to Christine Reynolds $1,000."

(P. S.) "Dear Jenny F. carry out my wishes."

"3. January 25 (1916 or later). I want $3,000 paid to Christine Reynolds and $3,000 to my sister Christine W. Price. And if Hunt's gold mine is a success and takes good care of Jenny F. Westfeldt the rest of my property I leave to Lulie Westfeldt. If the gold mine proves not a success I leave my property as I wrote before."

Hunt's gold mine proved not a success.

The testatrix left sufficient property to pay all specific bequests or legacies, with considerable property remaining for distribution under the remaining provisions of her will.

Jenny Fleetwood Westfeldt and Lulie Westfeldt were favorite nieces of the testatrix; the former at the time of the execution of the will was 48 years of age and unmarried, the latter 20 years of age, unmarried and a sufferer of infantile paralysis. Both survived the testatrix.

His Honor held (1) that the specific bequests of $1,000 and $3,000 to Christine Reynolds and the specific bequests of $1,000 and $3,000 to Christine Price are cumulative, giving each $4,000; (2) that Jenny Fleetwood Westfeldt and Lulie Westfeldt each take a one-half undivided interest in fee in the Rugby Grange property under the first devise; and (3) that Jenny Fleetwood Westfeldt is the owner in fee of a one-half undivided interest in the remainder of the estate by virtue of the second devise; and that under the same devise Lulie Westfeldt takes a defeasible fee in the remaining one-half undivided interest in the estate, with limitation over to the children of Overton Westfeldt Price, should the said Lulie Westfeldt die without issue surviving her.

From the judgment entered in accordance with the above rulings, Lulie Westfeldt and the children of Overton Westfeldt Price appeal, assigning errors.

Jones, Williams & Jones for plaintiffs.

Bourne, Parker & Jones and V. S. Starbuck for defendant, Lulie Westfeldt.

George H. Wright for defendants other than Lulie Westfeldt.

STACY, C. J. The will now submitted for construction was before the Court on an issue of *devisavit vel non* at the Fall Term, 1924, and is set out in full in 188 N. C., 702, with a valuable opinion by *Associate Justice Clarkson,* upholding the validity of the several paper-writings as the last will and testament of Jenny Westfeldt, deceased.

The appeal presents four separate and distinct questions. They will be considered *seriatim.*

First, as to whether the specific bequests of $1,000 and $3,000 to Christine Reynolds and the specific bequests of $1,000 and $3,000 to Christine Price are substitutional or cumulative:

It is generally held that where two bequests of quantity, of different amounts, are given to the same person in the same instrument, or by different instruments, as by a will in the one case and a codicil in the other, they are to be considered as cumulative rather than substitutional, and the beneficiary is entitled to receive both (40 Cyc., 1560), though

this rule must give way to the controlling rule of interpretation, that the intent of the testator, or testatrix as the case may be, is to govern, provided it does not conflict with the settled rules of law. In fact, the discovery of the intention of the testator, as gathered from the four corners of the will, is the cardinal principle in the interpretation of testamentary instruments, to which all other rules must bend. *Witty v. Witty,* 184 N. C., 375.

It is the approved position, so far as examined, that where two bequests, as here, are given *simpliciter,* that is, as plain gifts without any reason or motive assigned therefor, to the same person, by different testamentary instruments, though forming parts of the same will, the bequests are to be considered as cumulative, especially if the amounts are unequal. 40 Cyc., 1561.

In deference to this established rule of construction and in the absence of any contrary testamentary intent appearing from the will or the circumstances of the case, we are constrained to believe that his Honor correctly held, in keeping with the authorities on the subject, that the specific bequests to Christine Reynolds and Christine Price are cumulative, rather than substitutional. *Stowe v. Ward,* 10 N. C., 604.

Second, as to whether Jenny Fleetwood Westfeldt and Lulie Westfeldt each take a one-half undivided interest in fee in the Rugby Grange property under the first devise:

It is the position of the defendants that the first devise, made at Rugby Grange, was revoked by the second and subsequent devise, executed at Frankfort, Ky. We do not assent to this interpretation. *In re Wolfe* 185 N. C., 563. A later will does not revoke an earlier one, without express words of revocation, unless the two are so inconsistent as to be incapable of standing together. *In re Venable,* 127 N. C., 344.

Here, the first devise is specific and has reference to a single piece of property, which is only a small part of what the testatrix owned. It may therefore stand as an exception to the general devise contained in the second paper-writing, thus giving effect to both provisions. It is the duty of the court to reconcile the various clauses of a will, if this can be done, as the maker is presumed to have intended that all should take effect. *Pilley v. Sullivan,* 182 N. C., 493; *Dalton v. Scales,* 37 N. C., 521; *Edens v. Williams,* 7 N. C., 27; Underhill on Wills, sec. 359. And where a general disposition of the whole of the testator's property is preceded by specific devise of only a small part, it is held that the former must be understood as impliedly subject to the latter, and the property conveyed by the special devise will pass thereunder rather than under the universal disposition. *Rice v. Saterwhite,* 21 N. C., 69; *Fraser v. Alexander,* 17 N. C., 348; *Dalton v. Scales, supra.*

It follows, therefore, that Jenny Fleetwood Westfeldt and Lulie Westfeldt each take a one-half undivided interest in fee (C. S., 4162) in the Rugby Grange property under the first devise.

Third, as to whether Jenny Fleetwood Westfeldt takes a one-half undivided interest in fee in the remainder of the estate by virtue of the second devise:

We now come to the first real battleground of debate between the parties, but from the reasoning in all the decisions on the subject, the question would seem to be involved in no serious doubt as to its proper solution. Jenny Fleetwood Westfeldt survived the testatrix. The limitation that her interest under the second devise is "to revert to Lulie Westfeldt in case of Jenny Fleetwood Westfeldt's decease," has reference to the death of Jenny Fleetwood Westfeldt during the lifetime of the testatrix. This not having occurred, the devise to Jenny Fleetwood Westfeldt, under the second clause, became absolute upon her survival of the testatrix. *Goode v. Hearne,* 180 N. C., 475; *Bank v. Murray,* 175 N. C., 62.

It is the recognized rule of testamentary construction, here and elsewhere, that, in the absence of a contrary intention clearly expressed in the will, or to be derived from its context, read in the light of the surrounding circumstances, when a defeasible estate is created by devise, with no definite time fixed for the same to become absolute, and the alternative is either to adopt the time of the testator's death, or the death of the devisee, at which the estate may fairly be relieved of the contingency and become absolute, the time of the testator's death will ordinarily be adopted, unless prohibited by some statutory provision, as this makes for the early vesting of estates, which the law favors. *Goode v. Hearne, supra; Whitfield v. Douglas,* 175 N. C., 46; *Bell v. Keesler, ibid.,* 526; *Hilliard v. Kearney,* 45 N. C., 221. *Robertson v. Robertson,* 190 N. C., 558.

Jenny Fleetwood Westfeldt having outlived the testatrix, we are of opinion that his Honor correctly held that she takes a one-half undivided interest in fee in the remainder of the estate by virtue of the second devise.

Fourth, as to whether Lulie Westfeldt, under the second devise, takes a defeasible fee in the remaining one-half undivided interest in the estate, with limitation over to the children of Overton Westfeldt Price, should the said Lulie Westfeldt die without issue surviving her:

This brings us to the most serious question presented by the appeal.

What has already been said in regard to the interest arising to Jenny Fleetwood Westfeldt under the second devise, would seem to apply with equal force to the interest given to Lulie Westfeldt under the same

devise, unless the general rule of interpretation, as above stated, is affected by C. S., 1737, which provides: "Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) living at the time of his death, or born to him within ten lunar months thereafter, unless the intention of such limitation be otherwise, and expressly and plainly declared in the face of the deed or will creating it."

It may well be doubted as to whether the second devise to Lulie Westfeldt, and upon her dying without heirs, the property to go over to the Price children, is such a "limitation" as brings it under the operation of the statute (*Starnes v. Hill,* 112 N. C., 1), requiring that the words "die without heirs" shall be held and interpreted as referring to the death of Lulie Westfeldt without issue living at the time of her death. *Patterson v. McCormick,* 177 N. C., 448. But omitting for the moment any definite decision of this question, we think a contrary intent clearly appears on the face of the will.

In making the disposition now under consideration, the testatrix divided her property equally between Lulie Westfeldt and Jenny Fleetwood Westfeldt who were the primary objects of her bounty. As we have seen, she gave Jenny her share in fee. She provided that Jenny's half should go to Lulie in case Jenny should die before the will became effective, having in mind, we apprehend, that Jenny was much older than Lulie, and therefore more likely to predecease her, or at least it was more likely that she might not have issue, for the testatrix makes no corresponding alternative disposition in favor of Jenny. It clearly appears, by implication, we think, that the testatrix wanted Lulie's children, if any she had, to take their mother's share in case she also died during the lifetime of the testatrix. And only in the event of Jenny's death and Lulie's death without issue in the lifetime of the testatrix, was "the property" to go over to the Price children. It nowhere appears that the testatrix intended to give Lulie an estate in the property of less dignity than Jenny's. On the other hand, in several expressions, she apparently prefers Lulie to Jenny, this no doubt because of her affliction. In the third devise, she says: "If Hunt's gold mine is a success and takes good care of Jenny F. Westfeldt the rest of my property I leave to Lulie Westfeldt. If the gold mine proves not a success (and it did not), I leave my property as I wrote before." Here, it will be observed that upon a contingency which concerns only Jenny,

and not the Price children, the testatrix leaves to Lulie, not the half of her property, but the whole of it without qualification. It was her desire, as here expressed, to give the whole of her property to Lulie, to the exclusion of all others, if Jenny were provided for out of Hunt's gold mine. And if the gold did not prove a success, as she hoped it would, she then leaves her property "as she wrote before," showing clearly, we think, an intention to deal with Lulie no less generously than she had dealt with Jenny. The two were the primary objects of her bounty.

We perceive the devise to Lulie Westfeldt, under the second clause of the will, to be of a one-half undivided interest in the remainder of the estate in fee, intended to take effect at the death of the testatrix, and in the alternative: (1) To Lulie Westfeldt if living; (2) to her issue if any, if she be dead; (3) to the Price children if Lulie Westfeldt be dead without issue surviving. *Bowen v. Hackney,* 136 N. C., 187; *Watson v. Smith,* 110 N. C., 6.

It follows, therefore, as Lulie Westfeldt survived the testatrix, that she takes the remaining one-half undivided interest in the estate in fee simple under the second devise.

Our present position in no way conflicts with what was said in *Rees v. Williams,* 165 N. C., 201, strongly relied on by the Price children, for in that case there were terms in the devise which served to bring the case within the purview and operation of C. S., 1737, and there were also special terms in the will, much relied upon in the opinion, which went to show that the testatrix did not intend for the estate to vest at the time of her death.

Nor is the decision in *Patterson v. McCormick,* 177 N. C., 448, at variance with what is said above. Conversely, the interpretation placed upon the second devise in the will of Jenny Westfeldt, deceased, is supported, in tendency at least, by the following authorities: *Dupree v. Daughtridge,* 188 N. C., 193; *Goode v. Hearne,* 180 N. C., 475; *McDonald v. Howe,* 178 N. C., 257; *Bell v. Keesler,* 175 N. C., 525; *Bank v. Murray, ibid.,* 62; *Whitfield v. Douglas, ibid.,* 46; *Bank v. Johnson,* 168 N. C., 304; *Murchison v. Whitted,* 87 N. C., 465; *Burton v. Conigland,* 82 N. C., 100; *Davis v. Parker,* 69 N. C., 271.

The judgment will be modified in accordance with this opinion, and, as thus modified, it will be affirmed.

Modified and affirmed.

ADAMS and CONNOR, JJ., dissent.

JAMES L. RESPESS ET AL. v. REX SPINNING COMPANY.

(Filed 27 May, 1926.)

1. Corporations—Contracts — Stockholders — Directors — Principal and Agent—Ratification.

Where several of the stockholders of a corporation agree with public accountants to make an audit of the corporation's books, submit the proposition to a meeting of the stockholders who approve, the audit is made and the corporation receives the audit, the objection is untenable that the directors had not passed thereon, and the corporation is bound to the payment of the price of the audit.

2. Same—Meetings—Majority Vote.

Only a majority of the stockholders at a meeting lawfully held is necessary to ratify an act of several stockholders in employing public accountants to audit the books of the corporation.

3. Principal and Agent—Ratification Equivalent to Prior Authority.

The act of ratification by the principal of one who has assumed to act as his agent, relates back, and is equivalent to a prior authority given him to do the act.

4. Public Accountants—Statutes—Criminal Law—Actions—Defenses.

Our statute requiring public accountants under a penalty to qualify and take out a license in this State, is for the conduct of this business therein, and does not embrace within its terms an isolated instance of the employment of a firm of certified public accountants licensed in another state, who send their representative here to acquire information from the books of a corporation for a statement of its condition to be made out in the state in which the auditing concern is authorized to do business.

5. Same—Public Policy—Vocations.

While an accountant "actively engaged and practicing accounting as a principal vocation," is required to obtain a license therefor in this State, a mere isolated instance is not sufficient to come within the terms of the statute.

6. Statutes—Public Policy—Common-Law Right—Interpretation.

While a contract that contravenes a public policy declared or necessarily implied by statute, observing no distinction as between this and the imposition of a penalty on its violation, the statute will be strictly construed in favor of the alleged offender as being in derogation of a common-law right.

7. Corporations—Stockholders—Resolutions—Parol Evidence.

The minutes of the meeting of the stockholders of a corporation are the best evidence of a resolution upon the complete subject-matter, and in the absence of fraud or mistake, may not be varied or contradicted by parol evidence, or explained contrary to the plain meaning of the words used therein.

8. Contracts—Consideration—Corporations—Auditors.

A contract to audit the books of a corporation is not necessarily unenforceable because the corporation may not have been benefited thereby, if the auditors have made an examination of its books and reported to the corporation the results thereof.

APPEAL by defendant from *Webb, J.*, at November Term, 1925, of MECKLENBURG.

The plaintiffs, copartners doing business as public accountants under the name of Respess & Respess, brought suit against the defendant, a corporation, to recover for services rendered in auditing and reporting the condition of the defendant's business. On the trial the plaintiffs offered in evidence the following resolution appearing in the minutes of a regular annual meeting of the stockholders of the defendant held on 6 February, 1923: "Mr. W. D. Adams offered the following resolution in writing, to wit: Resolved that Allen J. Graham, W. C. Wilkinson and W. D. Adams be authorized to employ auditors to examine the books of the company covering the period since acquisition by them of stock in the corporation. (Signed) W. D. Adams, J. H. Mayes."

After the introduction of other record evidence and the examination of several witnesses this verdict was returned:

1. Is the defendant indebted to the plaintiffs? Answer: Yes.

2. If so, in what amount? Answer: $4,266.66.

Judgment for the plaintiffs. Appeal by defendants on assignments of error appearing in the opinion.

Cansler & Cansler and John M. Robinson for plaintiffs.

Hugh M. McAuley and Stewart, McRae & Bobbitt for defendant.

ADAMS, J. Two propositions constitute the basis of the defendant's motion for nonsuit: (1) The resolution purporting to authorize the employment of auditors was not adopted or approved by the directors, but by the stockholders in a meeting at which all the stockholders were not present or represented. (2) When they made the audit the plaintiffs had not complied with the law prescribed for public accountants. In our opinion neither of them assigns sufficient cause for dismissing the action.

With respect to the first we do not think it necessary to enter into a discussion of the duties devolving respectively upon the stockholders and the directors of a corporation. Pursuant to the resolution adopted by the stockholders in their regular annual meeting the plaintiffs were employed to audit the defendant's books; they made a detailed audit covering the time elapsing between 1 January, 1920, and 31 December, 1922; they presented and explained their audit to the stock-

holders in a meeting held 29 June, 1923, upon notice duly given; and their report was "accepted as information" by the stockholders. With the resolution upon the minutes, this appropriation of the plaintiffs' audit was a recognition of the alleged agreement with the plaintiffs; it was a ratification by the stockholders even if the directors had not authorized the committee to act in the premises. As the contract was not *ultra vires* it was not beyond the power of corporate ratification. By subsequent recognition it became as effectual and binding as if the committee had had undisputed power to bind the defendant. This on the principle that the defendant could not accept the benefit of the report and repudiate the agreement under which the report was made, or profit by the agreement and repudiate the authority of the agent by whom it was made. The ratification of an act by one who assumes to be an agent relates back, and is equivalent to a prior authority. 7 R. C. L., 662 (663), and cases cited; *Greenleaf v. R. R.*, 91 N. C., 33; *Taylor v. Navigation Co.*, 105 N. C., 484; *Starnes v. R. R.*, 170 N. C., 222; *Morris v. Basnight*, 179 N. C., 298. The absence of some of the stockholders did not impair the force of the resolution. We have held 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. *Hospital v. Nicholson*, 189 N. C., N. C., 44; *Cotton Mills v. Comrs.*, 108 N. C., 678.

Now, as to the defendant's second proposition. The plaintiffs are public accountants under the laws of the State of Georgia; but neither the plaintiffs nor H. T. Amason, who was assigned as their employee to do the work in the defendant's mill, had a public accountant's certificate as required by the laws of North Carolina. C. S., 7008 *et seq.* Section 7023, provides that if any person shall practice in this State as a certified public accountant without having received such certificate he shall be guilty of a misdemeanor; and section 7020, defines a public accountant as one "actively engaged and practicing accounting as his principal vocation during the business period of the day." The Revenue Act, Schedule B, imposed on public accountants the sum of five dollars as a license tax for the privilege of carrying on their business and made it unlawful for any person to carry on any business for which a license was required without having the license or a duplicate thereof in his actual possession at the time. Laws 1921, ch. 34, secs. 31, 88; Laws 1923, ch. 4, secs. 29, 95. The defendant contends that in breach of these statutes the plaintiffs in making the audit practiced the profession or carried on the business of public accountants in this State and hence cannot force the defendant to comply with its executory agreement to pay for their services. It is no doubt true that as a rule a contract will not be enforced if it rests upon a consideration which contravenes good

morals, public policy, or the common or statute law. In *Sharp v. Farmer,* 20 N. C., 255, it is said: "After a vast number of cases upon the subject, it seems to be now perfectly settled, that no action will be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute"; and in *Covington v. Threadgill,* 88 N. C., 186, it was held that the courts of this State have never recognized any distinction in this regard between the effect of statutes declaring certain acts to be unlawful and the effect of those imposing a penalty. Also in *Courtney v. Parker,* 173 N. C., 479: "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." See, in addition to the cases there cited: *Blythe v. Lovingood,* 24 N. C., 20; *Ramsay v. Woodard,* 48 N. C., 508; *Ingram v. Ingram,* 49 N. C., 188; *Griffin v. Hasty,* 94 N. C., 438; *Puckett v. Alexander,* 102 N. C., 95; *Randolph v. Heath,* 171 N. C., 383; *Phosphate Co. v. Johnson,* 188 N. C., 419.

In the case before us the determinative question is whether the plaintiffs in auditing the defendant's books "practiced as," or "carried on the business of," public accountants in North Carolina; and the answer must be sought in our interpretation of the statutes heretofore cited. In trying to ascertain whether a specific act is a breach of a statute we must consider, not only the language, but the scope and purpose of the statute and the object to be secured.

To practice a profession or to carry on a business usually signifies the regular pursuit of such profession or business as an occupation,—to make a practice of it, or actively to engage in it customarily or habitually. This definition is not without exceptions. As the Legislature may prohibit a general practice until prescribed conditions are complied with, it may attach the same conditions to a single transaction of a kind not likely to occur otherwise than as an instance of general practice. *Collins v. Texas,* 223 U. S., 288, 56 Law Ed., 439. But this the Legislature has not done in the cited statutes, and the construction of the act of 1925 is not involved. Laws 1925, 261.

As we have said, the plaintiffs, who have their office in Atlanta, are certified public accountants under the laws of Georgia. Allen J. Graham, one of the three men named in the resolution of the stockholders, went to Atlanta, and there the alleged agreement was made. The plaintiffs then appointed H. T. Amason and three others to do certain work at the defendant's mill. At that time neither of them was a certified

accountant. They spent several weeks at the mill, prepared their audit "in the rough with pencil," and returned to Atlanta and made up their report. Amason was senior accountant; and this was all the work he did in North Carolina.

In these circumstances we are of opinion that the plaintiffs did not practice or carry on the business of certified public accountants in this State within the meaning of the statutes. To carry on the business of a public accountant or to practice as a certified public accountant is much more than is implied in the series of detached acts done by the plaintiffs' representatives in acquiring information upon which to base their report. We are the more inclined to this view because the statutes are penal and should be construed strictly against the offender and liberally in his favor. Also because the act of 1925 was evidently intended to cure the defects or omissions of former statutes. We think the motion for nonsuit was properly overruled.

The first and fifth assignments of error relate to the exclusion of evidence offered by the defendant as to the circumstances under which the resolution of 6 February, 1923, was passed,—particularly that the word "instructed" in the original draft was changed to "authorized" before the resolution was adopted, and that an opinion was expressed by some of those present as to what the resolution would mean should the former be substituted by the latter. The controversy turned on the question whether Graham, Wilkinson, and Adams had been authorized to have an audit made for the defendant or for their own exclusive benefit.

As a general rule the minutes of a corporation are the best evidence of its acts, resolutions, and proceedings; and when they are complete, when no fraud or mistake is shown, and it does not appear that there is any error or omission, parol evidence is not admissible to contradict, modify or vary the record. If the language is ambiguous or its meaning is indefinite, or if the minutes are incomplete and fragmentary parol evidence may be heard to show what was done. *Motor Co. v. Scotton,* 190 N. C., 194; 4 Fletcher's Cyclopedia, Corporations, sec. 2782 *et seq.*

The resolution is expressed in language that is clear and unambiguous. Manifestly the three designated stockholders were "authorized" to employ auditors on behalf of the corporation; they were entitled for their own benefit, without a resolution, to reliable information as to the affairs and condition of the defendant and a pretended grant of authority to inspect its books and records would have imparted no additional vigor to their legal right. *Otis-Hidden Co. v. Scheirich,* 22 A. L. R., 19 and annotation. Apart from this the proffered evidence was vague, indefinite, and unsatisfactory. In its exclusion we see no error. It follows that his Honor's instruction as to the first issue was correct and that the seventh assignment must be overruled.

The defendant contended, as the basis of its fourth assignment, that the plaintiffs' audit had been repudiated by the stockholders and offered certain minutes in proof of this contention. The defendant says that as the suit was brought to recover for services rendered if no benefit was received no recovery can be had. The consideration did not necessarily consist of any profit or advantage accruing to the defendant; any benefit to the promisor or any loss or detriment to the promisee is a sufficient consideration. *Fawcett v. Fawcett, ante,* 679. If the information disclosed was not pleasing to the defendant the plaintiffs' detriment was not for this reason any the less. The fourth assignment is therefore overruled.

To the other exceptions we have given our careful attention and have found them to be without merit.

There is no reversible error in the record.

No error.

F. L. POTTER, ADMINISTRATOR OF C. F. GRESHAM, DECEASED, MARY S. GRESHAM, E. L. THOMAS, AND WIFE, BARBARA THOMAS, ANNA WALLER, ELLEN CARROLL, MAGGIE HINES, AND EVA BOSTIC v. J. S. MILLER AND R. E. WHITEHURST, TRUSTEE.

(Filed 27 May, 1926.)

Deeds and Conveyances—Covenants—Warranty—Equity — Rescission—Cancellation—Evidence—Damages—Contracts—Fraud and Mistake.

Where a grantee has accepted a deed to lands, with full knowledge of an outstanding life estate, but containing a warranty and covenants against the claims of other persons, there being no evidence of fraud or mistake that would vitiate the conveyance, the grantee must abide by the plain and unambiguous terms of the deed, and is not entitled to the equitable relief of rescission and cancellation, or damages as for a breach of covenants and warranty. The grantee must rely on the contract, the covenants in the deed.

APPEAL by defendants from *Bond, J.,* and a jury, at January Term, 1926, of DUPLIN. New trial.

The necessary facts are: On 30 December, 1919, the defendant, J. S. Miller, and wife executed and delivered to C. F. Gresham (now dead and F. L. Potter is his administrator), and E. L. Thomas, a deed conveying certain tracts of land in Duplin County, N. C., with the following covenants: "And the said parties of the first part do covenant to and with the said parties of the second part, their heirs and assigns, that they are seized of said premises in fee and have right to convey in fee simple; that the same are free and clear from all encumbrances,

and that they do hereby forever warrant and will forever defend the said title to the same against the claims of all persons whomsoever."

This deed was duly recorded in register of deeds office for Duplin County. The consideration was $4,000. Gresham and Thomas paid cash $900, open note for $100 and the remainder of the purchase money was secured by a deed in trust to R. E. Whitehurst—5 notes in the sum of $600 each with interest, each falling due each successive year for five years. This deed in trust was duly recorded.

The plaintiffs allege "that at the date of the execution of the deed as herein set out the said J. S. Miller did not have a fee-simple title to the lands described therein that the same was not free from encumbrances, that he was not seized of the same in fee simple, as he well knew, that one O. W. Quinn was in possession of the same, and is still in the possession of the same, for one Mrs. Hannah Scott, who then was and still is the lawful and rightful owner of a life estate in the said lands, and is in the use and occupation of the same, and legally entitled to use and occupy the same, and the said Miller promised to secure the said life estate, and put the said Gresham and Thomas into the possession of the same, and relying upon his promise paid the purchase money as hereinbefore set out, but the said J. S. Miller has failed and refused to keep his promise, and has never put the said Gresham and Thomas into the possession of the said lands."

C. F. Gresham left a widow and children who are parties plaintiff—his only heirs at law.

The plaintiffs further allege that the covenants were false and untrue. "That by reason of the said J. S. Miller's false covenants in said deeds as hereinbefore set out, and his representations as set out in this complaint, the said C. F. Gresham and E. L. Thomas were greatly damaged, to wit, in the sum of four thousand dollars." That defendants are threatening to make sale to their irreparable injury. That they have suffered great damage by reason of the false representations of the said J. S. Miller in the sum of $4,000. "Wherefore the plaintiffs pray that they recover of the defendants the sum of four thousand dollars damages, that the defendants be restrained from making said sale, that the said mortgage and deed be canceled, and that the defendant, J. S. Miller, be required to pay to the plaintiffs the purchase money expended by them, and for general relief."

The defendants admit the material allegations and allege that the fact of an existing life estate was left out of the deed by mutual mistake. Further—"That the said Miller would satisfy the life tenant as to rent during her tenure, either by a purchase of said life estate for the benefit of the plaintiffs herein or by payment of rent to said life tenant so long as said estate continued." That plaintiffs knew of the outstanding life

estate and they so dealt, and they were in no way deceived and no misrepresentations with reference to the same were made. Defendant, J. S. Miller, is amply solvent to respond to damages. That the whole transaction was in good faith. That "the said defendant, Miller, has at all times, been ready, able and willing and is now ready, able and willing to deliver said property to the plaintiffs, free of the claims of Hannah Scott, and that same would have been long since done but for the agreement heretofore entered into between the plaintiffs and the defendants (an alleged compromise in lieu of the life estate $100 per year to be credited on notes until occupancy of land desired). That if the plaintiffs are damaged by the failure to own and occupy said life estate it is due to their own choice and not through any fault or neglect, misrepresentation or other wrong of the defendant, J. S. Miller."

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

"1. Was the deed delivered and accepted by the plaintiffs with knowledge of the outstanding life estate, and with the agreement that the life estate and possession should be afterwards acquired? Answer: Yes.

"2. Was a provision for the exception of the life estate of Hannah Scott omitted from the deed set out in the complaint by mutual mistake of the parties as alleged in the answer? Answer: No.

"3. Has the conduct of the plaintiffs since the delivery of the deed been such as to render a tender of deed from Mrs. Hannah Scott unnecessary? Answer: No."

On the verdict, judgment was rendered by the court below rescinding the conveyance, canceling the deed in trust and notes be surrendered to be canceled. Judgment rendered in favor of C. F. Gresham, administrator and E. L. Thomas for $900. Defendants duly made exceptions and assigned error to the judgment rendered and appealed tc the Supreme Court.

Geo. R. Ward and Stevens, Beasley & Stevens for plaintiffs.

Gavin & Boney, Whitehurst & Barden and Ward & Ward for defendants.

CLARKSON, J. The first issue was as follows: "Was the deed delivered and accepted by the plaintiffs with knowledge of the outstanding life estate, and with the agreement that the life estate and possession should be afterwards acquired?" It was agreed by the parties that this issue be answered "Yes."

On the whole record we can find no sufficient evidence whatever to be considered by a jury on the second issue. It is well said by *Mr. Justice Connor,* in *Strickland v. Shearon, ante,* 560: "When parties to a

contract have expressed their agreement in terms that are explicit and plain of meaning—that is, when their minds have met on the terms of the contract—it may not be revoked or altered by reason of the mistake of one of the parties alone, resting wholly in his own mind, there being no fraud or misrepresentation by the other. *Lumber Co. v. Boushall,* 168 N. C., 501."

The finding on the first issue was by consent. The parties *sui juris,* made a deed and deed in trust. There was a life estate outstanding on the property conveyed. No mistake about the terms. The writings were complete, no fraud alleged or proved. The deed had covenants of warranty. By the first issue it was agreed between the grantor and grantees that the life estate and possession should be afterwards acquired. Defendant Miller sets up in his answer that he has at all times been ready, able and willing to deliver the property to defendants free of the claims of the life tenant. He has not done so, although years have passed. From the pleadings, admissions and entire evidence, the cause of action is one for breach of covenants expressed in the deed. This is the contract of the parties—they must abide by it.

In *Pridgen v. Long,* 177 N. C., 197, *Walker, J.,* speaking to the subject, says: "Where land has been sold and a deed of conveyance has been duly delivered, the contract becomes executed, and the parties are governed by its terms, and the purchaser's only right of relief, either at law or in equity, for defects or encumbrances depends, in the absence of fraud, solely upon the covenants in the deed which he has received. Rawls Covenants for Title, 459. If the purchaser has received no covenants, and there is no fraud vitiating the transaction, he has no relief for defects or encumbrances against his vendor, for it was his own folly to accept such a deed when he had it in his power to protect himself by proper covenants." *Price v. Deal,* 90 N. C., 290; *Newbern v. Hinton,* 190 N. C., p. 108.

"The covenant of seizin is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. Thus it is held that the covenant is broken if the grantor (in fee simple) has only an estate tail; or if there is an outstanding estate for life," etc., etc. Rawle Cov. Tit., sec. 58; *Crowell v. Jones,* 167 N. C., 389, citing 2 Dev. 30. 2 Mordecai's Lectures (2d ed.), p. 898.

From the pleadings, admissions of the parties, and the entire evidence, the suit cannot be maintained except under the contract—breach of the covenants in the deed.

For the reasons given, there must be a

New trial.

DeETTA FINGER v. ISABEL C. SMITH.

(Filed 27 May, 1926.)

1. **Judgments—Clerks of Court—Pleadings—Default — Irregular Judgments—Questions of Law.**

Where the parties are properly before the court, and the subject-matter of the action is also jurisdictional in the Superior Court, the clerk having authority under the provisions of our statute may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief.

2. **Same—Motions.**

Where a judgment has been entered contrary to the course and practice of the court, and is resisted by a party to the action, the remedy is by motion in the cause made within a reasonable time after its rendition, and upon denial thereof in the Superior Court, by appeal to the Supreme Court.

3. **Appeal and Error—Judgments—Clerks of Court—Pleadings—Statutes.**

Where the Superior Court has jurisdiction of the parties, properly before it, and the subject-matter of the action, the clerk, under the provisions of C. S., 593, may render a judgment by default upon the pleadings.

4. **Judgments—Courts—Jurisdiction—Void Judgments.**

A judgment is not void when rendered in the due course and practice of the courts, in the absence of some essential element of jurisdiction of the parties and the subject-matter of the action.

APPEAL by plaintiff from *Snow, Emergency Judge,* at March Special Term, 1926, of BUNCOMBE.

On 3 November, 1925, the defendant executed and delivered to the plaintiff an option, agreeing to convey the land therein described, at any time within thirty days, upon specified terms; but she afterwards refused for certain reasons to make the conveyance. The plaintiff brought suit for specific performance and filed her complaint alleging her compliance with the terms of the option. The defendant answered, denying the material allegations in the complaint and setting up the plaintiff's alleged fraud in procuring the execution of the agreement. The defendant prayed judgment for the cancellation of the option.

The summons, issued 4 December, 1925, was returnable 19 December; on the return day an alias was issued returnable 29 December. The complaint, verified, was filed 4 December, 1925, and a verified answer 6 January, 1926. No reply was filed. The clerk rendered judgment by default final against the plaintiff 1 February, 1926, containing this recital: "The complaint alleges that the defendant executed an agreement giving the plaintiff the option to purchase from the defendant

certain real estate. The answer, "as a further defense and by way of counterclaim and as grounds for affirmative relief," alleges that the agreement was procured by a false and fraudulent representation made by the plaintiff to the defendant and prays for the cancellation of the said agreement, on the ground that it constitutes a cloud upon the defendant's title; it is now ordered and adjudged, on this 1 February, 1926, being the first Monday of the month, that the contract aforesaid, dated 3 November, 1925, be, and it is hereby canceled, and the plaintiff is hereby ordered to deliver same to the clerk of this court to be delivered by said clerk to the defendant herein. It is further adjudged that this action be, and it is hereby dismissed, and that the plaintiff pay the costs thereof." On 4 February, 1926, the plaintiff served notice of her motion to vacate the judgment on the ground that it was entered without warrant of authority of law and that no counterclaim had been pleaded in the answer. On 15 February the clerk set aside the judgment and the defendant appealed, and on 9 March, 1926, the judge reversed the ruling of the clerk. The plaintiff excepted and appealed.

Kitchin & Kitchin for plaintiff.
J. E. Baumberger, M. W. Brown and F. W. Thomas for defendant.

ADAMS, J. The defendant's answer was served on the plaintiff's counsel and duly filed on 6 January, 1926, and the plaintiff was entitled to ten days thereafter in which to demur or reply, or to twenty days if the answer set up a counterclaim. 3 C. S., 524; Laws 1924, Ex. Ses., ch. 18. A reply was not filed within twenty days and on 1 February the clerk entered judgment by default final against the plaintiff and dismissed her action. On motion of the plaintiff he afterwards set this judgment aside; but on the defendant's appeal the judge vacated the latter judgment and held that as to the first judgment the plaintiff's remedy then applicable was by exception and appeal. It therefore becomes necessary to inquire into the nature of this judgment.

A judgment may be valid and unassailable, or it may be irregular, erroneous, or void. An irregular judgment is one rendered contrary to the course and practice of the court, as for example, at an improper time; or against an infant without a guardian; or by the court on an issue determinable by the jury; or where a plea in bar is undisposed of; or where the debt sued on has not matured; and in other similar cases. *Skinner v. Moore,* 19 N. C., 138, 156; *Winslow v. Anderson,* 20 N. C., 1; *Keaton v. Banks,* 32 N. C., 381; *Cowles v. Hayes,* 69 N. C., 406; *Wolfe v. Davis,* 74 N. C., 597; *Larkins v. Bullard,* 88 N. C., 35; *Williamson v. Hartman,* 92 N. C., 236; *Stafford v. Gallops,* 123 N. C., 19; *Duffer v. Brunson,* 188 N. C., 789.

An erroneous judgment is one rendered according to the course and practice of the court, but contrary to law, or upon a mistaken view of the law, or upon an erroneous application of legal principles, as where judgment is given for one party when it should have been given for another; or where the pleadings require several issues and only one is submitted; or where the undenied allegations of the complaint are not sufficient to warrant a recovery; and in other cases involving a mistake of law. *White v. Albertson,* 14 N. C., 241, 244; *Wolfe v. Davis, supra; Koonce v. Butler,* 84 N. C., 222; *Spillman v. Williams,* 91 N. C., 483; *May v. Lumber Co.,* 119 N. C., 96; *Cowles v. Cowles,* 121 N. C., 272; *Stafford v. Gallops, supra; Becton v. Dunn,* 142 N. C., 172; *Rawles v. Mayo,* 163 N. C., 177. A judgment may be regular and at the same time erroneous; that is, it is not irregular because it may happen to be erroneous. Error does not necessarily constitute irregularity or necessarily enter into it. *Skinner v. Moore, supra; Dobbin v. Gaster,* 26 N. C., 71.

A void judgment is one that has semblance but lacks some essential element, as jurisdiction or service of process. *McKee v. Angel,* 90 N. C., 60; *Duffer v. Brunson, supra.*

If a judgment is irregular the remedy is by a motion in the cause made within a reasonable time; if erroneous, the remedy is by appeal. *Spillman v. Williams, supra; May v. Lumber Co., supra; Henderson v. Moore,* 125 N. C., 383.

It is important to remember that the plaintiff's object was to enforce the specific performance of the option and that by way of avoidance the defendant pleaded, not only the plaintiff's failure to execute a proper deed of trust, but her fraudulent representation, as an inducement to the contract, that she was not a married woman. The ground upon which the defendant moved for judgment against the plaintiff was the absence of a reply to the alleged counterclaim. It is apparent, then, that the judgment dismissing the action was not void; the defendant's motion presented a question which it was the duty of the clerk to decide. The authorities hold that the mere fact that a pleading does not state a cause of action does not make a default judgment void if the allegations are sufficient to challenge the attention of the court and invoke its judicial action to determine the sufficiency thereof, because a court having jurisdiction of the parties and the subject-matter may determine for itself the sufficiency of the pleading. 3 Freeman on Judgments (5 ed.), sec. 1297; 33 C. J., 1133, sec. 81.

It is equally conclusive, we think, that the judgment was not irregular. The clerk had express statutory authority to render a judgment by default; his judgment was not given contrary to the course and practice of the court. 3 C. S., 593. His error, if he committed error, arose from

the inadvertent misapplication of legal principles; and under all the authorities his mistaken view of the law, if he was mistaken, resulted in an erroneous judgment, as to which the plaintiff's remedy was by appeal and not by motion in the cause.

This view of the case relieves us of the necessity of deciding whether the answer sets up a counterclaim in the nature of a cross-action to remove a cloud from the defendant's title and whether the clerk's first judgment was free from error. *McLamb v. McPhail,* 126 N. C., 218, 221; *Turner v. Livestock Co.,* 179 N. C., 457; C. S., 1743. The judgment is

Affirmed.

THE FARMERS CO-OPERATIVE FERTILIZER COMPANY, INC., v. EASTERN COTTON OIL COMPANY.

(Filed 17 February, 1926.)

APPEAL by defendant from *Grady, J.;* judgment signed out of term and out of county by consent of both parties—from PERQUIMANS.

Civil action to recover damage suffered by plaintiff on account of defendant's alleged breach of contract to deliver a certain quantity of cotton-seed meal, as per agreement between the parties.

From a judgment in favor of plaintiff for $325.00, with interest from 15 October, 1915, and costs, the defendant appeals, assigning errors.

Ehringhaus & Hall for plaintiff.
Whedbee & Whedbee for defendant.

PER CURIAM. It appearing from a perusal of the record that the case has been heard and determined without error, the judgment in favor of plaintiff will be upheld.

No error.

FRED L. POTTS v. CARTER-COBB MOTOR COMPANY.

(Filed 3 March, 1926.)

APPEAL by defendant from *Bond, J.,* and a jury, at October Term, 1925, of CRAVEN. No error.

Civil action to recover damages. The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the Apperson car destroyed by fire after defendant had received possession of it under the contract sued on? Answer: Yes.

"2. Was said fire caused by the negligence of said Cobb Motor Company? Answer: Yes.

"3. What damage is plaintiff entitled to recover from defendant? Answer: $356.00."

There was a judgment rendered on the verdict. Defendant excepted and assigned error. In the record there are six assignments of error made by defendant.

D. L. Ward for plaintiff.
Moore & Dunn for defendant.

PER CURIAM. We have examined the six assignments of error with care and can find no error in law. The jury has found the facts for plaintiff.

In the judgment there is

No error.

C. B. MOORE v. H. C. HOWER LUMBER COMPANY.

(Filed 3 March, 1926.)

APPEAL by defendant from *Devin, J.*, at August Term, 1925, of CHATHAM.

Civil action tried upon the following issue:

"1. Are the defendants indebted to the plaintiff; and if so, in what sum? Answer: $200."

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

Long & Bell for plaintiff.
A. C. Ray for defendant.

PER CURIAM. The plaintiff alleges that he sold the defendant a carload of lumber in 1924. This action is to recover the purchase price of said lumber.

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 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.

The testimony of the plaintiff fully justifies the verdict. Its credibility was for the jury. *Shell v. Roseman,* 155 N. C., 90; *In re Fuller,* 189 N. C., p. 512.

No error.

THE MILL SUPPLY COMPANY v. A. C. HOUSE.

(Filed 3 March, 1926.)

APPEAL by defendant from *Calvert, J.*, at November Term, 1925, of HALIFAX.

Whitehurst & Barden, and Ashby Dunn for plaintiff.
George C. Green for defendant.

PER CURIAM. After inspection of the record we are of opinion that the case has been tried in substantial compliance with the law, and that the appeal presents no reversible error.

No error.

L. W. TALTON v. SOUTHERN RAILWAY COMPANY.

(Filed 10 March, 1926.)

APPEAL by defendant from *Devin, J.*, at November Term, 1925, of WAYNE.

Civil action to recover damages for an alleged negligent injury, tried upon the following issues:

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

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover from the defendant? Answer: $1,000."

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

Dickinson & Freeman for plaintiff.
Langston, Allen & Taylor for defendant.

PER CURIAM. 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 the motion for judgment as of nonsuit, made on the ground that the plaintiff's own evidence clearly establishes a case of contributory negligence sufficient to bar his right of recovery. *Wright v. R. R.*, 155 N. C., 329; *Horne v. R. R.*, 170 N. C., 660; *Coleman v. R. R.*, 153 N. C., 322; *Holton v. R. R.*, 188 N. C., 277.

We are convinced from a careful perusal of the record that the evidence was properly submitted to the jury. No benefit would be derived from detailing plaintiff's testimony, as the only question presented by this exception is whether or not it is sufficient to carry the case to the jury, and we think it is. *Farris v. R. R.*, 151 N. C., 483.

No error.

CHARLES F. DUNN v. JOHN H. DOVE ET AL.

(Filed 17 March, 1926.)

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1925, of LENOIR. Affirmed.

Action to recover land. At close of plaintiff's evidence, defendants' motion for judgment of nonsuit was allowed. From judgment dismissing the action plaintiff appealed.

Charles F. Dunn, in propria persona.
F. E. Wallace and Cowper, Whitaker & Allen for defendants.

PER CURIAM. The assignment of error chiefly relied upon by plaintiff, on his appeal to this Court, is based upon his exception to the order allowing the motion for judgment of nonsuit. Plaintiff admitted upon the trial below that defendant, John H. Dove, was the owner of the three lots described in the complaint at the time the sheriff of Lenoir County sold same for taxes, on 3 June, 1924. He claims title under deed executed by the sheriff, dated 6 June, 1925. Evidence offered by plaintiff fails to show compliance by him as purchaser at the sale with statutory provisions required to make the sheriff's deed valid. There was no error in allowing the motion. *Price v. Slagle*, 189 N. C., 757.

The other exceptions are without merit. The judgment is

Affirmed.

CHARLES F. DUNN v. EMMA TILGHMAN.

(Filed 17 March, 1926.)

APPEAL by plaintiff from *Barnhill, J.*, at November Term, 1925, of LENOIR. Affirmed.

Action to recover land. Plaintiff claims title to the land described in the complaint under deed executed by city clerk and tax collector of

the city of Kinston, N. C. At close of plaintiff's evidence, defendant's motion for judgment of nonsuit was allowed. From judgment dismissing the action, plaintiff appealed.

Charles F. Dunn in propria persona.
Cowper, Whitaker & Allen for defendant.

PER CURIAM. An examination of this record, with a consideration of the briefs filed in this Court discloses no error. The judgment is sustained upon authority of *Slagle v. Price*, 189 N. C., 757, and must be Affirmed.

G. W. FOGLEMAN v. CORA A. ALLISON.

(Filed 7 April, 1926.)

APPEAL by defendant from *Nunn, J.*, at February Term, 1926, of ALAMANCE.

Carroll & Carroll for plaintiff.
John J. Henderson for defendant.

PER CURIAM. John M. Fogleman, seized of a tract of land, died intestate, leaving the plaintiff and the defendant his only heirs at law. In April, 1924, the plaintiff brought a proceeding before the clerk to have the land sold for partition. A commissioner sold the land under order of the court and made his report, but afterwards there were two other sales. The report of the third sale was confirmed 28 December, 1925. The purchaser demanded of the defendant the possession of the property and subsequently filed a petition for a writ of possession and the writ was issued on 17 February, 1926. Soon thereafter the defendant filed a petition asking that the order of confirmation be rescinded and the writ of possession recalled. Upon affidavits filed in the cause his Honor found as facts that the property had been duly advertised and sold, that the sale had been confirmed and a deed made to the purchaser, and that the purchaser had conveyed the land as security for borrowed money; and upon these facts the petitioner's motion was denied. In this we find nothing of which the defendant can justly complain. The judgment is

Affirmed.

WILLIE POOLE v. C. H. JONES.

(Filed 7 April, 1926.)

APPEAL by plaintiff from *Finley, J.*, at November Term, 1925, of FORSYTH.

Civil action to recover damages for an alleged negligent injury sustained by the plaintiff while a passenger on the defendant's bus operated for hire in the city of Winston-Salem.

Upon denial of liability, the usual issues of negligence, contributory negligence and damages were submitted to the jury, and a verdict returned in favor of the defendant on the first issue.

From the judgment rendered thereon, denying any right of recovery, the plaintiff appeals, assigning errors.

Wallace & Wells and Manly, Hendren & Womble for plaintiff.
Graves & Graves and Raymond G. Parker for defendant.

PER CURIAM. The appeal presents several exceptions which were the subject of earnest debate before us, and while they are not altogether free from difficulty, a careful perusal of the entire record confirms us in the belief that the case has been tried in substantial accord with the principles of law applicable.

The charge, when taken as a whole, would seem to be free from any reversible error.

The case presents no new or novel question of law; it only calls for the application of old principles to new facts. The verdict and judgment will be upheld.

No error.

STATE v. J. H. ROGERS.

(Filed 14 April, 1926.)

APPEAL by defendant from *Schenck, J.*, at December Term, 1925, of DAVIDSON.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Walser & Walser for defendant.

PER CURIAM. The defendant was convicted of a breach of the prohibition laws. He entered a "broadside exception" to the charge which, of course, cannot be entertained. The other exceptions are purely personal and call for no discussion. They must be overruled.

No error.

W. W. HONEYCUTT v. C. P. HARTSELL ET AL.

(Filed 21 April, 1926.)

APPEAL by defendants from *McElroy, J.*, at October Term, 1925, of UNION.

Civil action to recover the value of a quantity of lumber sold to the defendants by the plaintiff and destroyed by fire before the defendants had removed said lumber from the mill-yard of the plaintiff.

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

"1. Did the defendants buy the lumber in controversy when stacked on sticks on the mill-yard at $11.50 per thousand? Answer: Yes.

"2. In what amount, if any, are the defendants indebted to the plaintiff? Answer: $793.09, without interest."

From a judgment on the verdict for plaintiff, the defendants appeal, assigning errors.

Vann & Milliken for plaintiff.

R. L. Smith & Sons and John C. Sikes 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 accord with the principles of law applicable, 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.

The evidence is conflicting on the issue of liability; it is purely a question of fact; the jury has determined the matter against the defendants; there is no reversible error appearing on the record; the exceptions relating to the admission and exclusion of evidence, and those to the charge, including exceptions to prayers for special instructions tendered and refused, must all be resolved in favor of the validity of the trial; the case presents no new question of law, or one not heretofore settled by our decisions. The verdict and judgment will be upheld.

No error.

TOWN OF HILLSBORO v. THE MERCHANTS AND FARMERS BANK AND THE MARYLAND CASUALTY COMPANY.

(Filed 28 April, 1926.)

Appeal and Error—Divided Court—Judgment.

The judgment of the Superior Court stands as the law of the case when the Justices of the Supreme Court are equally divided in their opinion, one of them having been of counsel and taking no part therein.

APPEAL by plaintiff and defendant, the Maryland Casualty Company, from *Grady, J.*, at September Term, 1925, of ORANGE. Affirmed.

From judgment rendered herein, that the town of Hillsboro recover from the Merchants and Farmers Bank the sum of $1,215.97, and interest thereon from 11 June, 1923, and costs, plaintiff and defendant, Maryland Casualty Company, appealed.

Gattis & Gattis and A. H. Graham for plaintiff.

W. S. Lockhart for Merchants and Farmers Bank.

Craige & Craige and Fuller & Fuller for Maryland Casualty Company.

PER CURIAM. The Court being evenly divided in opinion, *Brogden, J.*, having been of counsel for the defendant, Merchants and Farmers Bank, in the trial below, not sitting, the judgment of the court below is affirmed and stands as the decision in this case without becoming a precedent. *McCarter v. R. R.*, 187 N. C., 863.

Affirmed.

R. J. JONES ET AL. v. N. JACOBI HARDWARE COMPANY.

(Filed 5 May, 1926.)

APPEAL by defendant from *Stack, J.*, at March Term, 1926, of SCOTLAND. Dismissed.

W. H. Weatherspoon for plaintiff.

Bryan & Campbell for defendant.

PER CURIAM. Since the argument of this appeal, it has been made to appear to this Court that appellant has satisfied the judgment of the Superior Court. At the request of appellant, and with the consent of appellee, the appeal is

Dismissed.

STATE v. WILLARD HENSLEY, QUINCE MILLER, FREEDOM HIGGINS AND JOE TIPTON.

(Filed 12 May, 1926.)

APPEAL by defendant, Willard Hensley, from *Harding, J.*, at October Term, 1925, of YANCEY.

Criminal prosecution tried upon four several indictments charging the appealing defendant and three others with three several assaults with deadly weapons and conspiracy, consolidated and tried together.

From a verdict of guilty on three of the charges and judgments pronounced thereon, the defendant, Willard Hensley, appeals, assigning errors.

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

Charles Hutchins for defendant.

PER CURIAM. The evidence is conflicting on the issue of guilt; it is purely a question of fact; the jury has determined the matter against the defendant; there is no reversible error appearing on the record; the exceptions relating to the admission and exclusion of evidence, and those to the charge, must all be resolved in favor of the validity of the trial; the case presents no new question of law, or one not heretofore settled by our decisions; the verdict and judgment will be upheld.

No error.

LUTHER HONEYCUTT v. JIM BROWN, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF ELK MOUNTAIN SAND AND GRAVEL COMPANY, AND JIM BROWN, INDIVIDUALLY.

(Filed 19 May, 1926.)

APPEAL by defendant, Jim Brown, from *Dunn, J.*, and a jury, at October Special Term, 1925, of BUNCOMBE. No error.

This is an action for actionable negligence, brought by plaintiff, Luther Honeycutt, against defendant, Jim Brown.

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

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

"2. Did the plaintiff contribute to his own injury, as alleged in the answer? Answer: No.

"3. Did the plaintiff 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: $400."

Defendant excepted to the judgment, assigned several errors and appealed to the Supreme Court.

George M. Pritchard for plaintiff.
George W. Garland for defendant.

PER CURIAM. We have heard the arguments of counsel, read the evidence carefully, considered the assignments of error and examined the briefs. We think the charge unusually full and explicit, and the law carefully applied to the facts. The briefs of the parties cite no authorities. The only material assignment of error on part of defendant was the motion for judgment as in case of nonsuit. C. S., 567. We think, under all the facts and circumstances of the case, there was sufficient evidence to be submitted to the jury. The probative force was for them. There was no new or novel proposition of law in the case. In law we can find

No error.

B. L. TURNER v. ANDREWS MANUFACTURING COMPANY.

(Filed 27 May, 1926.)

APPEAL by plaintiff from a judgment of nonsuit by *Siler, Emergency Judge,* at February Special Term, 1926, of CHEROKEE.

Dillard & Hill for plaintiff.
Thomas S. Rollins for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the defendant's negligence. He was engaged in transferring laths from a truck to an adjoining car, standing with one foot on the "dock" and the other on top of the car. While attempting to "pitch the bundles up there" his foot slipped and he was injured by falling. We fail to discover any sufficient evidence of actionable negligence, and the judgment must be

Affirmed.

T. C. NORRIS v. W. H. POWERS ET AL.

(Filed 27 May, 1926.)

APPEAL by defendants from *Brock, J.*, at January Term, 1926, of HAYWOOD.

Civil action instituted by plaintiff, a subcontractor, against the defendants, general contractors, to recover damages for alleged breaches of three separate building contracts.

Upon denial of liability, and issues joined, there was a verdict and judgment for plaintiff for $1,150, covering the total damages sustained by reason of breaches of the three several contracts. Defendants appeal, assigning errors.

Morgan & Ward for plaintiff.
Merrick, Barnard & Heazel 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 accord with the principles of law applicable, 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.

The exceptions relating to the admission and exclusion of evidence, and those to the charge, including exceptions to prayers for special instructions tendered and refused, must all be resolved in favor of the validity of the trial; the case presents no new question of law, or one not heretofore settled by our decisions; the verdict and judgment will be upheld.

No error.

O. S. SIZEMORE v. J. F. JUSTICE ET AL.

(Filed 27 May, 1926.)

PLAINTIFF appealed from a judgment of nonsuit rendered by *Webb, J.*, at November Term, 1925, of HAYWOOD. A voluntary nonsuit was taken as to the defendants Williams and Fulghum, and the question is whether the action can be maintained against the other defendants.

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

PER CURIAM. The plaintiff testified that at the time of his injury he was working for the defendants in the capacity of sawyer; that while sawing logs he noticed that the saw began to "lead"; that he shut down the carriage (but did not stop the saw) and attempted to tighten a set screw which regulated the alignment of the saw; that the screw was about eight inches from the saw; and that the wrench slipped from the screw and "jerked his hand into the saw," causing the loss of his fingers. The evidence, which is set out in the record, fully justifies the conclusion of the Court. The judgment of nonsuit is therefore

Affirmed.

J. H. PLOTT, ADMINISTRATOR BESSIE STAMEY, DECEASED, v. GEORGE HOWELL AND BOB HOWELL.

(Filed 27 May, 1926.)

Negligence—Automobiles—Family Car—Nonsuit—Appeal and Error.

The father is liable in damages for injuries resulting in death proximately caused by the negligence of his son in driving his car used for family purposes, when the son was customarily permitted to drive; but a nonsuit against the father is not reversible error when the negligence of the son is not established in the action brought against both.

CIVIL ACTION for damages for wrongful death, tried before *Brock, Emergency Judge,* at January Term, 1926, of HAYWOOD.

The plaintiff's intestate, a young girl about eighteen years of age, was attending a funeral at or near Woodrow, North Carolina, which village is situated between Waynesville and Canton. The evidence tended to show that there was a large crowd at the funeral, and that in front of the church cars were parked close together on each side of the highway. The plaintiff contended that as the people were leaving the church, the defendant, George Howell, drove a Hudson automobile along said highway at a rapid and dangerous rate of speed and without giving any signal or notice of the approach of said car, and, as a result of the negligent operation of said automobile, ran over and killed plaintiff's intestate while she was in the act of crossing the road.

There was also evidence on behalf of the defendant that the car was being operated in a careful manner, and that timely signals were duly given, and that plaintiff's intestate ran out from behind a car parked

on the side of the road immediately in front of defendant's car, and that the defendant, in the exercise of due care, could not avoid striking plaintiff's intestate.

The defendant, Bob Howell, was the father of the defendant, George Howell, and was the owner of the automobile. The automobile was purchased by the defendant, Bob Howell, who "permitted all the members of his family to use said automobile for their convenience, pleasure and business."

At the conclusion of plaintiff's evidence, the court entered a judgment of nonsuit as to the defendant, Bob Howell, to which plaintiff excepted.

The jury answered the issues as follows:

(1) Was the plaintiff's intestate injured and killed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

(2) Did the plaintiff's intestate, by her own negligence, contribute to her injury and death as alleged in the answer? Answer: Yes.

(3) Did the defendant, George Howell, recklessly and wilfully run over, injure and kill the plaintiff's intestate as alleged in the complaint? Answer: .....

(4) What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: .....

From the judgment of the court that plaintiff take nothing by the action, plaintiff appealed.

Hannah & Hannah, T. D. Bryson, Jr., and T. A. Clark for plaintiff.

Alley & Alley, Smathers, Robinson & Cogburn and Morgan & Ward for defendant.

PER CURIAM. It appearing that the defendant, Bob Howell, the owner of the automobile, had purchased it for general family use, and that it was being operated by his son, it was error to sustain the motion of nonsuit as to him. *Watts v. Lefler,* 190 N. C., 722. But this error is immaterial by reason of the fact that the jury found, upon competent evidence and under a proper charge by the trial judge, that the plaintiff's intestate was guilty of contributory negligence. The liability of defendant, Bob Howell, as owner of the automobile, used for family purposes, depended upon the liability of his son, George Howell, who was operating the automobile at the time. If the son was not liable under the findings of the jury, then, certainly, the father and owner of the car would not be liable. *Watts v. Lefler, supra.*

We have examined the record with care and are compelled to conclude that the case was tried in accordance with the law, and, therefore, the verdict of the jury terminates the litigation.

No error.

STATE v. HERMAN BANKS.

(Filed 27 May, 1926.)

Criminal Law—Jail Breaking—Indictment—Evidence — Intent — Questions for Jury—Instructions.

Under an indictment containing several counts as to the defendant breaking into a jail wherein a prisoner was confined with the purpose or intent of killing or injuring the prisoner, with evidence that the defendant was the leader of those who actually broke into the jail and searched for the prisoner, etc.: *Held*, the question of intent was one for the jury, and an instruction to find the defendant guilty if the jury believed the evidence beyond a reasonable doubt, was not reversible upon the defendant's appeal from a general verdict of guilty.

APPEAL by defendant from *Stack, J.*, at September Term, 1925, of BUNCOMBE. No error.

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

R. R. Reynolds and W. A. Sullivan for defendant.

PER CURIAM. The indictment contains six counts. The first charges the defendant and others with unlawfully and feloniously conspiring to break and enter the common jail of Buncombe County, in which a prisoner charged with a capital felony was confined, for the purpose of killing or otherwise injuring the prisoner. The second count charges the defendant and others with the unlawful and felonious breaking and entering of the common jail of Buncombe County in which the prisoner was confined for the purpose of killing or otherwise injuring the prisoner. In the third the charge is the felonious breaking into the jail with intent to injure, maim, assault and kill the prisoner; in the fourth and fifth counts, with injury to the jail; and in the sixth, with aiding and abetting in the commission of the crimes charged in the other counts.

The defendant testified in his own behalf, and his Honor instructed the jury as follows: "The State contends that Banks took an active part, at high school and on the street in getting up the mob, using rough language, calling on others to follow and get the negro. That he was on the committee to search the jail for the negro. That he was one of the active leaders of the crowd. That he said we are going to get the negro. That he went to the coal bin of the jail looking for him and saying he may be in there. The defendant admits that he was present at the jail and was a member of the committee appointed by the mob to search the jail, and did actively engage in searching the jail for the prisoner, Alvin Mansel. That he went to the home of Sheriff Mitchell

and encouraged others to look for the sheriff in order to try to force him to reveal the whereabouts of Alvin Mansel. That he admits he acted for the mob in looking for the negro. If you find from the evidence beyond a reasonable doubt the facts to be as testified to by Herman Banks, himself, then you will render a verdict of "Guilty." If not so satisfied, then "Not Guilty." If you find from all the evidence beyond a reasonable doubt, including the evidence of the defendant, Banks, that he did what he says he did, under the law as I have given you, your verdict would be "Guilty." If not satisfied "Not Guilty."

There was a general verdict of guilty, upon which judgment was pronounced. The defendant appealed assigning for error the instructions given the jury.

We are of opinion that the instruction was justified by the defendant's own testimony. Ordinarily intent is a question for the jury; but we think the defendant's purpose in joining the mob and going to the jail is plainly evident from his own admissions; for he was present when the jail was broken and in any event was engaged in aiding and abetting the commission of the felonies charged. We find

No error.

L. L. HEATON v. MURPHY COAL & IRON CO.

(Filed 27 May, 1926.)

Master and Servant—Employer and Employee—Negligence—Management of Work—Nonsuit.

A recovery for damages for a negligent, personal injury may not be had by a manager in charge at the time of the injury, having full control of the defendant corporation's operations at the time.

APPEAL by plaintiff from *Oglesby, J.*, at March Term, 1926, of CHEROKEE. Affirmed.

Moody & Moody for plaintiff.

Merrimon, Adams & Adams, M. W. Bell and A. Hall Johnston for defendant.

PER CURIAM. This was an action for actionable negligence. The defendant sets up as a defense: "That upon its organization, the plaintiff herein was duly elected and constituted its vice-president and general manager, which position he occupied at the time of the accident set forth in the complaint, and as such vice-president and general manager had exclusive charge, control and management of the defendant's work,

employees, business and machinery, and had full authority to do and perform any and all acts necessary for the proper management of its business, which was that of mining and shipping iron ore."

The plaintiff admits in his testimony that he was vice-president and general manager. Plaintiff was one of the original three stockholders; he, his wife and Scott Litton organized the company. The minutes of the directors' meeting show: "The president announces that he has employed as general manager, L. L. Heaton, at a salary of $300.00 per month and this action was unanimously approved by the board of directors." Plaintiff testified: "Yes, I could discharge any man there or get more if I needed them. Yes, while I was in full charge of the job I got my toe injured. . . . Yes, I went to help unload the crusher, and while helping to unload it I got my toe mashed."

The entire evidence, taken in a light most favorable to plaintiff, giving him the benefit of every reasonable intendment and every reasonable inference to be drawn therefrom, we do not think sufficient to be submitted to a jury.

Judgment affirmed.

DAVE McKINISH v. NORWOOD LUMBER COMPANY.

(Filed 27 May, 1926.)

Master and Servant—Employer and Employee—Carriers—Logging Roads—Contributory Negligence—Statutes.

A logging road comes within the provision of our statute making contributory negligence of an employee an element of consideration by the jury in assessing the amount of damages recoverable and is not a complete bar to the employee's recovery in his action for damages.

APPEAL by defendant from *Webb, J.*, at October-November Term, 1925, of SWAIN. No error.

Action to recover damages for personal injury, alleged to have been sustained by plaintiff, an employee of defendant, a corporation, while operating a steam skidder, used in loading logs on defendant's cars, to be transported on defendant's logging road.

While plaintiff was "spooling" a wire cable, which wound around the drum of the skidder, the iron bar, with which he was performing the duty incident to his employment, was struck by a knot in the cable, caused by "splicing" the cable, with such violence, that plaintiff was thrown against the drum and injured. The wire cable was old, worn and defective. Its condition had been called to the attention of defendant's superintendent, who promised to get a new cable, and instructed

plaintiff to splice the cable and to continue to use it. The cable had been broken in several places, and had been "spliced" or tied together, thus making six or seven knots, which projected two or three inches from the cable. One of these knots struck the iron bar, with which plaintiff was "spooling" the cable as it wound around the drum. As the result of his injury, plaintiff developed a rupture or hernia which caused him great suffering, and greatly impaired his ability to work and earn money.

The verdict of the jury was as follows:

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

2. Did the plaintiff by his own negligence contribute to his injury? Answer: Yes.

3. What damages, if any, is the plaintiff entitled to recover? Answer: $1,250.00.

From the judgment on this verdict, defendant appealed.

McKinley Edwards and Moody & Moody for plaintiff.
Alley & Leatherwood and S. W. Black for defendant.

PER CURIAM. Defendant relies, on this appeal, chiefly upon its exception to the refusal of the court to allow its motion for judgment as of nonsuit, at the close of all the evidence. The only other exceptions are to the exclusion of evidence upon objection of plaintiff. There are no exceptions to the instructions of the court in the charge to the jury, which has not been included in the case on appeal.

The fact, as found by the jury, that plaintiff by his own negligence contributed to his injury, does not bar a recovery by him of damages resulting from his injury. The effect of contributory negligence was to diminish the amount assessed by the jury as damages in proportion to the amount of negligence attributable to plaintiff. C. S. (1919), secs. 3466, 3467 and 3468, by the express provisions of C. S., 3470, are applicable in an action against defendant by plaintiff, to recover damages upon the facts of this case. Defendant was engaged in the operation of a logging road, and plaintiff was employed by defendant in the operation of said road. The injury was sustained while plaintiff was at work as such employee. *Craig v. Lumber Co.*, 185 N. C., 560.

There was evidence from which the jury could find, as they did, that plaintiff was injured by reason of a defect, or insufficiency, due to defendant's negligence, in the appliances, furnished by defendant to plaintiff, with which to do his work. The assignments of error cannot be sustained and the judgment must be affirmed. There is

No error.

APPEALS FROM SUPREME COURT OF NORTH CAROLINA

In the Supreme Court of the United States

The present status of cases appealed from the Supreme Court of North Carolina in the Supreme Court of the United States will be found on Page 881 of the 190th North Carolina Report.

PRESENTATION OF THE PORTRAIT

OF THE LATE ASSOCIATE JUSTICE OF THE SUPREME COURT

PLATT DICKINSON WALKER

APRIL 20, 1926

ADDRESS BY

E. T. CANSLER

May it Please the Court: It has been said by an eminent authority that no biography was ever written that pictured the man as he really was. The biographer, inspired by either a spirit of hero worship or a desire for self-glorification, usually overdraws the picture, so that the best friends of the subject do not recognize the likeness. Thus, all judges are made the equals of Coke, Erskine or Marshall, and all lawyers superior to Webster, Choate or Story. A popular biographer quotes Dean Stanley as saying, "All the gods of ancient mythology were once men." He then traces the evolution of man into a hero, the hero into a demigod, and the demigod into a divinity. Thus, by a slow process, the natural man is divested of all our common faults and frailties, he is clothed with superhuman attributes, and declared a being superior and apart, and is lost to us in the clouds.

In presenting to this Court the portrait of JUSTICE WALKER, I trust that I shall not, by this process of rhetorical evolution, describe him either as a hero, demigod or divinity, but simply as "splendidly human . . . in that he had in him the appetites, the ambitions, the desires of a man . . . who aspired, feared, hoped, loved, and bravely lived and died."

PLATT DICKINSON WALKER was the only son of Thomas Davis Walker and his wife, Mary Vance Dickinson. His father was the grandson of Major Jack Walker, a member of General Washington's staff, was a prominent business man in Wilmington, and once President of the Wilmington and Weldon Railroad Company. His mother was the daughter of Platt K. Dickinson, a wealthy manufacturer of Wilmington, with large business interests in New York, his native state. His parents both sprang from sturdy American stock, and were socially prominent in the Lower Cape Fear section.

It would serve no useful purpose further to trace his ancestry. Every American family tree should be rooted in good, American soil. He who seeks to trace his ancestry beyond that, either feels his own deficiencies or despises the land of his nativity. In either case, he reflects no credit upon his ancestry or his country.

He was born in Wilmington October 25, 1849, in a home of wealth, culture and refinement, which, however, do not always constitute the best environment for character building. The proverbial silver spoon has rarely adorned the infantile mouths of our presidents or other great men. It was Luther who said that men who become great and learned usually do so in spite of their parents. Else, how do you account for Luther? The truth is that real greatness, like the greatness of Washington and Lee, is of the soul, and not of the body. God is responsible for the one, and man for the other. In working out His divine plan, He bestows upon one, ten talents; upon another, one; and upon another, none. Mediocrity is normalcy; genius is a miracle, and only God can work a miracle. Nevertheless, it is good for a boy to be well born. God is more likely to commit His chosen vessels to the care of a Sarah than to the keeping of a Hagar. But passing by the seeming conflict in the laws of heredity and environment, we rejoice to know that this man-child was well born, in the truest and best sense of the term.

He was also well brought up. There is no doubt that parental influence has a large share in the development of a boy's character. The soil in which the acorn sprouts cannot change its species, but it can and does influence the seedling, so as to make it grow into a giant oak, or degenerate into a scrubby dwarf. So with the seed of woman. God can plant the germ of greatness in the unborn child, but whether that germ shall develop into the full stature of the man, according to God's design, will largely depend upon the soil in which the soul strikes its roots. This is why great men are usually the sons of great mothers, who, by their worthy precepts and examples, furnish their sons a fertile domestic soil in which to nourish the God-given seeds of genius. Witness Mary, the mother of Washington, and that other Mary, the mother of Marshall—fit representatives of a host of other mothers of the great men of the ages.

Mary Dickinson, the mother of our subject, proved to be no exception to this time-honored rule. She belonged to the best school of the ante-bellum mother. She required her children to obey and honor their father and mother, and thus keep the first commandment with a promise. She taught them all the cardinal virtues in the good, old-fashioned way. She knew nothing of rearing children by proxy, but was their real mother, in all the relations of life. Their home was her domain, over which she ruled by the divine right of motherhood. She knew no other sphere of activity to divert her from the supreme duties of wife and mother. The day of patriotic societies, social clubs and uplift movements had not yet arrived to interfere with the motherhood movement. In very truth, she was a mother in Israel. Small wonder, then, that

this, her only son, should grow up to bless her memory and reflect the sterling virtues of his forbears.

Young WALKER was also well educated in the schools and colleges of his day. When the Civil War ended, he was in his sixteenth year. Too young to enter the great struggle, he spent the four sad years of fratricidal strife in preparing himself for college in the private schools of Wilmington and at Horner's, at Oxford. Despite the poverty of reconstruction, means were found for him to enter the State University as a sophomore in 1866, where he remained for only one scholastic year. Among his fellow students were Dr. R. H. Lewis and F. H. Busbee, of Raleigh, Judge Jacob Battle of Rocky Mount, John W. Fries of Winston, Alexander Graham of Charlotte, Edmond Jones of Lenoir, A. H. Boyden of Salisbury, George M. Rose of Fayetteville, W. H. S. Burgwin of Henderson, Eugene Morehead of Durham, and Judge A. W. Graham of Oxford.

On leaving the University, he entered the University of Virginia, where he pursued an elective literary course and studied law under Dr. Minor, the Dean of the University Law School. While he made high averages as a student, both in school and in college, he showed no disposition to crowd his fellow students off the stage. His innate modesty and reserve naturally caused him to shrink from any unseemly struggle, either for class honors or college leadership. So far as we know, he was neither a boy orator nor a campus hero. He had no ambition to spring, full panoplied, into the arena of life, ready to do battle against all comers. He was just an honest, earnest, hard worker, willing to grow gradually and bide his time. He showed no ambition to arrive ahead of the schedule or wreck the train. Hence we have no "Little Willie" or Daniel Webster stories to relate, either of his school or college days, but, as we shall see, he made the grade and reached the end of the run absolutely on time. His growth was rather like that of the sturdy oak than the fabled beanstalk.

In the ideal civilization which flourished before the Civil War, there were only three learned professions—law, medicine and theology—the three "Black Graces." Young men of parts were usually sent to college to fit themselves for one of these three callings. It was then supposed to be a mere waste of time and money to educate boys to fit themselves for other pursuits. Whether the fathers were right or wrong in drawing this distinction has ever been a much mooted question. The college professors vote one way, and the disciples of the Old Blue Back Speller the other. Even so great a man as Webster voted both ways on the same question. In his great argument before the Supreme Court of the United States in the *Dartmouth College case*, he extolled higher education to the skies, only to reverse himself eighteen years later, in his

argument before the same august tribunal, in the *Girard College case.* Probably he was half right in both instances. It depends more upon the man than the opportunity. More men die of undernourishment from overfeeding than from underfeeding. St. Paul makes mention somewhere of feeding some weak Christians with milk and not with meat, because they were unable to bear it. He who looks upon a college course as a stepping-stone to a mere avocation fails, while he who considers it as a preparation for a real vocation, succeeds.

Of these learned professions, as we have seen, young WALKER selected the law. Subsequent events proved the wisdom of his choice. Professor William Lyon Phelps says: "'Law' and 'Duty' are the two greatest words in the dictionary." He might well have stopped with "Law." Without laws, natural, divine and human, there would be universal chaos. But for natural laws, there would be no human beings upon whom the divine laws could operate; without divine laws, there would be no duty which one man owed to another; and without human laws, the duties imposed by the divine could not be enforced. Until the arrival of the millenium, man-made laws, founded on the divine, are the keystone to the arch of civilization. The making and enforcement of these laws naturally and necessarily devolve upon the lawyer. Hence, the law ranks first among the learned professions.

That the subject of this sketch was inspired by these high ideals of his chosen profession is borne out by his walk and conversation, both as jurist and judge. He was licensed to practice in June, 1870, before he was twenty-one years of age, having passed the first examination for a license ever held by this Court. He first located in Rockingham, forming a partnership with Colonel Walter L. Steel, one of the most prominent citizens of his section. This relation continued until 1876, when Colonel Steel was elected to Congress. It was not long before he became one of the recognized young leaders of the bar of the Pee Dee section. To hold his own, he was compelled to measure swords with such able and resourceful lawyers as Colonel French and Judge T. A. McNeill of Lumberton, Major John D. Shaw, James T. LaGrande and Franklin McNeill of Rockingham, Judge J. D. McIver of Carthage, Judge Risden T. Bennett and James A Lockhart of Wadesboro, and David A. Covington, H. B. Adams and J. J. Vann of Monroe. The legal battles waged with these able and worthy opponents were most conducive to his mental growth and development as an all-round trial lawyer. Nothing is more stimulating to the healthy ambition of the young lawyer than to be forced from the beginning to mix wits and try conclusions with foemen worthy of his steel. When the leaders of the bar are lazy and indolent, the younger members almost invariably emulate their example, or seek a more stimulating legal atmosphere. Hence the five

years thus spent by this splendidly endowed young lawyer among his peers best served to lay the foundation upon which he built a sure and solid legal superstructure.

These five years, however, were but the beginning of a long and continuous legal warfare with other foemen, every whit his mental match. In 1876 he removed to Charlotte to become a member of the strongest bar that city ever possessed. The Civil War had impoverished the smaller surrounding country towns, so that their leading lawyers naturally gravitated to the largest and most prosperous town in Piedmont North Carolina. There came from Lincoln Guion, Ship, Bynum and Johnston; from Rowan, Jones and Bailey; Dowd from Moore; Fleming from McDowell, and Vance from North Carolina, to augment an already unusually strong local bar. Of these Vance, Saul-like, towered above his fellows, absolutely invincible before a jury. Bynum, the Old Roman, was the equal in lineage and learning of any man who ever sat upon this bench. Ship was a natural born judge, and looked it. Bailey was the "Black Letter" lawyer, Guion the typical English barrister, Jones, one of the greatest trial lawyers of his day and time, Dowd the wisest counsellor, Wilson the indefatigable, Osborne the eloquent, Grier the intrepid, Johnston the aggressive, Fleming the fearless, Maxwell the humorist, and Burwell the handsome, high-minded barrister. In such distinguished company, each lawyer took his place according to his several ability. Walker took his, and gradually, inch by inch, fought his way to the top. The partnership which he formed with Major Dowd instantly threw him in the forefront of the battle, where he fought without fear or favor, giving no quarter and asking none. To him, the trial of a lawsuit was not a mere game of chance, but a legal battle with definite plans of attack and lines of defense. Verdicts were not to be won by chance, but by the strongest army of facts most adroitly maneuvered on the battlefield. No general ever made a more careful and painstaking preparation for next day's fight than he for the next day's trial. He never went into court without a full brief on both the law and the facts, and consequently, was never taken by surprise. However, he was stronger on the law than the facts. He preferred to cut the Gordion knot by forcing the court to decide the whole case on the law, rather than leave it to the jury to decide on the facts. He studied the law of his case more thoroughly than he did the facts, and sometimes argued the facts to the jury like he argued the law to the court.

He was too learned a lawyer to be a popular advocate. Great jurists are rarely great orators. Patrick Henry ranks as one of the world's greatest orators, yet his ignorance of the law was appalling. It has been said that great orators have always been country bred, and their appeal has always been to a rural people—that people who live in cities

are not ordinarily moved by oratory, because they see so much and hear so much they cease to be impressed. Be that as it may, we know that orators, like poets, are born, not made, and while oratory has always been one of the coveted gifts of the gods, it has not always been associated either with brains or character. Witness the orators of the French, as well as some of those of the American, Revolution. The orator, like the poet, is both irregular and erratic in his habits of life. He is neither thorough nor profound. To him the genius for hard, honest work is an unknown quantity. The untutored savage and the ignorant negro frequently possess great oratorical powers. Therefore, the influence of the orator upon governments and nations is evanescent and transitory. Unless the orator is consumed with the zeal of a fanatic, it is hard to separate the wheat of sincerity from the chaff of play-acting.

However, we must not confuse oratory with eloquence. At Gettysburg, Lincoln spoke two minutes and Everett two hours. What Lincoln said there will be remembered as long as this nation endures. What Everett said was forgotten the next day. Lincoln's memory will be kept green as long as the American school boy declaims his immortal oration. Everett would have been long ago forgotten but for the fact that he was present when Lincoln made his famous speech. One was eloquent, while the other was a mere orator. The utterances of the one sprang from the heart, while those of the other sprang from the head. Oratory is not necessarily eloquence, and any earnest man, thoroughly imbued with the righteousness of his cause, can be and frequently is eloquent. In this sense, our hero was always eloquent, for he was always convinced that his client's quarrel was just, before he entered the lists.

When Major Dowd was elected to Congress in 1880, MR. WALKER formed a partnership with Captain Armistead Burwell (a former partner of Vance), an acknowledged leader of the Charlotte bar. These two strong men were admirably mated and matched for the practice of their profession, and no firm of lawyers in the State ever ranked higher in learning, ability and integrity. Their legal opinions passed as current coin, and were everywhere accepted for their face value. They appeared on one side or the other in nearly every important lawsuit that was tried in Mecklenburg and the surrounding counties, frequently being called to distant parts of the State. They were constantly pitted against such strong men as Bynum, Jones, Osborne and Wilson of Mecklenburg, Justice and Forney of Rutherford, Webb and McBrayer of Cleveland, Shank and the Hokes of Lincoln, Armfield, Robbins and Long of Iredell, Montgomery of Cabarrus, Covington, Adams and Vann of Union, Bennett and Lockhart of Anson, Shaw and McNeill of Richmond, and the McNeills of Robeson, and always and everywhere acquitted themselves like men.

Yet they earned but little more than a modest livelihood from what should have been a most lucrative practice. This was due to the fact that they looked upon the practice of the law as a profession, and not as a business. When they dedicated their lives to the law, they felt that the ethics of their profession forbade their trading upon the misfortunes of their clients. They esteemed the law as highly as the ministry. In each profession, the laborer was only worthy of his hire. They held that it was as much a prostitution of his profession for a lawyer to espouse an unworthy cause for the sake of a fat fee, as it was for a minister to accept a call of a big church for the sake of a tempting salary. They believed it to be the duty of the lawyer to advise his client to avoid litigation rather than seek it. Unfortunately, these old-fashioned ideals have passed away with the old-fashioned minister, family doctor and lawyer, who were "institutions" handed down from one generation to another. In those days, the preacher sometimes officiated at the marriage and burial of as many as three generations in the same family. The family doctor often officiated at the birth of mother, daughter and grand-daughter, and the family lawyer frequently drew the wills and settled the estates of both father and son. These confidential relations were held too sacred to be cemented by sordid gold. The day of the high-salaried city pastor, unsympathetic medical specialist and the cold-blooded business lawyer had not yet arrived. Therefore, it could not be said of these lawyers, what John Randolph once said of Webster: "His belief in his client's rights could always be refreshed and his zeal renewed by a check." They coveted their client's confidence more than all the coin in his coffers, and they strove more to vindicate the right in the trial of his cause than to earn their fee. They possessed a worthy ambition to honor the profession that had honored them. As sworn officers of the law, they deemed it their duty to aid the court in enforcing men's legal rights by upholding the majesty of the law. They held that all laws were equally binding on all men, and that he who violated one jot or one tittle of the law violated the whole law, by showing his contempt for the law. To them the law was no respecter of persons, but demanded unquestioned obedience, alike from judge, lawyer and layman. They believed that the judge who rendered an unrighteous judgment, in the name of the law, was as much a violator of the law as the guiltiest criminal serving the sentence of the law; that it was as much the duty of the citizen to aid in the enforcement of an unjust, as a just, law. Little wonder, then, that the best class of clients sought them in abundance, and that finally, they were each in turn called to sit on this bench. For twenty years these two able, honest lawyers worked as yoke-fellows in perfect harmony in the practice and purification of their profession. Their ideas and ideals coalesced on all ques-

tions—moral, professional and political. Verily, they were "lovely and pleasant in their lives, and in their death they were not divided."

When Captain Burwell was appointed Associate Justice of this Court in November, 1892, MR. WALKER associated your speaker with him in the practice of the law. This partnership continued until Judge Burwell retired from the bench in January, 1895, to become the head of his old firm, which relationship continued until MR. WALKER took the oath of the office as Associate Justice of this Court.

The contest for his first nomination in the Democratic Convention of 1902 was spirited. His opponents, Davidson, Armfield and Lockhart, were all able lawyers and widely popular. They were also his life-long personal friends, which caused him reluctantly to permit his friends to urge his candidacy for this high office. He regarded the office of such great honor and dignity that he felt that any man who actively sought it was unfit to fill it. Therefore, he absolutely refused to turn his hand over to secure this nomination, or to permit his friends to enter into any unseemly political scramble to secure it for him.

Though he was a loyal party man, he was in no sense a politician. Though a Democrat, he was elected from the then Republican county of Richmond to represent it in the State Legislature in 1875. In 1884, he was defeated by only a hair's breadth for the Democratic nomination for Attorney-General, but aspired to no other office prior to his nomination for Associate Justice of this Court. Yet so widespread was his reputation as a great lawyer, that he was unanimously elected the first president of the North Carolina Bar Association in 1899, and when his name was suggested for the position of Associate Justice of this Court, his party responded so cordially that he received nearly as many votes in the convention on the first ballot as did his three distinguished opponents, combined, and was triumphantly nominated on the second ballot. He was elected in the succeeding November election, and took the oath of office as Associate Justice of this Court in January, 1903, which office he filled by successive re-election until the day of his death in Raleigh, May 22, 1923, thus having rounded out a period of more than twenty years of continuous service on this bench, which exceeded that of any other member of the Court, with the exception of Chief Justices Ruffin, Pearson, and Clark. At the time of his death, he was the senior Associate Justice of this Court, and therefore, next in line of promotion to the Chief Justiceship when a vacancy in that high office should occur.

When he became a member of this Court he was fifty-three years of age. He had been engaged in the general practice of his profession for thirty-two years. He was at the peak of his physical and intellectual powers, having arrived at the age when youthful desires for individual

success had passed, leaving him capable of doing his best work. He had also reached the goal of his ambition—the dream of his young manhood. Notwithstanding he had had no previous judicial experience, he was peculiarly fitted, by natural endowments and professional training, to worthily wear the judicial ermine. Many of the ablest men who have adorned this bench have served apprenticeships as trial judges. However, there have been notable exceptions to this rule, among whom (and I speak only of the dead) were Gaston, Rodman, Dillard, Ashe, Smith, Davis and Burwell, all of whom, as we remember, came here directly from an active practice at the bar. It is not denied that a wide and varied experience incident to the duties of a trial judge tends to produce that judicial temperament without which no court of last resort can fairly and fearlessly pass upon the life and death, or the personal or property rights, of him who brings his cause here for judgment. But a fair, unprejudiced mind is not the sole prerequisite of a great judge. He must also possess the ability to analyze and clearly grasp the facts of a case before he can accurately apply the law. These powers of analysis are best developed by the experiences of the active practitioner, who must consider and fairly appraise his adversary's theory of the case, as well as his own, if he would not be taken by surprise. Probably the ideal preparatory schools for the well-rounded appellate judge would be fifteen years in active practice at the bar, and ten years as a trial judge. He should then be able to glean from the record the living, vibrant facts as they appeared to the eyes of the trial judge and jury, to analyze and appraise the testimony as it fell from the lips of the witnesses on the stand, and not as it literally appears in cold, unsympathetic type. In no other way can this Court know whether the error complained of was prejudicial or harmless—the latter the loophole through which so many of the errors of the trial court escape.

JUDGE WALKER filed his first opinion in the case of *Board of Education v. The Town of Greenville,* reported 24 February, 1903, 132 N. C., 4, and his last opinion was filed in the case of *Erskine v. Motors Co.,* 185 N. C., 479, 26 May, 1923, four days after his death. He probably wrote more than two thousand opinions during the twenty years he was a member of this Court. However, it would be a useless waste of time, as well as a very difficult task, to undertake here to give even the briefest analysis of his more important judicial deliverances. They are familiar to this Court, and ought to be reasonably so to the profession. To others, they would not be interesting. While all the opinions of this Court are supposed to represent the combined wisdom of at least a majority of its members, the truth is, they do not. Each opinion is the mental offspring of the judge who writes it, and more vividly represents his mental and moral characteristics than the chil-

dren around his fireside. Therefore, if you would know the real man, read what he has written. (The wise man showed wisdom when he exclaimed, "O that mine enemy would write a book!") If his mind is warped by passion or prejudice, he cannot think or write straight. If he is honest and above board, he will so think and write. To slightly paraphrase the words of the great lawyer-Apostle, he will think on "whatsoever things are true, whatsoever things are honest, whatsover things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report." Measured by this standard, I confidently commend to this Court and to the profession the high ideals reflected in JUDGE WALKER'S opinions. They lifted on high the majesty of the law; they were free from personal and party prejudice; they recognized the constitutional limitations of this Court; they accorded to the legislative branch of the government the sole right to make laws; they reserved to the courts the right to interpret these laws in the light of the Constitution and the well established common-law rules of construction; they recognized that new conditions required new laws, but they also recognized that it was the sole function of the Legislature to pass such laws; they held that it was as wrong for the judiciary to encroach upon the powers of the Legislature as for the Legislature to usurp the powers of the judiciary; they upheld the ancient landmarks of the law established by well seasoned precedents, and neither "respected the person of the poor nor honored the person of the mighty."

But let no one think that because JUDGE WALKER adhered to those ancient landmarks, he was a reactionary. To the contrary, he was in all things progressive, within the limitations of the law. He fully recognized that the many and mighty changes that had been wrought in our civilization within the last half century had brought about social, industrial and economic conditions which demanded new laws to meet these conditions, and no man was more heartily in favor of the enactment, by the duly constituted law-making bodies of the land, of every wise and humane law necessary to protect the rights of all men and women against the aggression of predatory power, wherever found; but he insisted that under the Constitution, these reforms could only come through legislation, and not by judicial usurpation. He therefore held that it was a greater sin to violate the Constitution by a species of judicial legislation, even to correct an economic or industrial wrong, than to leave that wrong unrighted, until the people, through their chosen representatives, could provide the remedy. To him, the end never justified the means if the means were unlawful. He would not do evil that good might come of it. In no other way did he believe that constitutional government could endure.

JUDGE WALKER was a member of the Dialectic Society of the University of North Carolina, and after becoming a member of this bench, that institution, as well as Davidson College, conferred upon him the degree of Doctor of Laws. He was also elected vice-president of the American Bar Association for North Carolina for the years 1916, 1917 and 1918.

But I fear I have already violated the rules of propriety in multiplying words in an earnest attempt to inscribe on the records of this Court a true estimate of the virtues of this great lawyer and judge as they appeared to me. Let me speak for but a moment of the man, divorced from his profession and his office.

First of all, he was a faithful but humble member of, and for many years vestryman in, the Episcopal Church, upon the services of which he was a regular attendant. However, he did not parade his religion by wearing phylacteries or making long prayers. He neither magnified his own Christian virtues nor minified those of others. His whole life was a living sermon, exemplifying the divine command "to do justly and to love mercy and to walk humbly before thy God."

But learned and profound as he was as a jurist and judge, and faithful as he was to the vows of his Church, in my opinion his chief charm consisted of his gentleness of soul, and his consequent perfect poise. Truly it could be said of him that he was as wise as a serpent, yet as harmless as a dove. This, indeed, is a rare virtue in a strong man such as he was. Thinking no evil, he spoke no evil of any man. Though he spake not "with the tongue of men and of angels," yet he possessed that broad charity for the weakness of mankind, which we are told by the great Apostle not only abideth, but is greater than either faith or hope.

It was my privilege to be intimately associated with him for half a lifetime—ten years in the practice of law, and twenty years while he was a member of this Court. During that period, he accorded me every consideration he showed men nearer his own age and attainments. He was always and everywhere the soul of courtesy and kindness. He never lost his temper or became irritated with anybody or at anything. He was courteous and deferential alike to his opponents and his associates at the bar, as well as his brethren of the bench, and he never impugned the motive or good faith of any one.

But in Rome, the private character of a Cæsar's wife is never discussed. So with a man who possesses the cardinal virtues. His character is not in issue. When it is, there is some doubt about it. We assume that a gentleman is truthful, honest, chivalrous and courageous. To discuss these virtues is to doubt them. Only a muck-raking notoriety seeker will discuss the private character of a Washington, which

is beyond the realm of doubt or the clouds of suspicion. We may discuss a gentleman's personal traits, but not his private character or his domestic relations. To assert that a man is a true, tender, considerate husband is to imply that somebody has suggested that he is not. So we shall not tear asunder the veil of the sacred domestic temple to cast profane eyes upon the holy of holies of this man's family life, except merely to chronicle the fact that he was married in 1878 to Miss Nettie Settle Covington of Richmond County, who died at her home in Charlotte in 1907, four years after her devoted husband had been elevated to this bench, and in 1910 he was again married to Miss Alma Locke Mordecai of New Orleans, who survives him to cherish the memory of the tranquil happiness of their married life.

After having lived beyond the time allotted to most men, he was stricken within the precincts of this temple of justice with the robes of office about him, and on 22 May, 1923, at his home in this city, surrounded by his loved ones, the silver cord of life was loosed, and his spirit returned unto the God that gave it. Accompanied by his family and friends, his remains were borne hence to the city of Wilmington and laid to rest among the scenes and surroundings of his boyhood, there to be mingled with the dust of his loved ones who had gone before. Verily, "thou shalt come to thy grave in a full age, like as a shock of corn cometh in in his season." He is also survived by a sister, Miss Maria Walker of Wilmington, and several nieces and nephews, one of whom is Mr. Thomas W. Davis, a leading lawyer of Wilmington, ex-president of the North Carolina Bar Association, and now general solicitor of the Atlantic Coast Line Railroad Company, a position formerly held by his distinguished father, Mr. Junius Davis, and by his grandfather, the Hon. George Davis, Attorney-General in the Confederate Cabinet.

I can do no better, in closing this memorial, than to repeat the words of Washington, in speaking of the death of a friend: "He left as fair a reputation as ever belonged to a human character. . . . Midst all the sorrowings that are mingled on this melancholy occasion, I venture to assert that none could have felt his death with more regret than I, because no one had a higher opinion of his worth."

On behalf of his loved ones, I now have the honor of presenting to this Court the portrait of him who not long ago sat as one of you on this bench, that it may take its place in this room, among the silent images of those of his predecessors, who have gone the way of all flesh. In doing so, I am deeply conscious of the utter inability of artist's brush or spoken word to reproduce more than a faint image of him whose life we have attempted to portray. When the stranger, who knew him not, beholds this portrait and reads these words, he will be like the

man who beheld his natural face in a glass and went his way and straightway forgot what manner of man he was. It is reserved to those only, who knew him best and loved him most, to see in that face and discern from these feeble words, the great, gentle, generous soul that dwelt within the breast of him whose portrait today takes its place on these walls, among its mute companions, as another silent sentinel to guard the dignity and honor of this Court.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF THE LATE ASSOCIATE JUSTICE PLATT D. WALKER, IN THE SUPREME COURT ROOM, 20 APRIL, 1926.

The Court is pleased to have this portrait of Associate Justice Platt D. Walker, and it has heard with gratification the thoughtful and discriminating address on his life and character.

In fifty-four volumes of our published Reports, his opinions afford convincing proof of the unusual ability, the marked accuracy of learning and the constant devotion to duty, which were his. These opinions will be read and studied and appreciated more and more as time and careful perusal continue to reveal their great value to the bench as well as to members of the legal profession and students of the law.

We heartily concur in the estimate of the speaker that he will take prominent place among the ablest and most learned judges of the commonwealth.

He was a rare type of gentleman and scholar, a great lawyer and jurist, and to those of us who had the honor of his association and the privilege of his friendship, his passing was a matter of deep personal sorrow, and we shall ever hold for him an abiding affection and respect.

The Marshal will cause the portrait to be hung in its appropriate place on the walls of this Chamber, and these proceedings will be published in the forthcoming volume of our Reports.

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