NORTH CAROLINA REPORTS

VOLUME 197

This book is an exact photo-reproduction of the original Volume 197 of North Carolina Reports that was published in 1930.

Published by
THE STATE OF NORTH CAROLINA
RALEIGH
1972

Reprinted by
COMMERCIAL PRINTING COMPANY
RALEIGH, NORTH CAROLINA

NORTH CAROLINA REPORTS
VOL. 197

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1929
FALL TERM, 1929

REPORTED BY
ROBERT C. STRONG

RALEIGH
BYNUM PRINTING COMPANY
STATE PRINTERS
1930

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Rule 46 of the Supreme Court is as follows:

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11 " "	"	33	"
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13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1928
SPRING TERM, 1929

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

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

ATTORNEY-GENERAL:

DENNIS G. BRUMMITT.

ASSISTANT ATTORNEYS-GENERAL:

FRANK NASH,
WALTER D. SILER.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD C. SEAWELL.

MARSHAL AND LIBRARIAN:

MARSHALL DeLANCEY HAYWOOD.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
WALTER L. SMALL	First	Elizabeth City.
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.
W. C. HARRIS	Seventh	Raleigh.
E. H. CRANMER	Eighth	Southport.
N. A. SINCLAIR	Ninth	Fayetteville.
W. A. DEVIN	Tenth	Oxford.

SPECIAL JUDGES

CLAYTON MOORE	Williamston.
THOMAS L. JOHNSON	Lumberton.
G. V. COWPER	Kinston.

WESTERN DIVISION

JOHN H. CLEMENT	Eleventh	Winston-Salem.
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.
WALTER E. MOORE	Twentieth	Sylva.

SPECIAL JUDGES

H. HOYLE SINK	Lexington.
CAMERON F. MACRAE	Asheville.
JOHN H. HARWOOD	Bryson City.

EMERGENCY JUDGE

C. C. LYON	Elizabethtown.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
HERBERT R. LEARY	First	Edenton.
DONNELL GILLIAM	Second	Tarboro.
R. H. PARKER	Third	Henderson.
CLAWSON L. WILLIAMS	Fourth	Sanford.
D. M. CLARK	Fifth	Greenville.
JAMES A. POWERS	Sixth	Kinston.
L. S. BRASSFIELD	Seventh	Raleigh.
WOODUS KELLUM	Eighth	Wilmington.
T. A. MCNEILL	Ninth	Lumberton.
W. B. UMSTEAD	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.
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L. SPURGEON SPURLING	Sixteenth	Lenoir.
JNO. R. JONES	Seventeenth	N. Wilkesboro.
J. W. PLESS, JR.	Eighteenth	Marion.
ROBT. M. WELLS	Nineteenth	Asheville.
GROVER C. DAVIS	Twentieth	Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1929

Successful applicants for license to practice law at examination conducted by Supreme Court at the Fall Term, 1929—19 August, 1929.

ALLEN, WALTER DANIEL.....Weldon.
ANDERSON, JOHN HUSKE, JR.....Chapel Hill.
ANSELL, BURR TRACY.....Washington, D. C.
AYCOCK, LESLIE BARNES.....Rocky Mount.
AYSCUE, EDWIN OSBORNE.....Monroe.
BELL, JESSE SPENCER.....Charlotte.
BENNETT, NORMAN SMITH.....Rocky Mount.
BOWDEN, BERNICE SAUNDERS.....Burgaw.
BRASWELL, ROBERT RUSSELL.....Rocky Mount.
BROWN, BRYANT COUNCIL.....Chapel Hill.
BROWN, WALLÆR DAVIES.....Concord.
BURGESS, JAMES RALPH.....Spindale.
BURNS, EDWARD JONES.....Carthage.
BUTLER, JAMES EDWARD.....Glen Alpine.
BUTLER, LESTER CLAGETT.....Durham.
CASEY, SILAS BURNS.....High Point.
COBURN, WILLIAM HUBERT.....Williamston.
COLTRANE, JAMES ELBRIDGE.....Greensboro.
CONNELL, WILLIAM BLAND.....Washington, D. C.
COVINGTON, AUGUSTUS MCALISTER.....Chapel Hill.
COX, EDWARD YOUNG.....Rocky Mount.
CRAWFORD, PHILIP HOWELL, JR.....Kinston.
CREW, JAMES WINFIELD, JR.....Pleasant Hill.
CRUMPLER, JUNIUS ALLEN.....Chapel Hill.
CULBRETH, ERNEST LESTER.....Durham.
DANIEL, ARMAND TURNER.....Mocksville.
DAUGHTRIDGE, JAMES WATKINS.....Rocky Mount.
DAVIS, ROBERT MAYO.....Goldsboro.
DERRICKSON, VERNON BLADES.....New Bern.
DOMINICK, MRS. MINNIE STONE.....Rocky Mount.
DONNAHOE, MARK EARLE.....Asheville.
DREHER, AMZI BOND.....Greensboro.
DUNCAN, FITZHUGH DURHAM.....Raleigh.
DUNN, CHARLES GARNETTE.....Rocky Mount.
EATON, OSCAR BENJAMIN, JR.....Winston-Salem.
EWBANK, JOHN.....Hendersonville.
FINCH, WILLIAM ATLAS, JR.....Wilson.
GASKILL, NATHAN BUZBY.....Asheville.
GRADY, CHARLES GILBERT.....Four Oaks.
GRAY, THOMAS COWAN.....Hayesville.
GRESHAM, JOHN THOMAS, JR.....Warsaw.
GRIFFIN, FLOYD SAMPSON.....Chapel Hill.
HARRIS, MRS. CLYDE FARMER.....Wilson.
HENDERSON, HOKE FREDERICK.....Greensboro.

HUDGINS, CARTER.....Marion.
HUDGINS, DANIEL EDWARD, JR.....Marion.
JENNETTE, JOHN ROBERT.....Goldsboro.
JEWETT, THOMAS HARDIN.....Winston-Salem.
JONES, RUSSELL LEWIS.....Raleigh.
KINDLEY, WILLIAM ERWIN HOFFMAN, JR.....Fayetteville.
LAMB, MRS. VADA WYNNE.....Wilson.
LENNON, ALTON ASA.....Wilmington.
LEWIS, NELL BATTLE.....Raleigh.
LILLY, RICHARD MACKUBIN.....Fayetteville.
LONG, MARTIN LUTHER.....Wake Forest.
MCCREA, CHARLES ARTHUR.....Asheville.
MCDANIEL, GEORGE DAWSON.....Chapel Hill.
MACKETHAN, EDWIN ROBESON, JR.....Fayetteville.
MCLEAN, WILLIAM KATHERINE.....Democrat.
MCMULLAN, JOHN BROCKETT.....Elizabeth City.
MARSHBURN, ORIS MILTON.....Rocky Mount.
PHILLIPS, GEORGE WILLIAM.....Charlotte.
PIRKEY, JOHN FREDERICK.....Rocky Mount.
RAYMER, AUGUSTUS BARKER.....Statesville.
REYNOLDS, BENJAMIN FURMAN.....Rockingham.
ROBERTS, NATHAN JAY.....Charlotte.
ROGERS, LUDLOW THOMAS.....Durham.
ROUSE, CHARLES FRANCIS.....Kinston.
ROYSTER, THOMAS SAMPSON.....Oxford.
ROYSTER, WILBUR HIGH.....Raleigh.
SAPP, CLARENCE ODELL.....Winston-Salem.
SATTERFIELD, BYRD ISAAC.....Timberlake.
SINK, JOHN MOYER, JR.....Greensboro.
SHUFORD, WILLIAM TALMAGE.....Salisbury.
SMITH, ALLEN KENDRICK.....Raleigh.
SMITH, DORSEY DEWEY.....Chapel Hill.
SPARGER, COLLIER BRYSON.....Chapel Hill.
SPRINKLE, THOMAS WEAVER.....Raleigh.
STITH, LAWRENCE AUGUSTINE.....New Bern.
STOUT, ECTOR CLIFTON.....Thomasville.
STRICKLAND, HECTOR PAUL.....Dunn.
TAYLOR, EDWARD FORT.....Oxford.
THOMPSON, ALFRED MARSH.....Raleigh.
TOMS, WILLIAM FRANCIS.....Asheville.
TROY, JOHN CLARKE.....Durham.
VENTERS, CARL VERNON.....Richlands.
WATT, LAWRENCE EUGENE.....Reidsville.
WHITAKER, ALICE PEIRSON.....Winston-Salem.
WINN, MRS. JUANITA GREGG.....Liberty.
YOUNCE, ADAM.....Spencer.

COMITY APPLICANTS

LUNSFORD, JOHN LOCKHART, from Kentucky.....Rougemont.
BOYNTON, LAWRENCE WILLIAM, from New York.....Concord.

CALL OF CALENDAR IN SUPREME COURT

SPRING TERM, 1930

(Showing when records and briefs must be filed)

FIRST DISTRICT appeals will be called Tuesday, 4 February, 1930.
Appeals must be docketed by 10 A. M. Tuesday, 21 January.
Appellant's brief must be filed by noon of 28 January.
Appellee's brief must be filed by noon of 1 February.

SECOND DISTRICT appeals will be called Tuesday, 11 February.
Appeals must be docketed by 10 A. M. Tuesday, 28 January.
Appellant's brief must be filed by noon of 4 February.
Appellee's brief must be filed by noon of 8 February.

THIRD-FOURTH DISTRICTS appeals will be called Tuesday, 18 February.
Appeals must be docketed by 10 A. M. Tuesday, 4 February.
Appellant's brief must be filed by noon of 11 February.
Appellee's brief must be filed by noon of 15 February.

FIFTH DISTRICT appeals will be called Tuesday, 25 February.
Appeals must be docketed by 10 A. M. Tuesday, 11 February.
Appellant's brief must be filed by noon of 18 February.
Appellee's brief must be filed by noon of 22 February.

SIXTH DISTRICT appeals will be called Tuesday, 4 March.
Appeals must be docketed by 10 A. M. Tuesday, 18 February.
Appellant's brief must be filed by noon of 25 February.
Appellee's brief must be filed by noon of 1 March.

SEVENTH DISTRICT appeals will be called Tuesday, 11 March.
Appeals must be docketed by 10 A. M. Tuesday, 25 February
Appellant's brief must be filed by noon of 4 March.
Appellee's brief must be filed by noon of 8 March.

EIGHTH-NINTH DISTRICTS appeals will be called Tuesday, 18 March.
Appeals must be docketed by 10 A. M. Tuesday, 4 March.
Appellant's brief must be filed by noon of 11 March.
Appellee's brief must be filed by noon of 15 March.

TENTH DISTRICT appeals will be called Tuesday, 25 March.
Appeals must be docketed by 10 A. M. Tuesday, 11 March.
Appellant's brief must be filed by noon of 18 March.
Appellee's brief must be filed by noon of 22 March.

ELEVENTH DISTRICT appeals will be called Tuesday, 1 April.
Appeals must be docketed by 10 A. M. Tuesday, 18 March.
Appellant's brief must be filed by noon of 25 March.
Appellee's brief must be filed by noon of 29 March.

TWELFTH DISTRICT appeals will be called Tuesday, 8 April.
Appeals must be docketed by 10 A. M. Tuesday, 25 March.
Appellant's brief must be filed by noon of 1 April.
Appellee's brief must be filed by noon of 5 April.

THIRTEENTH DISTRICT appeals will be called Tuesday, 15 April.
Appeals must be docketed by 10 A. M. Tuesday, 1 April.
Appellant's brief must be filed by noon of 8 April.
Appellee's brief must be filed by noon of 12 April.

FOURTEENTH DISTRICT appeals will be called Tuesday, 22 April.
Appeals must be docketed by 10 A. M. Tuesday, 8 April.
Appellant's brief must be filed by noon of 15 April.
Appellee's brief must be filed by noon of 19 April.

FIFTEENTH-SIXTEENTH DISTRICTS appeals will be called Tuesday, 29 April.
Appeals must be docketed by 10 A. M. Tuesday, 15 April.
Appellant's brief must be filed by noon of 22 April.
Appellee's brief must be filed by noon of 26 April.

SEVENTEENTH-EIGHTEENTH DISTRICTS appeals will be called Tuesday, 6 May.
Appeals must be docketed by 10 A. M. Tuesday, 22 April.
Appellant's brief must be filed by noon of 29 April.
Appellee's brief must be filed by noon of 3 May.

NINETEENTH DISTRICT appeals will be called Tuesday, 13 May.
Appeals must be docketed by 10 A. M. Tuesday, 29 April.
Appellant's brief must be filed by noon of 6 May.
Appellee's brief must be filed by noon of 10 May.

TWENTIETH DISTRICT appeals will be called Tuesday, 20 May.
Appeals must be docketed by 10 A. M. Tuesday, 6 May.
Appellant's brief must be filed by noon of 13 May.
Appellee's brief must be filed by noon of 17 May.

SUPERIOR COURTS, SPRING TERM, 1930

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

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

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Cranmer.*

Pasquotank—Jan. 6†; Feb. 10†; Feb. 17* (A); Mar. 17†; May 5† (A) (2); June 2*; June 9† (2).
Beaufort—Jan. 13*; Feb. 17† (2); April 7†; May 5† (2).
Perquimans—Jan. 20; April 14.
Currituck—Mar. 3; April 28†.
Camden—Mar. 10.
Gates—Mar. 24.
Chowan—Mar. 31.
Tyrrell—April 21.
Hyde—May 19.
Dare—May 26.

SECOND JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Sinclair.*

Washington—Jan. 6 (2); April 14†.
Edgecombe—Jan. 20; Mar. 3; Mar. 31† (2); June 2 (2).
Nash—Jan. 27; Feb. 17† (2); Mar. 10; April 21† (2); May 26.
Wilson—Feb. 3*; Feb. 10; May 12*; May 19†; June 23†.
Martin—Mar. 17 (2); April 14† (A) (2); June 16.

THIRD JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Devin.*

Vance—Jan. 6*; Mar. 3*; Mar. 10†; June 16*; June 23†.
Warren—Jan. 13 (2); May 19 (2).
Halifax—Jan. 27 (2); Mar. 17† (2); April 28* (A); June 2† (2).
Bertie—Feb. 10 (2); April 28† (3).
Hertford—Feb. 24*; April 14† (2).
Northampton—Mar. 31 (2).

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Small.*

Harnett—Jan. 6; Feb. 3† (2); Mar. 31† (A) (2); May 19; June 16*.
Chatham—Jan. 13; Mar. 3†; Mar. 17†; May 12.
Wayne—Jan. 20; Jan. 27†; Mar. 3† (A) (2); April 7; April 14†; May 26; June 2†.
Lee—Jan. 27† (A) (2); Mar. 24 (2); May 5.
Johnston—Feb. 17† (2); Mar. 3* (A); Mar. 10; April 21† (2); June 23*.

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Barnhill.*

Craven—Jan. 6*; Jan. 27† (3); April 7‡; May 12†; June 2*.
Pitt—Jan. 13†; Jan. 20; Feb. 17†; Mar. 17 (2) April 14 (2); May 5† (A); May 19† (2).
Greene—Feb. 24 (2); June 23.
Carteret—Mar. 10; June 9 (2).
Jones—Mar. 31.
Pamlico—April 28 (2).

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Midyette.*

Duplin—Jan. 6† (2); Jan. 27*; Mar. 24† (2).
Lenoir—Jan. 20*; Feb. 17† (2); April 7; May 19*; June 9† (2).
Sampson—Feb. 3 (2); Mar. 10† (2); April 28 (2).
Onslow—Mar. 3; April 14† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Daniels.*

Wake—Jan. 6*; Jan. 27†; Feb. 3*; Feb. 10†; Mar. 3*; Mar. 10† (4); April 7*; April 14† (3); May 5*; May 19† (2); June 2*; June 9† (2).
Franklin—Jan. 13 (2); Feb. 17† (2); May 12.

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Nunn.*

Brunswick—Jan. 6†; April 7; June 16†.
New Hanover—Jan. 13*; Feb. 3† (2); Mar. 3† (2); Mar. 17*; April 14† (2); May 12*; May 26† (2); June 9*.
Pender—Jan. 20; Mar. 24† (2); May 19.
Columbus—Jan. 27; Feb. 17† (2); April 28 (2).

NINTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Grady.*

Bladen—Jan. 6; Mar. 10*; April 21†.
Cumberland—Jan. 13*; Feb. 10† (2); Mar. 17† (2); April 28† (2); May 26*.
Hoke—Jan. 20; April 14.
Robeson—Jan. 27*; Feb. 3; Feb. 24† (2); Mar. 31‡; April 7*; May 12† (2).

TENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Harris.*

Durham—Jan. 6† (3); Feb. 17*; Mar. 3† (2); Mar. 24*; April 28†; May 5† (A); May 19*; June 2† (A) (2); June 23*.
Person—Jan. 20 (A); Jan. 27†; April 21.
Granville—Feb. 3 (2); April 7 (2).
Alamance—Feb. 24*; Mar. 31†; May 5†; May 26† (2).
Orange—Mar. 17; May 12†; June 9 (2).

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Schenck.*

Forsyth—Jan. 6 (2); Feb. 10† (2); Feb. 24 (A) (2); Mar. 10† (2); Mar. 24*; May 19* (2); June 2† (2); June 23† (A).
Surry—Jan. 13† (A) (2); Feb. 3; Mar. 17† (A) (2); April 21 (2); June 23† (A) (2).
Rockingham—Jan. 20*; Feb. 24† (2); May 12; June16† (2).
Caswell—Mar. 31; May 5† (A).
Ashe—April 7 (2).
Alleghany—May 5.

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge McElroy.*

Guilford—Jan. 6† (2); Jan. 20*; Feb. 3† (2); Feb. 17† (A) (2); Mar. 3* (2); Mar. 17† (2); Mar. 31† (A) (2); April 14† (2); April 28*; May 12† (2); June 2† (2); June 16*.
Davidson—Jan. 27*; Feb. 17† (2); May 5*; May 26†; June 23*.
Stokes—Mar. 31*; April 7†.

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Moore.*

Richmond—Dec. 30†; Jan. 6*; Mar. 17†; April 7*; May 26†; June 16†.
Anson—Jan. 13*; Mar. 3†; April 14 (2); June 9†.
Moore—Jan. 20*; Feb. 10†; Mar. 24† (A) (2); May 19; May 26† (A).
Union—Jan. 27*; Feb. 17† (2); Mar. 24†; May 5†.
Stanly—Feb. 3†; Mar. 31; May 12†.
Scotland—Mar. 10†; April 28; June 2.

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Clement.*

Mecklenburg—Jan. 6*; Feb. 3† (3); Feb. 24*; Mar. 3† (2); Mar. 31† (2); April 28† (2); May 12*; May 19† (2); June 9*; June 16†.
Gaston—Jan. 13*; Jan. 20† (2); Mar. 17† (2); April 14*; June 2*.

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Shaw.*

Cabarrus—Jan. 6 (2); Feb 24†; April 21 (2).
Montgomery—Jan. 20*; April 7† (2).
Iredell—Jan. 27 (2); Mar. 10†; May 19 (2).
Rowan—Feb. 10 (2); Mar. 3†; May 5 (2).
Randolph—Mar. 17† (2); Mar. 31*.

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Stack.*

Cleveland—Jan. 6; Mar. 24 (2).
Catawba—Jan. 13† (2); Feb. 3 (2); May 5† (2).
Lincoln—Jan. 20 (A); Jan. 27†.
Caldwell—Feb. 24 (2); May 19† (2).
Burke—Mar. 10* (2); June 2† (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Harding.*

Alexander—Feb. 17.
Yadkin—Feb. 24*; May 12† (2).
Wilkes—Mar. 3 (2); June 2† (2).
Davie—Mar. 17; May 26†.
Watauga—Mar. 24 (2).
Mitchell—April 7 (2).
Avery—April 21 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Oglesby.*

McDowell—Jan. 6*; Feb. 17† (2); June 9 (3).
Henderson—Jan. 13 (2); Mar. 3 (2); April 28† (2); May 26† (2).
Yancey—Jan. 27†; Mar. 17 (2).
Rutherford—Feb. 3† (2); May 12 (2).
Transylvania—Mar. 31 (2).
Polk—April 14 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Webb.*

Buncombe—(Special civil term 3 weeks each month except May and December) Jan. 13† (2); Jan. 27; Feb. 3† (2); Feb. 17; Mar. 3† (2); Mar. 17; Mar. 31; April 7† (2); April 21; May 5† (2); May 19; June 2† (2); June 16 (2).
Madison—Jan. 6; Feb. 24; Mar. 24; April 28; May 26.

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1930—*Judge Finley.*

Graham—Jan. 6† (A) (2); Mar. 17 (2); June 2† (2).
Haywood—Jan. 6† (2); Feb. 3 (2); May 5† (2).
Cherokee—Jan. 20† (2); Mar. 31 (2); June 16†.
Jackson—Feb. 17 (2); May 19† (2)
Swain—Mar. 3 (2).
Macon—April 14 (2).
Clay—April 28; May 5 (A).

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

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—ISAAC M. MEEKINS, *Judge*, Elizabeth City.
Middle District—JOHNSON J. HAYES, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby.

EASTERN DISTRICT

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

Durham, first Monday in March and September. S. A. ASHE, Clerk.

Raleigh, criminal term, second Monday after the fourth Monday in April and October; civil term, second Monday in March and September. S. A. ASHE, Clerk.

Fayetteville, third Monday in March and Seeptember. D. N. GEDDIE, Deputy Clerk.

Elizabeth City, fourth Monday in March and September. J. P. THOMPSON, Deputy Clerk, Elizabeth City.

Washington, first Monday in April and October. J. B. RESPESS, Deputy Clerk, Washington.

New Bern, second Monday in April and October. GEORGE GREEN, Deputy Clerk, New Bern.

Wilson, third Monday in April and October. G. L. PARKER, Deputy Clerk.

Wilmington, fourth Monday in April and October. PORTER HUFHAM, Deputy Clerk, Wilmington.

OFFICERS

W. H. FISHER, United States District Attorney, Wilmington.
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.

MIDDLE 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 COBB, Chief Deputy; DELLA BUTT, Deputy; CORA SHAW, Deputy.

Rockingham, first Monday in March and September. R. L. BLAYLOCK, Clerk, Greensboro.

Salisbury, third Monday in April and October. R. L. BLAYLOCK, Clerk, Greensboro; ELIZABETH HENNESSEE, Deputy.

Winston-Salem, first Monday in May and November. R. L. BLAYLOCK, Clerk, Greensboro; ELLA SHORE, Deputy.

Wilkesboro, third Monday in May and November. LINVILLE BUMGARNER, Deputy Clerk.

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A. E. TILLEY, Assistant United States Attorney, Greensboro.
J. J. JENKINS, United States Marshal, Greensboro.
R. L. BLAYLOCK, Clerk United States District Court, Greensboro.

WESTERN DISTRICT

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

Asheville, second Monday in May and November. J. Y. JORDAN, Clerk; OSCAR L. MCLURD, Chief Deputy Clerk; WILLIAM A. LYTLE, Deputy Clerk.

Charlotte, first Monday in April and October. FAN BARNETT, Deputy Clerk, Charlotte.

Statesville, fourth Monday in April and October. ANNIE ADERHOLDT, Deputy Clerk.

Shelby, fourth Monday in September and third Monday in March. FAN BARNETT, Deputy Clerk, Charlotte.

Bryson City, fourth Monday in May and November. J. Y. JORDAN, Clerk.

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FRANK C. PATTON, Assistant United States Attorney, Charlotte (Morganton).
THOS. C. MCCOY, Assistant United States Attorney, Asheville.
BROWNLOW JACKSON, United States Marshal, Asheville.
J. Y. JORDAN, Clerk United States District Court, Asheville.

CASES REPORTED

A

	PAGE
Alexander, Wilder v.	780
Allen, S. v.	684
Alspaugh v. Drainage Comrs.	776
Alston v. Warren County	470
Amos, Tate v.	159
Anderson v. Insurance Co.	72
Arrington v. Pinetops	433
Asheville, Noland v.	300
Atkinson v. Greene	118
Attorney-General v. R. R.	381
Austin v. R. R.	319
Ayden v. Lancaster	556

B

Baking Co., Kjellander v.	206
Bank v. Bank	68
Bank v. Bank	526
Bank, Briggs v.	120
Bank, Braswell v.	229
Bank v. Broadhurst	365
Bank, Comrs. of Chowan v.	410
Bank, Dawson v.	499
Bank v. Liles	413
Bank, Qualls v.	438
Bank, Stanback v.	292
Banking Co. v. Green	534
Barbee, S. v.	248
Barber, S. v.	554
Barbour v. Wake County	314
Barefoot v. Underwood	791
Barnes, Realty Co. v.	6
Barnett, Carawan v.	511
Battle v. Shore	449
Berger v. Stevens	234
Bessemer City, Black v.	195
Bishop, Greensboro v.	748
Black v. Bessemer City	195
Blower Co. v. MacKenzie	152
Board of Education v. Pegram	33
Bohannon v. Stores Co.	755
Booker, Ogburn v.	687
Boone, Music Store v.	174
Bostwick v. Jackson	785
Bottling Co., Reece v.	661
Bouldin v. Davis	731
Bowie v. Tucker	671
Boyd v. Brooks	644
Braswell v. Bank	229
Braswell, Sears v.	515
Brick Co. v. R. R.	442
Bridgeman v. Ins. Co.	599
Briggs v. Bank	120
Broadhurst, Bank v.	365
Broadhurst, Brown v.	738
Brockwell, *In re Will of*	545
Brooks, Boyd v.	644
Broughton, Hyman v.	1
Brown v. Broadhurst	738
Brown, Earnhardt v.	204
Brown v. Lewis	704
Brown v. Osteen	305
Brown v. Sheets	268
Brown, Waller v.	508
Brummitt, Atty.-General, v. R. R.	381
Bryant v. Construction Co.	639
Bryant, Cranford v.	784
Buie v. R. R.	655
Burton, Thornburg v.	193
Bus Line, Martin v.	720
Byrd v. Hyman	189

C

Cagle, S. v.	778
Candler v. R. R.	399
Car Co., Whitaker v.	83
Carawan v. Barnett	511
Carson, Roebuck v.	492
Carstarphen, Owens v.	424
Casey, *In re Will of*	347
Casualty Co., Peeler v.	286
Cathey v. Charlotte	309
Cecil v. Lumber Co.	81
Charlotte, Cathey v.	309
Cheek v. Gregory	761
C. I. T. Corp. v. Drake	162
C. I. T. Corp. v. Windsor	208
Clark v. Maxwell, Comr. of Rev.	604
Cleve, Morris v.	253
Coach Co., Tallant v.	783
Coach Co., Williams v.	12
Coe v. Loan Co.	689
Cole, Land Co. v.	452
Cole v. Wagner	692
Collins v. Norfleet-Baggs	659
Comr. of Revenue, Clark v.	604
Comrs. of Chowan v. Bank	410

PAGE

Connor v. Mfg. Co. 66
Construction Co., Bryant v. 639
Construction Co., Jackson v. 781
Construction Co., Mehaffey v. 22
Construction Co., Supply Co. v. 774
Construction Co., Watson v. 586
Cooper, Wilson v. 791
Coppersmith, Walston v. 407
Cornett, S. v. 627
Corp. Com. v. Harris 202
Corp. Com., Indemnity Co. v. 562
Corporation Com. v. Murphey 42
Corporation Com. v. R. R. 699
Cotton v. Transportation Co. 709
Cotton Co., Dodson v. 782
Cowans v. Hospitals 41
Coward, Darden v. 35
Coward, Skinner v. 466
Cowen v. Williams 432
Cox, Lipscomb v. 64
Coxe v. Dillard 344
Cranford v. Bryant 784
Crawford, S. v. 513
Culbreth, Glenn v. 675
Currie, Thompson v. 793

D

Dalton, S. v. 125
Daniels, S. v. 285
Darden v. Coward 35
Davis, Bouldin v. 731
Davis v. Ins. Co. 617
Davis v. Jeffreys 712
Dawson v. Bank 499
Dicks, Smith v. 355
Dillard, Coxe v. 344
Dodson v. Cotton Co. 782
Doll, Springs v. 240
Dooley, Underwood v. 100
Drainage Comrs., Alspaugh v. 776
Drake, C. I. T. Corporation v. 162
Draughon, Newberry v. 298
Dulin v. Dulin 215
Durham, Jones v. 127

E

Earnhardt v. Brown 204
Edwards v. Spence 495
Eldridge, S. v. 626
Electric Co. v. Electric Co. 495
Electric Co. v. Light Co. 766

PAGE

Elizabeth City, Simmons v. 404
Elliott, King v. 93
Eubank, Gruber v. 280

F

Fayetteville, Holmes v. 740
Ferguson v. Martin 301
Finance Co., Morrison v. 322
Fitzgerald, Rutledge v. 163
Ford v. Willys-Overland 147
Foster v. Hyman 189
Fox, S. v. 478
Freeman, S. v. 376
Frick Co. v. Shelton 296
Fulbright, Jones v. 274
Fulton, Grimes v. 84

G

Gant v. Gant 164
Gant v. Ins. Co. 122
Gill, Poe v. 326
Gilliken v. Norcom 8
Gillis, Scott v. 223
Glass Co. v. Hotel Corp. 10
Glenn v. Culbreth 675
Goodwin v. R. R. 792
Green, Banking Co. v. 534
Green, S. v. 624
Greene, Atkinson v. 118
Greene v. Stadiem 472
Greene County v. R. R. 419
Greensboro v. Bishop 748
Gregory, Cheek v. 761
Griggs, S. v. 352
Grimes v. Fulton 84
Groves Mills v. R. R. 388
Gruber v. Eubank 280
Gulley, *In re Will of* 789
Gurley, Redrying Co. v. 56

H

Hamilton v. Henderson 353
Hanna v. Mortgage Co. 184
Hardin v. Myers 775
Hardware Co. v. Whitten 251
Harper v. Lumber Co. 539
Harrell v. Tripp 426
Harris, Corporation Com. v. 202
Harris, *In re Will of* 787
Harrison v. Sluder 76
Harvey v. Knitting Co. 177
Harvey, Tull v. 329

PAGE

Hassell v. Peanut Corporation 444
Hattaway, Wimbish v. 107
Heath v. R. R. 541
Hemphill v. Oil Co. 339
Henderson, Hamilton v. 353
Herman v. R. R. 718
Herrin, Oates v. 171
Hodges, Shelton v. 221
Holderby, Townsend v. 550
Holmes v. Fayetteville 740
Holt Mills, Sasser v. 603
Hospitals, Cowans v. 41
Hotel Co., Pick v. 110
Hotel Corp., Glass Co. v. 10
Hotel Corp. v. Toxey 787
Howard, Schwarberg v. 126
Howell v. Roberson 572
Hulin, Nance v. 222
Hunt, Pitman v. 574
Hunt, S. v. 707
Hyder, Kenilworth v. 85
Hyman, Byrd v. 189
Hyman v. Broughton 1
Hyman, Foster v. 189

I

Indemnity Co. v. Corp. Com. 562
Industrial Com. v. O'Berry, State Treasurer 595
In re Estate of Wallace 334
In re Trust Co. 613
In re Will of Brockwell 545
In re Will of Casey 347
In re Will of Gulley 789
In re Will of Harris 787
In re Will of Shemwell 332
Ins. Co., Anderson v. 72
Ins. Co., Bridgeman v. 599
Ins. Co., Davis v. 617
Ins. Co., Gant v. 122
Ins. Co., King v. 566
Ins. Co., Midkiff v. 139
Ins. Co., Midkiff v. 144
Ins. Co., Radiator Co. v. 776
Ins. Co., Rhodes v. 337
Ins. Co., Smith v. 621
Ins. Co., Tomlinson v. 777
Ins. Co., Urey v. 385
Ins. Co., Whitehurst v. 790
Investment Trust v. Drake 162
Investment Trust v. Windsor 208
Isenhour v. Kimball 795

J

PAGE

Jackson, Bostwick v. 785
Jackson v. Construction Co. 781
Jeffrey v. Mfg. Co. 724
Jeffreys, Davis v. 712
Jenkins v. R. R. 786
Johnson, West v. 789
Johnston v. Utility Co. 393
Jones v. Durham 127
Jones v. Fulbright 274
Justice v. Sherard 237

K

Kenilworth v. Hyder 85
Kernersville, Marshall v. 674
Kimball, Isenhour v. 795
King v. Elliott 93
King v. Ins. Co. 566
King, Pender County v. 50
Kjellander v. Baking Co. 206
Knitting Co., Harvey v. 177
Krouse v. R. R. 541

L

Lancaster, Ayden v. 556
Land Co. v. Cole 452
Langford v. Lumber Co. 396
Lee v. Produce Co. 714
Lewis, Brown v. 704
Lewis, Morrison v. 79
Light Co., Electric Co. v. 766
Liles, Bank v. 413
Liles v. Pickett Mills 772
Lipscomb v. Cox 64
Little-Long Co., Millinery Co. v. 168
Loan Co., Coe v. 689
Loman, Snow v. 794
Lowe, Staley v. 243
Lowery v. Lumber Co. 299
Lumber Co., Cecil v. 81
Lumber Co., Harper v. 539
Lumber Co., Langford v. 396
Lumber Co., Lowery v. 299
Lumber Co., Slaughter v. 395
Lumber Co., Stamey v. 391
Lumber Co., S. v. 4
Lumber Co., Sutton v. 38
Lumber Co. v. Welch 249

Mc

McDaniel v. Trent Mills 342
McFarland, Salmon v. 493

	PAGE
McKinnon, S. v.	576
MacKinzie, Blower Co. v.	152
McRee v. Talbot	779
M	
Machinery Co. v. Sellers	30
Mallard, Pierce v.	679
Mfg. Co., Connor v.	66
Mfg. Co., Jeffrey v.	724
Marshall v. Kernersville	674
Martin v. Bus Line	720
Martin, Ferguson v.	301
Maxwell, Com. of Rev., Clark v.	604
Mehaffey v. Construction Co.	22
Midkiff v. Ins. Co.	139
Midkiff v. Ins. Co.	144
Millinery Co. v. Little-Long Co.	168
Miller, S. v.	445
Mock, Mull v.	785
Moore, S. v.	196
Morgan v. R. R.	568
Morris v. Cleve	253
Morris v. R. R.	788
Morrison v. Finance Co.	322
Morrison v. Lewis	79
Mortgage Co., Hanna v.	184
Moseley v. R. R.	628
Motor Co. v. Motor Co.	371
Mount Airy, Wolfe v.	450
Mull v. Mock	785
Murphey, Corporation Com. v.	42
Murphy, West v.	488
Music Store v. Boone	174
Myers, Hardin v.	775
N	
Nance v. Hulin	222
Nelson v. Nelson	465
Newberry v. Draughon	298
Noland v. Asheville	300
Norcom, Gilliken v.	8
Norfleet-Baggs, Collins v.	659
Norman v. Porter	222
O	
Oates v. Herrin	171
O'Berry, S. Treas., Ind. Com. v.	595
Ogburn v. Booker	687
Oil Co., Hemphill v.	339
O'Neal, S. v.	548
Osteen, Brown v.	305
Owens v. Carstarphen	424
Owens, Walker v.	412
P	
Palmer, S. v.	135
Paschal v. Paschal	40
Paylor v. Williams	773
Peacock, Power Co. v.	735
Peanut Corporation, Hassell v.	444
Peeler v. Casualty Co.	286
Pegram, Board of Education v.	33
Pender County v. King	50
Perry v. Wiggins	502
Phifer, S. v.	729
Pick v. Hotel Co.	110
Pickett Mills, Liles v.	772
Pierce v. Mallard	679
Pierce v. Pierce	348
Pinetops, Arrington v.	433
Pitman v. Hunt	574
Poe v. Gill	326
Poe, S. v.	601
Poole v. Russell	246
Porter, Norman v.	222
Potter v. R. R.	17
Power Co. v. Peacock	735
Produce Co., Lee v.	714
Q	
Qualls v. Bank	438
R	
Radiator Co. v. Ins. Co.	776
R. R., Austin v.	319
R. R., Brick Co. v.	442
R. R., Brummitt, Atty.-General v.	381
R. R., Buie v.	655
R. R., Candler v.	399
R. R., Corporation Commission v.	699
R. R., Goodwin v.	792
R. R., Greene County v.	419
R. R., Groves Mills v.	388
R. R., Heath v.	541
R. R., Herman v.	718
R. R., Jenkins v.	786
R. R., Krouse v.	541
R. R., Morgan v.	568
R. R., Morris v.	788
R. R., Moseley v.	628
R. R., Potter v.	17
R. R., Rockingham County v.	116
R. R. v. Schwartz	778
R. R., Stone v.	429
R. R. v. Transit Co.	505
Realty Co. v. Barnes	6
Realty Co., Smith v.	783

	PAGE
Redrying Co. v. Gurley	56
Reece v. Bottling Co.	661
Rhodes v. Ins. Co.	337
Rhodes v. Tanner	458
Rhodes v. Upholstery Co.	673
Rhyne, S. v.	146
Richardson v. Ritter	108
Richardson v. Satterwhite	609
Ritter, S. v.	113
Roberson, Howell v.	572
Roberson, S. v.	657
Roberts, S. v.	662
Rockingham County v. R. R.	116
Roebuck v. Carson	492
Rose, Steel Co. v.	464
Russell, Poole v.	246
Rutledge v. Fitzgerald	163

S

Salmon v. McFarland	493
Sasser v. Holt Mills	603
Satterwhite, Richardson v.	609
Schwarberg v. Howard	126
Schwartz, R. R. v.	778
Scott v. Gillis	223
Scurlock, S. v.	475
Sears v. Braswell	515
Sellers, Machinery Co. v.	30
Sheets, Brown v.	268
Shelton, Frick Co. v.	296
Shelton v. Hodges	221
Shemwell, *In re Will of*	332
Sherard, Justice v.	237
Shoffner v. Thompson	664
Shore, Battle v.	449
Shuford v. Yarborough	150
Simmons v. Elizabeth City	404
Skinner v. Coward	466
Slaughter v. Lumber Co.	395
Sluder, Harrison v.	76
Smith v. Dicks	355
Smith v. Ins. Co.	621
Smith v. Realty Co.	783
Sneed, S. v.	668
Snow v. Loman	794
Spence, Edwards v.	495
Springs v. Doll	240
Stadiem, Greene v.	472
Staley v. Lowe	243
Stamey v. Lumber Co.	391
Stanback v. Bank	292
Stansberry, S. v.	350

	PAGE
S. v. Allen	684
S. v. Barbee	248
S. v. Barber	554
S. v. Cagle	778
S. v. Cornett	627
S. v. Crawford	513
S. v. Dalton	125
S. v. Daniels	285
S. v. Eldridge	626
S. v. Fox	478
S. v. Freeman	376
S. v. Green	624
S. v. Griggs	352
S. v. Hunt	707
S. v. Lumber Co.	4
S. v. McKinnon	576
S. v. Miller	445
S. v. Moore	196
S. v. O'Neal	548
S. v. Palmer	135
S. v. Phifer	729
S. v. Poe	601
S. v. Rhyne	146
S. v. Ritter	113
S. v. Roberson	657
S. v. Roberts	662
S. v. Scurlock	475
S. v. Sneed	668
S. v. Stansberry	350
S. v. Straughn	691
S. v. Vickers	62
S. v. Wade	571
S. v. Weston	25
S. v. Wilson	547
State Treas., Industrial Com. v.	595
Steel Co. v. Rose	464
Stevens, Berger v.	234
Stone v. R. R.	429
Stores Co., Bohannon v.	755
Straughn, S. v.	691
Supply Co. v. Construction Co.	774
Sutton v. Lumber Co.	38
Sykes v. Sykes	37

T

Talbot, McRee v.	779
Tallant v. Coach Co.	783
Tanner, Rhodes v.	458
Tate v. Amos	159
Taylor v. Taylor	197
Thompson v. Currie	793
Thompson, Shoffner v.	664
Thornburg v. Burton	193

PAGE

Tomlinson v. Ins. Co. 777
Townsend v. Holderby 550
Toxey, Hotel Corp. v. 787
Transit Co., R. R. v. 505
Transportation Co., Cotton v. 709
Trent Mills, McDaniel v. 342
Tripp, Harrell v. 426
Trust Co., *In re* 613
Tucker, Bowie v. 671
Tull v. Harvey 329

U

Underwood, Barefoot v. 791
Underwood v. Dooley 100
Upholstery Co., Rhodes v. 673
Urey v. Ins. Co. 385
Utility Co., Johnston v. 393

V

Vickers, S. v. 62

W

Wade, S. v. 571
Wagner, Cole v. 692
Wake County, Barbour v. 314
Walker v. Owens 412
Wallace, *In re* Estate of 334

PAGE

Waller v. Brown 508
Walston v. Coppersmith 407
Warehouse Co. v. Willis 476
Warren County, Alston v. 470
Watson v. Construction Co. 586
Welch, Lumber Co. v. 249
West v. Johnson 789
West v. Murphy 488
Weston, S. v. 25
Whitten, Hardware Co. v. 251
Whitaker v. Car Co. 83
Whitehurst v. Ins. Co. 790
Wiggins, Perry v. 502
Wilder v. Alexander 780
Williams v. Coach Co. 12
Williams, Cowen v. 432
Williams, Paylor v. 773
Willis, Warehouse Co. v. 476
Willys-Overland, Ford v. 147
Wilson v. Cooper 791
Wilson, S. v. 547
Wimbish v. Hattaway 107
Windsor, Investment Trust v. 208
Wolfe v. Mount Airy 450

Y

Yarborough, Shuford v. 150

APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES 795

CASES CITED

A

Abernethy v. Comrs. of Pitt----169 N. C., 631---------- 31
Accident Assur. Co., Moore v.----173 N. C., 532---------- 623
Achenbach, Boyden v.---------- 79 N. C., 539---------- 285
Adams v. Durham----------189 N. C., 232---------- 746
Adams, Lassiter v.----------196 N. C., 711---------- 695, 737
Adams, Marcom v.----------122 N. C., 222---------- 658
Adams, S. v.----------138 N. C., 688---------- 687
Adams, S. v.----------193 N. C., 581---------- 379, 658
Adams v. Wilson----------191 N. C., 392---------- 523
Ahoskie, R. R. v.----------192 N. C., 258---------- 512
Albemarle, Anderson v.----------182 N. C., 434---------- 752
Albemarle, Asbury v.----------162 N. C., 247---------- 744
Alderman, S. v.----------182 N. C., 917---------- 687
Aldridge, Clark v.----------162 N. C., 326---------- 247, 248
Aldridge v. Ins. Co.----------194 N. C., 683---------- 142, 673
Alexander, Bank v.----------188 N. C., 667---------- 219
Alexander v. Cedar Works-----177 N. C., 536---------- 68
Alexander, Charlotte v.---------173 N. C., 515---------- 133
Alexander, Lunsford v.---------- 20 N. C., 166---------- 170
Alexander v. Norwood----------118 N. C., 381---------- 81, 102, 103, 370
Alexander v. Pharr----------179 N. C., 699---------- 733
Allen, Cadell v.---------- 99 N. C., 542---------- 112
Allen, Fort v.----------110 N. C., 183---------- 523
Allen, Gaskins v.----------137 N. C., 426---------- 699
Allen, Johnson v.----------100 N. C., 131---------- 642
Allen v. Salley----------179 N. C., 147---------- 81, 103, 104, 253, 370, 371
Allen, Sermons v.----------184 N. C., 127---------- 525
Allen, Shields v.---------- 77 N. C., 375---------- 504
Allen v. Smith----------183 N. C., 222---------- 279
Allen, S. v.----------166 N. C., 265---------- 514, 692
Allen, S. v.----------190 N. C., 498---------- 353
Alsbrook v. Reid---------- 89 N. C., 151---------- 219
Alston v. Savage----------173 N. C., 213---------- 374
Aman v. Walker----------165 N. C., 224---------- 462
Anders v. Gardner----------151 N. C., 604---------- 226
Anderson v. Albemarle----------182 N. C., 434---------- 752
Anderson, Lumber Co. v.---------196 N. C., 474---------- 164
Anderson, S. v.---------- 92 N. C., 732---------- 116
Anderson v. Wilkins----------142 N. C., 154---------- 296
Andrew, S. v.---------- 61 N. C., 205---------- 487
Andrews, Grimes v.----------170 N. C., 515---------- 612
Angelo, Bank v.----------193 N. C., 576---------- 55
Angelo v. Winston-Salem---------193 N. C., 207---------- 493
Angier v. Howard---------- 94 N. C., 27---------- 433
Archbell v. Archbell----------158 N. C., 408---------- 201
Archer, Belding v.----------131 N. C., 287---------- 755
Armfield, Leak v.----------187 N. C., 625---------- 273

Armfield, R. R. v. 167 N. C., 464 559
Armstrong v. Comrs. of Gaston 185 N. C., 405 89
Asbury v. Albemarle 162 N. C., 247 744
Ashburn, S. v. 187 N. C., 717 378
Ashby, Winston-Salem v. 194 N. C., 388 132
Asheville, Cressler v. 138 N. C., 482 127
Asheville, Goode v. 193 N. C., 134 512, 559, 560
Asheville, Miller v. 112 N. C., 759 560
Asheville Division v. Aston 92 N. C., 579 361, 383
Askew v. Stevenson 61 N. C., 288 681
Assell, Comrs. of McDowell v. 194 N. C., 412 318
Assell, Comrs. of McDowell v. 195 N. C., 719 318
Assurance Co., Mfg. Co. v. 161 N. C., 88 388
Assurance Co., Moore v. 173 N. C., 532 623
Aston, Asheville Division v. 92 N. C., 579 361, 383
Aswell, S. v. 193 N. C., 399 379
Atkinson v. Graves 91 N. C., 99 374
Attorney-General v. R. R. 28 N. C., 456 383, 384
Attorney-General v. R. R. 197 N. C., 381 424
Auction Co., Paul v. 181 N. C., 1 191
Austin v. R. R. 187 N. C., 7 203
Avery, Morganton v. 179 N. C., 551 512
Avery, R. R. v. 64 N. C., 491 59
Avery v. Stewart 134 N. C., 287 525
Aycock, Edgerton v. 123 N. C., 134 510
Ayden v. Lancaster 195 N. C., 297 556
Ayden v. Lancaster 197 N. C., 556 754
Aydlett, Swift & Co. v. 192 N. C., 330 3
Ayers v. Makely 131 N. C., 60 182
Ayscue v. Barnes 190 N. C., 859 173

B

Baggett v. Jackson 160 N. C., 26 699
Bahnsen v. Clemmons 79 N. C., 556 697
Bailey v. Bailey 172 N. C., 671 157
Bailey v. Hassell 184 N. C., 450 532
Bailey v. R. R. 149 N. C., 169 191
Bailey v. R. R. 196 N. C., 515 541, 714
Bailey, S. v. 65 N. C., 426 628
Bailey, Wester v. 118 N. C., 193 433
Bain, Comrs. of Orange v. 173 N. C., 377 55, 305
Baker v. Edwards 176 N. C., 229 739, 770
Baldwin v. Smitherman 171 N. C., 772 242
Baldwin, S. v. 193 N. C., 566 586
Ballew v. R. R. 186 N. C., 704 191, 192
Ballinger v. Thomas 195 N. C., 517 720
Bank v. Alexander 188 N. C., 667 219
Bank v. Angelo 193 N. C., 576 55
Bank v. Bank 75 N. C., 534 233, 441
Bank v. Bank 197 N. C., 526 500, 501, 559
Bank v. Barrow 189 N. C., 303 233, 261, 264, 441
Bank, Bell v. 196 N. C., 233 532, 533
Bank, Boyden v. 65 N. C., 13 533

Bank, Braswell v.---197 N. C., 229---442
Bank v. Brickhouse---193 N. C., 231---324
Bank, Briggs v.---197 N. C., 120---299
Bank, Corporation Com. v.---137 N. C., 697---263
Bank, Corporation Com. v.---192 N. C., 366---44
Bank, Corporation Com. v.---193 N. C., 113---44
Bank v. Cotton Factory---179 N. C., 203---194
Bank v. Cotton Mills---115 N. C., 507---61
Bank, Dawson v.---196 N. C., 134---500, 533
Bank v. Dew---175 N. C., 79---418, 673
Bank, Drewry v.---173 N. C., 664---770
Bank v. Duke---187 N. C., 386---696
Bank, Estates v.---171 N. C., 579---531
Bank v. Floyd---142 N. C., 187---441
Bank, Glenn v.---70 N. C., 191---273
Bank, Goodloe v.---183 N. C., 315---533
Bank, Havens v.---132 N. C., 214---36, 418
Bank v. Ins. Co.---187 N. C., 97---71, 291
Bank v. Leverette---187 N. C., 743---477
Bank, Moore v.---173 N. C., 180---565
Bank v. Oil Co.---150 N. C., 718---418
Bank v. Pearson---186 N. C., 609---375
Bank, Plotkin v.---188 N. C., 711---526
Bank, Reid v.---159 N. C., 99---533
Bank, Smathers v.---135 N. C., 410---362, 616
Bank, Speas v.---188 N. C., 524---726, 740
Bank, S. v.---193 N. C., 524---151, 718
Bank v. Sumner---188 N. C., 687---650
Bank, Trust Co. v.---166 N. C., 112---500
Bank v. Trust Co.---172 N. C., 344---441
Bank v. Watson---187 N. C., 107---621
Bank v. Yelverton---185 N. C., 314---667
Banking Co. v. Sears-Roebuck & Co. v.---191 N. C., 500---324
Banks, Pate v.---178 N. C., 139---512
Banks, S. v.---143 N. C., 652---448
Barbee v. Barbee---108 N. C., 581---433
Barbee v. Barbee---187 N. C., 538---201
Barber v. R. R.---193 N. C., 691---223, 635
Barcliff v. R. R.---176 N. C., 39---104
Barco, S. v.---150 N. C., 792---31
Barnes, Ayscue v.---190 N. C., 859---173
Barnes, Barrett v.---186 N. C., 154---469, 621
Barnes v. Lewis---73 N. C., 138---418
Barnes, R. R. v.---104 N. C., 25---418
Barnes, Realty Co. v.---197 N. C., 6---226
Barrett v. Barnes---186 N. C., 154---469, 621
Barrow, Bank v.---189 N. C., 303---233, 261, 264, 441
Bassett v. Cooperage Co.---188 N. C., 511---61
Batchelor v. R. R.---196 N. C., 84---638
Bateman v. Lumber Co.---154 N. C., 248---674
Batts v. Sullivan---182 N. C., 129---71
Bauguess, *In re*---196 N. C., 278---187
Baumgarten v. Broadway---77 N. C., 8---226

Baynes v. Harris---160 N. C., 307---67
Beal v. R. R.---136 N. C., 298---562
Beam, Hicks v.---112 N. C., 642---699
Beam, S. v.---181 N. C., 597---670
Bear v. Harris---118 N. C., 476---507
Beasley, S. v.---196 N. C., 797---514
Beck, Bilyeu v.---178 N. C., 481---711, 724
Beck, Lawrence v.---185 N. C., 196---537
Becton, Eubanks v.---158 N. C., 230---272
Belding v. Archer---131 N. C., 287---755
Bell v. Bank---196 N. C., 233---532, 533
Bell, Grant v.---87 N. C., 34---219
Bell v. Jasper---37 N. C., 597---54
Bell, Snowden v.---159 N. C., 497---285
Bell, S. v.---61 N. C., 76---296
Bellamy, Wood v.---120 N. C., 212---406
Belo v. Comrs. of Forsyth---76 N. C., 489---423
Benbow, Trust Co. v.---135 N. C., 303---155
Bennett v. Comrs. Rockingham---173 N. C., 625---451
Benson, S. v.---183 N. C., 795---447, 448
Benthall, Powell v.---136 N. C., 145---553
Berry, S. v.---190 N. C., 363---271
Best v. Mortgage Co.---128 N. C., 351---681
Best, Williams v.---195 N. C., 324---490
Bethell v. McKinney---164 N. C., 71---155
Biggs, Green v.---167 N. C., 417---41
Bi'es v. Holmes---33 N. C., 16---641
Bilyeu v. Beck---178 N. C., 481---711, 724
Bird v. Gilliam---121 N. C., 326---490
Bird, Perrett v.---152 N. C., 220---490
Bissette v. Strickland---191 N. C., 260---284, 575
Blackledge v. Simmons---180 N. C., 535---491
Blackmore v. Winders---144 N. C., 212---56
Blackwelder, S. v.---182 N. C., 899---582, 686
Blake v. Smith---163 N. C., 274---15
Bland, Marlowe v.---154 N. C., 140---711
Blaylock, Mfg. Co. v.---192 N. C., 407---498
Blum v. R. R.---187 N. C., 640---638
Board of Aldermen, Cabe v.---185 N. C., 158---746
Board of Canvassers, Britt v.---172 N. C., 797---733
Board of Education v. Comrs. of Johnston---183 N. C., 300---318
Board of Education v. Forrest---190 N. C., 753---34
Board of Education, Jones v.---185 N. C., 303---423, 451
Board of Education, Pickler v.---149 N. C., 221---678
Board of Elections, Johnston v. 172 N. C., 162---678
Bobbitt v. Stanton---120 N. C., 253---469
Bogue Corp., Morris v.---194 N. C., 279---271
Bohanon, S. v.---142 N. C., 695---487
Bond v. Mfg. Co.---140 N. C., 381---9
Bond, S. v.---49 N. C., 9---296
Bonding Co., Ins. Co. v.---162 N. C., 385---411
Bonding Co., State Prison v.---192 N. C., 391---574
Bonner v. Styron---113 N. C., 30---183

Bonsal, Clark v.---157 N. C., 270---151
Booker, Rogers v.---184 N. C., 183---122
Booth v. Hairston---193 N. C., 278---674
Boring, Comrs. of Bladen v.---175 N. C., 105---423
Bost v. Bost---87 N. C., 477---348
Bost v. Cabarrus---152 N. C., 531---560
Bottling Co., Perry v.---196 N. C., 175---662
Boudinot, Moore v.---64 N. C., 190---54
Bowe, Harrison v.---56 N. C., 478---161
Bowen v. Schnibben---184 N. C., 248---15
Bowman, Winstead v.---68 N. C., 170---220
Boyden v. Achenbach---79 N. C., 539---285
Boyden v. Bank---65 N. C., 13---533
Boykin, Trust Co. v.---192 N. C., 262---574
Boyles, Lamb v.---192 N. C., 542---242, 320, 662
Brackville, S. v.---106 N. C., 701---686
Bradley v. Coal Co.---169 N. C., 255---593
Bradley v. R. R.---126 N. C., 735---431
Bradshaw v. Millikin---173 N. C., 432---7
Brady, S. v.---107 N. C., 822---115
Bragaw, Church v.---144 N. C., 126---7
Branch v. Saunders---195 N. C., 176---513
Braswell v. Bank---197 N. C., 229---442
Brawley, Cornelius v.---109 N. C., 542---219
Brett v. Davenport---151 N. C., 56---272
Brewster v. Elizabeth City---137 N. C., 392---594
Brick Co. v. Gentry---191 N. C., 636---12, 239, 344
Brickhouse, Bank v.---193 N. C., 231---324
Bridge Co., Isley v.---141 N. C., 220---320
Bridger, Freeman v.---49 N. C., 2---695, 696
Bridgers, S. v.---172 N. C., 879---686, 722
Briggs v. Bank---197 N. C., 120---299
Briggs v. Developers---191 N. C., 784---537, 538
Briggs v. Raleigh---195 N. C., 223---746
Brinkley, Perkins v.---133 N. C., 154---526
Britt v. Board of Canvassers---172 N. C., 797---733
Brittain v. Westall---137 N. C., 30---112
Brittingham v. Stadiem---151 N. C., 299---592
Broadway, Baumgarten v.---77 N. C., 8---266
Brock v. Ins. Co.---156 N. C., 112---643
Brockenbrough, Construction Co. v.---187 N. C., 65---318
Brodnax v. Groom---64 N. C., 244---317
Broughton, Syme v.---85 N. C., 367---219
Brown v. Brown---121 N. C., 8---552
Brown v. Brown---124 N. C., 19---552
Brown, Charlotte v.---165 N. C., 435---132
Brown v. Comrs. of Hertford---100 N. C., 92---423
Brown v. Hillsboro---185 N. C., 368---133, 642
Brown v. Hutchinson---155 N. C., 205---525
Brown v. Power Co.---140 N. C., 333---755
Brown v. R. R.---195 N. C., 699---789
Brown v. Rhinehart---112 N. C., 772---193
Brown, S. v.---100 N. C., 519---770

Brown v. Turner ..... 70 N. C., 93 734
Brown v. Williams ..... 196 N. C., 247 245
Brummitt, Attorney-General,
v. R. R. ..... 197 N. C., 381 424
Bruner v. Threadgill ..... 88 N. C., 361 755
Bruton, Wooley v. ..... 184 N. C., 438 538
Bryan, Jacksonville v. ..... 196 N. C., 721 54
Bryan, Meadows Co. v. ..... 195 N. C., 398 308
Bryan, Oates v. ..... 14 N. C., 451 54
Bryant, Jefferson v. ..... 161 N. C., 404 98
Bryson v. McCoy ..... 194 N. C., 91 284
Buchanan, Thompson v. ..... 195 N. C., 155 524
Bucken v. R. R. ..... 157 N. C., 443 722
Buford, Medlin v. ..... 115 N. C., 260 418
Building Supplies Co. v. Hos-
pital Co. ..... 176 N. C., 87 498
Bullard v. Ins. Co. ..... 189 N. C., 34 142
Bullen, Van Gilder v. ..... 159 N. C., 291 297
Bunch v. Comrs. of Randolph ..... 159 N. C., 335 251
Bunker v. Bunker ..... 140 N. C., 18 456
Bunn v. R. R. ..... 169 N. C., 648 21
Burn's Will, *In re* ..... 121 N. C., 336 348
Burney, Oil Co. v. ..... 174 N. C., 382 232
Burnsville, Stamey v. ..... 189 N. C., 39 560
Burr v. Maultsby ..... 99 N. C., 263 97
Burriss v. Starr ..... 165 N. C., 657 433
Burton, Thornburg v. ..... 197 N. C., 193 681
Busbee v. Creech ..... 192 N. C., 499 574
Butler v. Fertilizer Works ..... 195 N. C., 409 486
Butler, Loudermilk v. ..... 182 N. C., 502 362
Butts v. Screws ..... 95 N. C., 215 465
Byers, Winchester v. ..... 196 N. C., 383 38
Bynum, S. v. ..... 175 N. C., 777 686

C

Cabarrus, Bost v. ..... 152 N. C., 531 560
Cabe v. Board of Aldermen ..... 185 N. C., 158 746
Cadell v. Allen ..... 99 N. C., 542 112
Cagle v. Hampton ..... 196 N. C., 470 707
Cahoon, Drainage District v. ..... 193 N. C., 326 512
Cain, Hyman v. ..... 48 N. C., 111 696
Cain v. Rouse ..... 186 N. C., 175 226
Caldwell, Geiger v. ..... 184 N. C., 387 691
Callender, St. John's Lodge v. ..... 26 N. C., 335 219
Cameron v. Lumber Co. ..... 118 N. C., 266 100
Campbell v. Everhart ..... 139 N. C., 502 686
Campbell v. Huffines ..... 151 N. C., 262 418
Campbell v. Road Comrs. ..... 173 N. C., 500 560
Canal Co., Cherry v. ..... 140 N. C., 422 465
Canal Co. v. Whitley ..... 172 N. C., 102 512
Concord, Parks-Belk Co. v. ..... 194 N. C., 134 312
Cannon, Hart v. ..... 133 N. C., 10 331
Cannon v. Mills Co. ..... 195 N. C., 119 769

Canton, Felmet v. 177 N. C., 52 752
Capps v. R. R. 183 N. C., 181 401
Carlson, S. v. 171 N. C., 818 582
Carpenter, Dameron v. 190 N. C., 595 183
Carpet Co., Stewart v. 138 N. C., 60 242, 643
Carr, Smith v. 128 N. C., 150 574
Carr v. Smith 129 N. C., 232 574
Carr, S. v. 196 N. C., 129 486
Carraway, Distributing Co. v. 196 N. C., 58 370
Carraway v. Stancill 137 N. C., 472 504
Carstaphan, Purvis v. 73 N. C., 575 158
Carstarphen, Coburn v. 194 N. C., 386 565
Carswell v. Talley 192 N. C., 37 151
Carter, Gower v. 194 N. C., 293 670, 735
Carter, Gower v. 195 N. C., 697 670
Carter v. Lumber Co. 129 N. C., 203 593
Carter v. Strickland 165 N. C., 69 706
Case, Porter v. 187 N. C., 629 97
Causey v. Morris 195 N. C., 532 369
Caveness, S. v. 78 N. C., 484 249, 476
Cedar Works, Alexander v. 177 N. C., 536 68
Cedar Works v. Shepard 181 N. C., 13 525
Chair Co. v. Crawford 193 N. C., 531 325, 525
Chandler v. Jones 172 N. C., 569 699
Chapman v. McLawhorn 150 N. C., 166 256
Chappell, Emry v. 148 N. C., 327 103, 370
Chard v. Warren 122 N. C., 75 523
Charlotte v. Alexander 173 N. C., 515 133
Charlotte v. Brown 165 N. C., 435 132
Charlotte, Flowers v. 195 N. C., 599 132
Chemical Co. v. Floyd 158 N. C., 455 151
Chemical Co. v. Walston 187 N. C., 817 158
Cherokee County, R. R. v. 195 N. C., 756 318
Cherry v. Canal Co. 140 N. C., 422 465
Cherry v. Gilliam 195 N. C., 233 186, 187, 537, 620
Cherry v. Power Co. 142 N. C., 404 523
Cherry v. R. R. 174 N. C., 263 782
Cherry v. Slade 7 N. C., 82 247
Cherry, S. v. 154 N. C., 624 549
Cheshire, Condry v. 88 N. C., 375 525
Cheshire, Harris v. 189 N. C., 219 97
Chewning v. Mason 158 N. C., 578 279
Christman v. Hilliard 167 N. C., 4 526
Christmas, Laws v. 178 N. C., 359 707
Christopher v. Wilson 188 N. C., 757 161
Church v. Bragaw 144 N. C., 126 7
Church, Humphrey v. 109 N. C., 132 219
Clark v. Bonsal 157 N. C., 270 151
Clark v. Clark 64 N. C., 150 194, 195
Clark v. Edwards 119 N. C., 115 498
Clark v. Sweaney 176 N. C., 529 712, 723
Clark, Wilson v. 110 N. C., 364 590
Clarke v. Aldridge 162 N. C., 326 247, 248
Clarke, Comrs. of Bladen v. 73 N. C., 255 564, 565

Clay v. Ins. Co. 174 N. C., 642 568
Clemmons, Bahnsen v. 79 N. C., 556 697
Cleve, Morris v. 193 N. C., 389 255
Cleve, Morris v. 194 N. C., 202 256
Clodfelter's Will, *In re* 171 N. C., 528 67
Cloninger, S. v. 149 N. C., 567 658
Clyburn, S. v. 195 N. C., 618 692
Coal Co., Bradley v. 169 N. C., 255 593
Coach Co. v. Griffin 196 N. C., 559 164, 226
Coal Co., Street v. 196 N. C., 178 486, 593
Cobb, Cook v. 101 N. C., 68 98
Cobia v. R. R. 188 N. C., 487 403
Coble v. Comrs. of Guilford 184 N. C., 342 89
Coble v. Dick 194 N. C., 732 513
Coble, Winston-Salem v. 192 N. C., 776 132
Coburn v. Carstarphen 194 N. C., 386 565
Cochran, Sams v. 188 N. C., 731 565
Coffield, Jordan v. 70 N. C., 110 696
Cogdill v. Hardwood Co. 194 N. C., 745 353
Cole, Seawell v. 194 N. C., 546 6
Cole, Springs v. 171 N. C., 418 346
Collins v. Norfleet-Baggs 197 N. C., 659 695
Colson, S. v. 193 N. C., 236 658
Colt v. Conner 194 N. C., 344 3
Colt v. Kimball 190 N. C., 169 3, 331
Commander, Griffin v. 163 N. C., 230 706
Comrs. of Alexander, Moose v. 172 N. C., 419 317
Comrs. of Anson, Harrington v. 189 N. C., 572 89
Comrs. of Beaufort, Mayo v. 196 N. C., 15 318
Comrs. of Beaufort, Parvin v. 177 N. C., 508 317
Comrs. of Bladen v. Boring 175 N. C., 105 423
Comrs. of Bladen v. Clarke 73 N. C., 255 564, 565
Comrs. of Buncombe, Waters v. 186 N. C., 719 251
Comrs. of Caldwell, Guire v. 177 N. C., 516 317
Comrs. of Cleveland, Johnston v. 67 N. C., 101 452
Comrs. of Craven, Williams v. 119 N. C., 520 317
Comrs. of Cumberland, Lilly v. 69 N. C., 300 471
Comrs. of Forsyth, Belo v. 76 N. C., 489 423
Comrs. of Franklin, Perry v. 148 N. C., 521 746
Comrs. of Gaston, Armstrong v. 185 N. C., 405 89
Comrs. of Guilford, Coble v. 184 N. C., 342 89
Comrs. of Haywood, Tate v. 122 N. C., 812 421, 423
Comrs. of Hendersonville v. Webb 148 N. C., 120 451, 452
Comrs. of Hertford, Brown v. 100 N. C., 92 423
Comrs. of Jackson, Wilkel v. 120 N. C., 451 678
Comrs. of Johnston, Board of Education v. 183 N. C., 300 318
Comrs. of Johnston v. State Treasurer 174 N. C., 141 423
Comrs. of McDowell v. Assell 194 N. C., 412 318
Comrs. of McDowell v. Assell 195 N. C., 719 318
Comrs. of Madison, Jones v. 137 N. C., 579 451
Comrs. of Mecklenburg, R. R. v. 148 N. C., 220 317

Comrs. of Nash, Edwards v.____183 N. C., 58____ 423
Comrs. of New Hanover,
French v. ____ 74 N. C., 692____ 452
Comrs. of Orange v. Bain____173 N. C., 377____ 55, 305
Comrs. of Pender, Mfg. Co. v.___196 N. C., 744____ 133
Comrs. of Person, Jones v.____107 N. C., 248____ 317
Comrs. of Pickens v. Jennings__181 N. C., 393____ 592
Comrs. of Pitt, Abernethy v.____169 N. C., 631____ 31
Comrs. of Pitt, Elks v.____179 N. C., 241____ 560
Comrs. of Randolph, Bunch v.___159 N. C., 335____ 251
Comrs. of Rockingham,
Bennett v. ____173 N. C., 625____ 451
Comrs. of Scotland, Gibson v.____163 N. C., 510____ 679
Comrs. of Stanly, Honeycutt v._182 N. C., 319____ 451
Comrs. of Surry, Jackson v.____171 N. C., 379____ 317
Comrs. of Yadkin, Day v.____191 N. C., 780____ 89
Comrs. of Yancey v. Road
Comrs. ____165 N. C., 632____ 317
Condry v. Cheshire____ 88 N. C., 375____ 525
Cone, Reich v.____180 N. C., 267____ 724
Conner, Colt v.____194 N. C., 344____ 3
Conner, Draper v.____187 N. C., 18____ 285
Construction Co. v. Brocken-
brough ____187 N. C., 65____ 318
Construction Co. v. Ice Co.____190 N. C., 580____80, 103, 370
Construction Co., Mehaffey v.___194 N. C., 717____ 24, 65
Construction Co. v. R. R.____184 N. C., 179____ 714, 719
Cook v. Cobb____101 N. C., 68____ 98
Cook, Freeman v.____ 41 N. C., 373____ 219
Cook v. Mining Co.____114 N. C., 617____ 194
Cook v. Sink____190 N. C., 620____ 523
Cooper v. Security Co.____127 N. C., 219____ 59
Cooperage Co., Bassett v.____188 N. C., 511____ 61
Cooperage Co., Winborne v.____178 N. C., 88____ 593
Copper Co., Holshouser v.____138 N. C., 248____ 61
Cornelius v. Brawley____109 N. C., 542____ 219
Corporation Com. v. Bank____137 N. C., 697____ 263
Corporation Com. v. Bank____192 N. C., 366____ 44
Corporation Com. v. Bank____193 N. C., 113____ 44
Corporation Com. v. Dunn____174 N. C., 679____ 155
Corporation Com. v. Murphey___197 N. C., 42____ 36, 616
Corporation Com. v. R. R.____170 N. C., 560____ 703
Corporation Com. v. R. R.____196 N. C., 190____ 703
Cothrane, Newsom v.____185 N. C., 161____ 561
Cotton v. Transportation Co.___197 N. C., 709____ 722, 726
Cotton Factory, Bank v.____179 N. C., 203____ 194
Cotton Mills, Bank v.____115 N. C., 507____ 61
Cotton Mills, Ferrell v.____157 N. C., 528____ 436
Cotton Mills, Jarvis v.____194 N. C., 687____ 341
Cotton Mills, Lineberger v.____196 N. C., 506____ 493
Cotton Mills, Malcom v.____191 N. C., 727____ 324
Cotton Mills, Ross v.____140 N. C., 115____ 643
Cotton Mills, Sturtevant v.____171 N. C., 119____ 82
Council v. Everett____ 95 N. C., 131____ 221

Cowan v. Fairbrother---118 N. C., 406---226
Coward, Darden v.---197 N. C., 35---615
Cox, Ellis v.---176 N. C., 616---245
Craft, Hauser v.---134 N. C., 319---491, 492
Craig v. Lumber Co.---189 N. C., 137---343
Craige, Foster v.---22 N. C., 209---221
Crane, O'Quinn v.---189 N. C., 97---706
Crawford, Chair Co. v.---193 N. C., 531---324, 525
Crawford, S. v.---197 N. C., 513---692
Crawley v. Stearns---194 N. C., 15---490
Creamery Co., Hayes v.---195 N. C., 113---712
Creech, Busbee v.---192 N. C., 499---574
Creecy, *In re*---190 N. C., 301---348
Cressler v. Asheville---138 N. C., 482---127
Crews v. Crews---175 N. C., 168---201
Crocker v. Moore---140 N. C., 429---317
Crook, S. v.---115 N. C., 760---628
Crook, S. v.---132 N. C., 1053---457
Crook, S. v.---189 N. C., 545---571
Crowell, Moose v.---147 N. C., 551---433
Cruden v. Neale---2 N. C., 338---235
Crutchfield, S. v.---187 N. C., 607---137
Crye v. Stoltz---193 N. C., 802---672
Culberson, Edwards v.---111 N. C., 342---201
Cullens v. Cullens---161 N. C., 344---161
Cunningham v. R. R.---139 N. C., 427---106
Cunningham v. Worthington---196 N. C., 778---161
Currie v. Hawkins---118 N. C., 593---80

D

Dail, S. v.---191 N. C., 231---249
Dail v. Taylor---151 N. C., 284---242
Dailey, Pritchard v.---168 N. C., 330---667
Dale v. Lumber Co.---152 N. C., 651---346
Dalton, Freeman v.---183 N. C., 538---712, 723
Dalton, S. v.---168 N. C., 204---115
Dalton, S. v.---185 N. C., 606---692
Dameron v. Carpenter---190 N. C., 595---183
Daniel v. R. R.---136 N. C., 517---711
Daniel, S. v.---136 N. C., 571---352
Daniel v. Wilkerson---35 N. C., 329---67
Darden v. Coward---197 N. C., 35---615
Daughtry, McCullen v.---190 N. C., 215---162
Davenport, Brett v.---151 N. C., 56---272
Davenport, Hill v.---195 N. C., 271---226
Davenport, Nobles v.---183 N. C., 207---41
Davis, Hayman v.---182 N. C., 563---78
Davis v. Higgins---91 N. C., 382---524
Davis v. Lenoir---178 N. C., 668---317
Davis v. Long---189 N. C., 129---84
Davis v. Mfg. Co.---114 N. C., 321---565, 617
Davis, Ramsey v.---193 N. C., 395---112
Davis v. Robinson---189 N. C., 589---7

Dawson v. Bank---196 N. C., 134---500, 533
Dawson, Douglass v.---190 N. C., 458---44
Dawson v. Ennett---151 N. C., 543---490
Dawson v. Ins. Co.---192 N. C., 312---387
Day v. Comrs. of Yadkin---191 N. C., 780---89
Day v. Day---84 N. C., 408---463
Dean, S. v.---35 N. C., 63---116
Debnam, Parker v.---195 N. C., 56---271
DeHart, Hyatt v.---140 N. C., 270---455
DeLaney v. Henderson-Gilmer Co. ---192 N. C., 647---561
Denmark v. R. R.---107 N. C., 187---219
Denny, Milliken v.---135 N. C., 19---672
DeRosset, Von Glahn v.---81 N. C., 467---361
Developers, Briggs v.---191 N. C., 784---537, 538
Devries v. Summit---86 N. C., 132---660
Dew, Bank v.---175 N. C., 79---418, 673
Dewey v. Margolis---195 N. C., 307---266
Dick, Coble v.---194 N. C., 732---513
Dillard v. Mercantile Co.---190 N. C., 225---574
Dill Corp. v. Downs---195 N. C., 189---576
Distributing Co. v. Carraway---196 N. C., 58---370
Dixon v. Green---178 N. C., 205---718
Dixon, Herring v.---122 N. C., 420---317, 421
Dixon, Hotel Corp. v.---196 N. C., 265---271
Dobson v. R. R.---132 N. C., 900---641
Dobson v. Simonton---86 N. C., 492---361
Dockery v. Fairbanks---172 N. C., 529---737
Dorsett v. Dorsett---183 N. C., 354---245
Doughton, Tea Co. v.---196 N. C., 145---606
Douglas v. Rhodes---188 N. C., 580---272
Douglass v. Dawson---190 N. C., 458---44
Dover v. Mfg. Co.---157 N. C., 324---710, 723
Dowd, Simmons v.---77 N. C., 155---456
Dowdy, S. v.---145 N. C., 432---286
Downs, Dill Corp. v.---195 N. C., 189---576
Downs, Mercer v.---191 N. C., 203---510
Drainage Comrs. v. Sparks---179 N. C., 581---512
Drainage Comrs., Taylor v.---176 N. C., 217---513
Drainage District v. Cahoon---193 N. C., 326---512
Drake, S. v.---82 N. C., 592---487
Drake, S. v.---113 N. C., 624---487
Draper v. Conner---187 N. C., 18---285
Drewry v. Bank---173 N. C., 664---770
Driller Co. v. Worth---117 N. C., 515---739
Drug Co. v. Drug Co.---173 N. C., 502---61
Drug Co. v. Lenoir---160 N. C., 571---474
Drum v. Miller---135 N. C., 204---593
Dry, S. v.---152 N. C., 813---549
Dry Kiln Co. v. Ellington---172 N. C., 481---375
Dudley v. R. R.---180 N. C., 34---638
Duke, Bank v.---187 N. C., 386---696
Dunn, Corporation Com. v.---174 N. C., 679---155
Dunn v. Jones---195 N. C., 354---672

Dunn v. Taylor---186 N. C., 254---474
Dunning, S. v.---177 N. C., 559---447
Dupont, Hipp v.---182 N. C., 9---343
Dupree v. Dupree---45 N. C., 164---510
Durham, Adams v.---189 N. C., 232---746
Durham v. Proctor---191 N. C., 119---752
Durham v. R. R.---185 N. C., 240---133
Durham, Rhodes v.---165 N. C., 679---196
Durham, S. v.---141 N. C., 741---447
Durham v. Wright---190 N. C., 568---285

E

Early, Grocery Co. v.---181 N. C., 459---418
Earnhardt, S. v.---170 N. C., 725---31
Earp, S. v.---196 N. C., 164---582
Earwood v. R. R.---192 N. C., 27---634
Eastern Star Home, Supply Co. v.---163 N. C., 513---652
Edgerton v. Aycock---123 N. C., 134---510
Edgerton v. Taylor---184 N. C., 571---328
Edney v. Edney---80 N. C., 81---504
Educational Co., Patton v.---101 N. C., 408---284
Edwards, Baker v.---176 N. C., 229---737, 770
Edwards, Clark v.---119 N. C., 115---498
Edwards v. Comrs. of Nash---183 N. C., 58---423
Edwards v. Culberson---111 N. C., 342---201
Edwards v. Finance Co.---196 N. C., 462---324
Edwards v. Power Co.---193 N. C., 780---390
Edwards, Price v.---178 N. C., 493---264
Edwards v. R. R.---129 N. C., 79---635
Edwards v. R. R.---132 N. C., 99---691
Ehringhaus, Gordon v.---190 N. C., 147---162, 706
Elder v. R. R.---194 N. C., 617---109, 714
Electric Co. v. Light Co.---197 N. C., 766---743
Electric Co., Overcash v.---144 N. C., 572---643
Elizabeth City, Brewster v.---137 N. C., 392---594
Elizabeth City, Power Co. v.---188 N. C., 278---698
Elizabeth City, Ward v.---121 N. C., 1---406
Elks v. Comrs. of Pitt---179 N. C., 241---560
Eller, Lawrence v.---169 N. C., 211---576
Eller v. R. R.---140 N. C., 140---104
Ellington, Dry Kiln Co. v.---172 N. C., 481---375
Ellington, Mial v.---134 N. C., 131---406
Ellington v. Trust Co.---196 N. C., 755---161
Elliott v. Jefferson---113 N. C., 207---510
Elliott, Sledge v.---116 N. C., 712---524
Ellis v. Cox---176 N. C., 616---245
Ellis v. Ellis---193 N. C., 216---183
Ellis v. Power Co.---193 N. C., 357---436
Ellis, S. v.---97 N. C., 447---487
Ellis, S. v.---187 N. C., 840---670
Ellison v. Raleigh---89 N. C., 125---678
Ellison v. Sexton---105 N. C., 356---418
Elmore v. R. R.---189 N. C., 658---712
Emry v. Chappell---148 N. C., 327---103, 370

Engineering Co., Reed v. 188 N. C., 39 89
English, Ledbetter v. 166 N. C., 125 84
Enloe v. R. R. 179 N. C., 83 242
Ennett, Dawson v. 151 N. C., 543 490
Ensley v. Lumber Co. 165 N. C., 687 24
Estates v. Bank 171 N. C., 579 531
Estes, Millsaps v. 137 N. C., 536 660
Eubank, Timber Co. v. 196 N. C., 724 284
Eubanks v. Becton 158 N. C., 230 272
Evans, S. v. 183 N. C., 758 730
Everett, Council v. 95 N. C., 131 221
Everett, Potter v. 42 N. C., 152 155
Everett v. Receivers 121 N. C., 519 191
Everhart, Campbell v. 139 N. C., 502 683
Everhart v. Ins. Co. 194 N. C., 494 71, 291
Ewbank v. Lyman 170 N. C., 505 463

F

Fairbanks, Dockery v. 172 N. C., 529 737
Fairbrother, Cowan v. 118 N. C., 406 226
Faircloth v. Johnson 189 N. C., 429 699
Faison v. Middleton 171 N. C., 170 162
Faison, Moore v. 97 N. C., 322 457
Falkner, S. v. 182 N. C., 793 663, 691
Farmer, Vaughan v. 90 N. C., 607 221
Farmers Federation, Hardware Co. v. 195 N. C., 702 408
Farrington, S. v. 141 N. C., 844 286
Faust v. Rohr 166 N. C., 187 226
Fayetteville, Lutterloh v. 149 N. C., 65 744, 746
Fellows, McClure v. 131 N. C., 509 80
Felmet v. Canton 177 N. C., 52 752
Fenner, Meyer v. 196 N. C., 476 12
Ferebee v. R. R. 167 N. C., 290 486
Ferguson v. Spinning Co. 196 N. C., 614 711, 722, 726
Ferrell v. Cotton Mills 157 N. C., 528 436
Ferrell v. R. R. 172 N. C., 682 436, 437, 438
Fertilizer Works, Butler v. 195 N. C., 409 486
Fibre Co., Nichols v. 190 N. C., 1 15
Fidelity Co. v. Fleming 132 N. C., 332 54
Fidelity Co., Glass Co. v. 193 N. C., 769 11
Finance Co., Edwards v. 196 N. C., 462 324
Finance Co., McNair v. 191 N. C., 710 309
Finch, Johnson v. 93 N. C., 205 695
Finch v. R. R. 195 N. C., 190 634, 638
Fisher v. Owens 132 N. C., 686 412
Fisher, Realty Corp. v. 196 N. C., 503 164
Fisher, S. v. 51 N. C., 478 487
Fitts v. Grocery Co. 144 N. C., 463 71
Fitts v. Hawkins 9 N. C., 394 55
Fleming, Fidelity Co. v. 132 N. C., 332 54
Fleming v. Knitting Mills 161 N. C., 436 722
Fleming v. Roberts 84 N. C., 532 456
Flowers v. Charlotte 195 N. C., 599 132
Floyd, Bank v. 142 N. C., 187 441

Floyd, Chemical Co. v.----------158 N. C., 455---------- 151
Foard v. Hall----------111 N. C., 369---------- 732
Foot v. R. R.----------142 N. C., 51---------- 191
Foote, Peebles v.---------- 83 N. C., 102---------- 190, 192
Forbes, Tarboro v.----------185 N. C., 59---------- 132
Fore v. Geary----------191 N. C., 90---------- 166
Forrest, Board of Education v.-190 N. C., 753---------- 34
Fort v. Allen----------110 N. C., 183---------- 523
Foster v. Craige---------- 22 N. C., 209---------- 221
Foundry Co. v. Killian---------- 99 N. C., 501---------- 61
Fountain, King v.----------126 N. C., 196---------- 226
Fowler v. Poor---------- 93 N. C., 466---------- 273
Fowler, S. v.----------151 N. C., 731---------- 448
Fox v. Horah---------- 36 N. C., 358---------- 361
Foy v. Stephens----------168 N. C., 438---------- 331
Franklin v. R. R.----------192 N. C., 717---------- 634
Freeman v. Bridger---------- 49 N. C., 2---------- 695, 696
Freeman v. Cook---------- 41 N. C., 373---------- 219
Freeman v. Dalton----------183 N. C., 538---------- 712, 723
Freeman, Hobby v.----------183 N. C., 240---------- 576
Freeman v. Ramsey----------189 N. C., 790---------- 523
French v. Comrs, of New Hanover ---------- 74 N. C., 692---------- 452
Frutchey, Tyson v.----------194 N. C., 750---------- 724
Fry, Johnson v.----------195 N. C., 832---------- 526
Fry v. Utilities Co.----------183 N. C., 281---------- 710, 712
Fulcher v. Lumber Co.----------191 N. C., 408---------- 714
Furniture Co., Hauser v.--------174 N. C., 463---------- 16
Furniture Co. v. Mfg. Co.-------169 N. C., 41---------- 4
Furniture Co. v. R. R.----------195 N. C., 636---------- 12, 257

G

Gaither, Hemphill v.----------180 N. C., 604---------- 691
Gaither, Turner v.---------- 83 N. C., 357---------- 696
Gallimore v. Thomasville------191 N. C., 648---------- 131, 134
Gallop, Newby v.----------193 N. C., 244---------- 537
Gammon v. Johnson----------126 N. C., 64---------- 621
Gardner, Anders v.----------151 N. C., 604---------- 266
Gardner v. Rowland---------- 24 N. C., 247---------- 508
Gardner, Vinson v.----------185 N. C., 193---------- 492
Garrett, S. v.---------- 60 N. C., 144---------- 447
Garris, Waters v.----------188 N. C., 305----------299, 495, 526
Garris, Whitfield v.----------134 N. C., 24---------- 490
Garrison v. Williams----------150 N. C., 674---------- 695, 737
Gas Co., Haynes v.----------114 N. C., 203---------- 643
Gash, S. v.----------177 N. C., 595---------- 137
Gaskins v. Allen----------137 N. C., 426---------- 699
Gastonia, Lineberger v.---------196 N. C., 449---------- 371
Gatewood v. Tomlinson--------113 N. C., 312---------- 155
Gatling, Saunders v.---------- 81 N. C., 298---------- 734
Gay, Leak v.----------107 N. C., 468---------- 423
Geary, Fore v.----------191 N. C., 90---------- 166
Geiger v. Caldwell----------184 N. C., 387---------- 691
Gentry, Brick Co. v.----------191 N. C., 636----------12, 239, 344
Gentry v. Utilities Co.---------185 N. C., 285---------- 642

George, S. v. 29 N. C., 321 115, 116
George, S. v. 50 N. C., 233 487
Georgia Co., Guilford v. 109 N. C., 310 274
Geurukus, S. v. 195 N. C., 642 585
Gherkin, Moore v. 44 N. C., 73 690
Gibson v. Comrs. of Scotland 163 N. C., 510 679
Gibson, Pridgen v. 194 N. C., 289 773
Gibson, Welch v. 193 N. C., 684 491
Gillespie, Poston v. 58 N. C., 258 201
Gillette, Wadford v. 193 N. C., 413 693
Gilliam, Bird v. 121 N. C., 326 490
Gilliam, Cherry v. 195 N. C., 233 186, 187, 537, 620
Gilliam v. Jones 191 N. C., 621 222
Gillis v. Transit Corp. 193 N. C., 346 84
Gilmer v. Young 122 N. C., 806 232
Gilmers, Worthington v. 190 N. C., 128 362
Gilmore v. Walker 195 N. C., 460 54
Givens v. Mfg. Co. 196 N. C., 377 394, 396
Glass Co. v. Fidelity Co. 193 N. C., 769 11
Glass Co. v. Hotel Corp. 197 N. C., 10 6, 239
Glazener v. Lumber Co. 167 N. C., 676 375
Glenn v. Bank 70 N. C., 191 273
Glenn, Hoke v. 167 N. C., 594 42
Glisson v. Newton 2 N. C., 336 121
Goff v. R. R. 179 N. C., 216 635
Goforth v. R. R. 144 N. C., 569 431
Goins v. Sargent 196 N. C., 478 601, 673
Goldsboro, Kornegay v. 180 N. C., 441 89, 747
Goldsboro, R. R. v. 155 N. C., 356 133
Goode v. Asheville 193 N. C., 134 512, 559, 560
Goodloe v. Bank 183 N. C., 315 533
Goodman, Swain v. 183 N. C., 531 673
Goodson, S. v. 107 N. C., 798 686
Gordon v. Ehringhaus 190 N. C., 147 162, 705
Gore v. Townsend 105 N. C., 228 155, 156, 158
Goss v. Williams 196 N. C., 213 84, 633
Gower v. Carter 194 N. C., 293 670, 735
Gower v. Carter 195 N. C., 697 670
Graham v. Power Co. 189 N. C., 381 436, 437
Graham v. Warehouse 189 N. C., 533 258, 533
Grant v. Bell 87 N. C., 34 219
Grant, Spivey v. 96 N. C., 214 122, 374
Grant, Wynn v. 166 N. C., 39 418
Graves, Atkinson v. 91 N. C., 99 374
Gray, Midgett v. 158 N. C., 133 732
Gray, S. v. 180 N. C., 697 137, 139
Green v. Biggs 167 N. C., 417 41
Green, Dixon v. 178 N. C., 205 718
Green, Newell v. 169 N. C., 462 423
Green, S. v. 197 N. C., 624 730
Greene v. Ins. Co. 196 N. C., 335 141, 142
Greensboro, Martin v. 193 N. C., 573 746
Greensboro, Murphy v. 190 N. C., 268 120
Greensboro, Wharton v. 146 N. C., 356 405, 746
Greenville, Lanier v. 174 N. C., 311 560

Gregory, S. v. 153 N. C., 646 249
Grier v. Grier 192 N. C., 760 711, 722, 724, 726
Griffin, Coach Co. v. 196 N. C., 559 164, 226
Griffin v. Commander 163 N. C., 230 706
Griffin, Jenkins v. 175 N. C., 184 272
Griffin, Main v. 141 N. C., 43 3
Grimes v. Andrews 170 N. C., 515 612
Groce, *In re* Will of 196 N. C., 373 333
Grocery Co. v. Early 181 N. C., 459 418
Grocery Co., Fitts v. 144 N. C., 463 71
Grocery Co., Womble v. 135 N. C., 474 643
Groom, Brodnax v. 64 N. C., 244 317
Grove, May v. 195 N. C., 235 639
Guano Co. v. Livestock Co. 168 N. C., 442 3, 297
Guilford v. Georgia Co. 109 N. C., 310 274
Guilford v. Porter 167 N. C., 366 7
Guire v. Comrs. of Caldwell 177 N. C., 516 317
Gunter v. Sanford 186 N. C., 452 133, 752
Gurley v. Power Co. 172 N. C., 690 722
Gwathmey v. Pearce 74 N. C., 398 155, 158

H

Hairston, Booth v. 193 N. C., 278 674
Hall, Foard v. 111 N. C., 369 732
Hall, Hinton v. 166 N. C., 477 272
Halsey, Norman v. 132 N. C., 6 469
Halton, Robertson v. 156 N. C., 215 297, 298
Hammond v. Schiff 100 N. C., 161 773
Hampton, Cagle v. 196 N. C., 470 707
Hampton, Wofford v. 173 N. C., 686 369
Hancock, Tilghman v. 196 N. C., 780 642
Handle Co. v. Plumbing Co. 171 N. C., 495 346
Handle Co., Shaw v. 188 N. C., 222 486, 561
Handley v. Warren 185 N. C., 95 428
Hanes v. Shapiro 168 N. C., 24 592
Hanes Co., Martin v. 189 N. C., 644 641
Hanna v. Mortgage Co. 197 N. C., 184 273
Hannon, S. v. 168 N. C., 215 670
Harbert, S. v. 185 N. C., 760 351, 353
Hardie, S. v. 23 N. C., 42 734
Hardware Co. v. Farmers Federation 195 N. C., 702 408
Hardwood Co., Cogdill v. 194 N. C., 745 353
Hardy v. Hardy 174 N. C., 505 707
Hargrave v. King 40 N. C., 430 169
Hargrove, Taylor v. 101 N. C., 145 522
Harkrader v. Lawrence 190 N. C., 441 735
Harmon, Kiger v. 113 N. C., 406 176
Harmon v. Taylor 98 N. C., 341 533
Harper v. Harper 148 N. C., 453 218, 220
Harrell v. Watson 63 N. C., 454 433
Harrington v. Comrs. of Anson 189 N. C., 572 89
Harrington v. Wadesboro 153 N. C., 437 436
Harris, Baynes v. 160 N. C., 307 67
Harris, Bear v. 118 N. C., 476 507

Harris v. Cheshire 189 N. C., 219 97
Harris, Hight v. 188 N. C., 328 660, 695
Harris v. R. R. 190 N. C., 480 176
Harris v. Singletary 193 N. C., 583 525
Harris, Von Glahn v. 73 N. C., 323 361
Harris, Wray v. 77 N. C., 77 93
Harrison v. Bowe 56 N. C., 478 161
Harrison v. New Bern 193 N. C., 555 120
Harrison v. R. R. 194 N. C., 656 636
Harrison, S. v. 115 N. C., 706 487
Hart v. Cannon 133 N. C., 10 331
Hart, S. v. 186 N. C., 582 353
Hartley, Morrison v. 178 N. C., 618 463
Hartsfield, S. v. 188 N. C., 357 514, 692
Harvey, Kilpatrick v. 170 N. C., 668 648
Hass v. Hass 195 N. C., 734 706
Hassell, Bailey v. 184 N. C., 450 532
Hauser v. Craft 134 N. C., 319 491, 492
Hauser v. Furniture Co. 174 N. C., 463 16
Hauser, Shober v. 20 N. C., 222 122
Havens v. Bank 132 N. C., 214 36, 418
Havens v. Lathene 75 N. C., 505 564
Hawkins, Currie v. 118 N. C., 593 80
Hawkins, Fitts v. 9 N. C., 394 55
Hayes v. Creamery Co. 195 N. C., 113 712
Hayes, Power Co. v. 193 N. C., 104 559, 560
Hayes, Trust Co. v. 191 N. C., 542 428, 456
Hayman v. Davis 182 N. C., 563 78
Hayman, Misenheimer v. 195 N. C., 613 712, 717, 723, 726, 728
Haynes v. Gas Co. 114 N. C., 203 643
Haynie v. Power Co. 157 N. C., 503 24
Hayworth v. Ins. Co. 190 N. C., 757 623
Heath, Patton v. 190 N. C., 586 428
Hedgepeth, *In re* 150 N. C., 245 219
Helderman v. Mills Co. 192 N. C., 626 164, 672
Helms v. Power Co. 192 N. C., 784 436, 437
Hemphill v. Gaither 180 N. C., 604 691
Hemphill, S. v. 162 N. C., 632 351
Henderson, Hoke v. 15 N. C., 1 406
Henderson v. Wilmington 191 N. C., 269 421
Henderson-Gilmer Co., DeLaney v. 192 N. C., 647 561
Hendersonville v. Jordan 150 N. C., 35 317
Herring v. Dixon 122 N. C., 420 317, 421
Herring v. Ipock 187 N. C., 459 525
Hice, S. v. 117 N. C., 782 658
Hickory, White v. 195 N. C., 42 120
Hicks v. Beam 112 N. C., 642 699
Hicks v. Skinner 71 N. C., 539 670
Higgins, Davis v. 91 N. C., 382 534
Hight v. Harris 188 N. C., 328 660, 695
Highway Com., Milling Co. v. 190 N. C., 692 561, 754
Highway Com., Woodall v. 176 N. C., 377 317
Hill v. Davenport 195 N. C., 271 226
Hill v. Lumber Co. 113 N. C., 173 61

Hill v. Skinner---169 N. C., 405---678
Hill, Winders v.---141 N. C., 694---151
Hilliard, Christman v.---167 N. C., 4---526
Hillsboro, Brown v.---185 N. C., 368---133, 642
Hines v. Lucas---195 N. C., 376---673
Hines v. Rocky Mount---162 N. C., 409---196
Hines v. Vann---118 N. C., 3---732
Hines, White v.---182 N. C., 275---203, 643
Hinnant v. Power Co.---189 N. C., 120---343
Hinton v. Hall---166 N. C., 477---272
Hinton v. Hinton---61 N. C., 410---296
Hinton v. Hinton---196 N. C., 341---237
Hinton, Overton v.---123 N. C., 1---158
Hinton's Will, *In re*---180 N. C., 206---348
Hipp v. Dupont---182 N. C., 9---343
Hobby v. Freeman---183 N. C., 240---576
Hoell v. White---169 N. C., 640---612
Hogan v. Utter---175 N. C., 332---699
Hoggard, Jones v.---107 N. C., 349---127
Hoggard v. R. R.---194 N. C., 256---789
Hoke v. Glenn---167 N. C., 594---42
Hoke v. Henderson---15 N. C., 1---406
Holcomb v. Holcomb---192 N. C., 504---164
Holeman v. Shipbuilding Co.---192 N. C., 236---642
Holland, S. v.---193 N. C., 713---26
Hollingsworth, Lamborn v.---195 N. C., 350---625
Holloway v. Moser---193 N. C., 185---447
Holmes, Biles v.---33 N. C., 16---641
Holshouser v. Copper Co.---138 N. C., 248---61
Holt v. Holt---114 N. C., 241---706
Holt, Orvis v.---173 N. C., 231---15
Holt, Rogers v.---62 N. C., 108---370
Holt, S. v.---90 N. C., 749---514
Holton v. Mocksville---189 N. C., 144---318, 423
Holton v. Moore---165 N. C., 549---173
Holton v. R. R.---188 N. C., 277---714
Honeycutt v. Comrs. of Stanly---182 N. C., 319---451
Hooker v. Worthington---134 N. C., 283---463
Hopkins, S. v.---130 N. C., 647---670
Horah, Fox v.---36 N. C., 358---361
Horney v. Price---189 N. C., 820---683
Horton, S. v.---139 N. C., 588---137
Hospital, Johnson v.---196 N. C., 610---42
Hospital, Nash v.---180 N. C., 59---331
Hospital Co., Building Supplies Co. v.---176 N. C., 87---498
Hotel Co., Lumber Co. v.---109 N. C., 658---498
Hotel Corp. v. Dixon---196 N. C., 265---271
Hotel Corp., Glass Co. v.---197 N. C., 10---6, 239
Houghtalling, Knight v.---94 N. C., 408---477
Houghtalling v. Taylor---122 N. C., 141---732
Houser v. McGinnas---108 N. C., 631---697
Houston, Thomas v.---181 N. C., 91---428
Houston v. Thornton---122 N. C., 365---80
Houston v. Traction Co.---155 N. C., 4---643

Howard, Angier v. 94 N. C., 27 433
Howard v. Wright 173 N. C., 339 641
Huffines, Campbell v. 151 N. C., 262 418
Hughes v. Luther 189 N. C., 841 714
Hulin, Nance v. 192 N. C., 665 222
Humphrey v. Church 109 N. C., 132 219
Hunt v. Satterwhite 85 N. C., 73 161
Hurt v. Power Co. 194 N. C., 696 722
Hutchinson, Brown v. 155 N. C., 205 525
Hyatt v. DeHart 140 N. C., 270 455
Hyman v. Cain 48 N. C., 111 696

I

Ice Co., Construction Co. v. 190 N. C., 580 80, 103, 370
Idol, S. v. 195 N. C., 497 658
Inge v. R. R. 192 N. C., 522 401, 635
In re Assessment against R. R. 196 N. C., 756 133, 271
In re Bauguess 196 N. C., 278 187
In re Burn's Will 121 N. C., 336 348
In re Clodfelter's Will 171 N. C., 528 67
In re Creecy 190 N. C., 301 348
In re Ellis 187 N. C., 840 670
In re Groce's Will 196 N. C., 373 333
In re Hedgepeth 150 N. C., 245 219
In re Hinton's Will 180 N. C., 206 348
In re Jenkins 157 N. C., 429 220
In re McKay 183 N. C., 226 658
In re Mann 192 N. C., 248 575
In re Ross 182 N. C., 477 219
In re Sermon's Land 182 N. C., 122 186, 537, 620
In re Staub's Will 172 N. C., 138 348
In re Stephen's Will 189 N. C., 267 348
In re Ware 187 N. C., 693 187, 537
Ins. Co., Aldridge v. 194 N. C., 683 142, 673
Ins. Co., Bank v. 187 N. C., 97 71, 291
Ins. Co. v. Bonding Co. 162 N. C., 385 411
Ins. Co., Brock v. 156 N. C., 122 643
Ins. Co., Bullard v. 189 N. C., 34 142
Ins. Co., Clay v. 174 N. C., 642 568
Ins. Co., Dawson v. 192 N. C., 312 387
Ins. Co., Everhardt v. 194 N. C., 494 71, 291
Ins. Co., Greene v. 196 N. C., 335 141, 142
Ins. Co., Hayworth v. 190 N. C., 757 623
Ins. Co. v. Ins. Commissioner 144 N. C., 442 338
Ins. Co., Johnson v. 172 N. C., 142 142
Ins. Co., Kendrick v. 124 N. C., 315 388
Ins. Co., Lancaster v. 153 N. C., 285 141
Ins. Co. v. Lumber Co. 186 N. C., 269 106, 142
Ins. Co., Moore v. 192 N. C., 580 26
Ins. Co., Page v. 131 N. C., 115 388
Ins. Co., Penn v. 158 N. C., 29 124
Ins. Co., Pippen v. 130 N. C., 23 660
Ins. Co. v. Reid 171 N. C., 513 71
Ins. Co., Smith v. 193 N. C., 446 142
Ins. Co., Taylor v. 182 N. C., 120 237

Ins. Co., Trust Co. v.----------173 N. C., 558---------- 387
Ins. Co., Welch v.----------196 N. C., 546---------- 71
Ins. Co., Yates v.----------166 N. C., 134---------- 648
Ipock, Herring v.----------187 N. C., 459---------- 525
Isley v. Bridge Co.----------141 N. C., 220---------- 320

J

Jackson, Baggett v.----------160 N. C., 26---------- 699
Jackson v. Comrs. of Surry----171 N. C., 379---------- 317
Jackson, Motor Co. v.----------184 N. C., 328---------- 177
Jackson, S. v.---------- 82 N. C., 565---------- 115
Jacksonville v. Bryan----------196 N. C., 721---------- 54
Jarratt, Long v.---------- 94 N. C., 443---------- 370
Jarvis v. Cotton Mills----------194 N. C., 687---------- 341
Jasper, Bell v.---------- 37 N. C., 597---------- 54
Jeanette, Potato Co. v.---------174 N. C., 236---------- 532
Jefferson v. Bryant----------161 N. C., 404---------- 98
Jefferson, Elliott v.----------113 N. C., 207---------- 510
Jefferson v. Raleigh----------194 N. C., 479---------- 593
Jefferson, S. v.---------- 66 N. C., 309---------- 628
Jeffreys, S. v.----------192 N. C., 318---------- 126
Jenkins v. Griffin----------175 N. C., 184---------- 272
Jenkins, *In re*----------157 N. C., 429---------- 220
Jenkins v. Parker----------192 N. C., 188----------739, 770
Jenkins v. R. R.----------196 N. C., 466---------- 786
Jenkins, S. v.---------- 84 N. C., 813---------- 549
Jenkins, Trust Co. v.----------193 N. C., 761----------36, 204, 615
Jennette Bros., Seed Co. v.-----195 N. C., 173---------- 328
Jennings, Comrs. of Pickens v.---181 N. C., 393---------- 592
Jessup, S. v.----------183 N. C., 771---------- 137
Johnson v. Allen----------100 N. C., 131---------- 642
Johnson, Faircloth v.----------189 N. C., 429---------- 699
Johnson v. Finch---------- 93 N. C., 205---------- 695
Johnson v. Fry----------195 N. C., 832---------- 526
Johnson, Gammon v.----------126 N. C., 64---------- 621
Johnson v. Hospital----------196 N. C., 610---------- 42
Johnson v. Ins. Co.----------172 N. C., 142---------- 142
Johnson v. Leavitt----------188 N. C., 682---------- 649
Johnson, Lynch v.----------171 N. C., 611---------- 538
Johnson v. Peterson---------- 59 N. C., 12---------- 201
Johnson v. R. R.----------163 N. C., 431---------- 273
Johnson v. Yates----------183 N. C., 24---------- 375
Johnston v. Board of Elections-172 N. C., 162---------- 678
Johnston v. Comrs. of Cleveland 67 N. C., 101---------- 452
Jones v. Board of Education---185 N. C., 303----------423, 451
Jones, Chandler v.----------172 N. C., 569---------- 699
Jones v. Comrs. of Madison-----137 N. C., 579---------- 451
Jones v. Comrs. of Person------107 N. C., 248---------- 317
Jones, Dunn v.----------195 N. C., 354---------- 672
Jones, Gilliam v.----------191 N. C., 621---------- 222
Jones v. Hoggard----------107 N. C., 349---------- 127
Jones, Mayo v.---------- 78 N. C., 402---------- 219
Jones v. Richmond----------161 N. C., 553---------- 706
Jones v. Riggs----------154 N. C., 281---------- 732

Jones, S. v. 68 N. C., 443 486
Jones, S. v. 139 N. C., 613 48
Jones, S. v. 191 N. C., 753 548
Jones v. Whichard 163 N. C., 241 491
Jordan v. Coffield 70 N. C., 110 696
Jordan, Hendersonville v. 150 N. C., 35 317
Journegan, Roe v. 175 N. C., 261 295
Junge v. MacKnight 135 N. C., 105 193
Junge v. MacKnight 137 N. C., 285 193
Justice v. Sherard 197 N. C., 237 344, 346

K

Kale, S. v. 124 N. C., 816 447
Kearney v. Vann 154 N. C., 311 31
Keller v. Parrish 196 N. C., 733 346
Kelly, S. v. 97 N. C., 404 549
Kemp, Marshall v. 190 N. C., 491 564, 565
Kendrick v. Ins. Co. 124 N. C., 315 388
Kerner v. R. R. 170 N. C., 94 544
Kiger v. Harmon 113 N. C., 406 176
Killian, Foundry Co. v. 99 N. C., 501 61
Killian, Winkler v. 141 N. C., 575 245
Kilpatrick v. Harvey 170 N. C., 668 648
Kilpatrick, Walter v. 191 N. C., 458 308
Kimball, Colt v. 190 N. C., 169 3, 331
Kincaid, Wood v. 144 N. C., 393 12
King v. Fountain 126 N. C., 196 226
King, Hargrave v. 40 N. C., 430 169
King, Pender County v. 197 N. C., 50 305
King v. Sellers 194 N. C., 533 522
King, Smith v. 107 N. C., 273 201
Kinston, Rouse v. 188 N. C., 12 561
Kinston v. Wooten 150 N. C., 295 751
Kirby, Weaver v. 186 N. C., 387 706
Kitchen, R. R. v. 91 N. C., 39 418
Kivett, Sheldon v. 110 N. C., 408 194
Kleybolte v. Timber Co. 151 N. C., 635 31
Kline, S. v. 190 N. C., 177 353
Klutz, Power Co. v. 196 N. C., 358 85
Knight v. Houghtalling 94 N. C., 408 477
Knitting Mills, Fleming v. 161 N. C., 436 722
Kornegay v. Goldsboro 180 N. C., 441 89, 747
Kornegay v. Kornegay 109 N. C., 188 112, 176
Kornegay v. Spicer 76 N. C., 96 469
Krachanake v. Mfg. Co. 175 N. C., 435 236
Kron, Smith v. 96 N. C., 392 488, 695

L

Lamb v. Boyles 192 N. C., 542 242, 320, 662
Lamb v. Perry 169 N. C., 436 9
Lamb v. R. R. 179 N. C., 619 401
Lambert, S. v. 196 N. C., 524 586
Lambeth, Thornton v. 103 N. C., 86 240
Lamborn v. Hollingsworth 195 N. C., 350 625

Lancaster, Ayden v. 195 N. C., 297 559
Lancaster, Ayden v. 197 N. C., 556 754
Lancaster v. Ins. Co. 153 N. C., 285 141
Lancaster v. Stanfield 191 N. C., 340 574
Land Co. v. Smith 151 N. C., 70 606
Land Co., Wentz v. 193 N. C., 32 7, 455, 493
Lane, Lefler v. 170 N. C., 181 266, 601
Lane v. Rogers 113 N. C., 171 247
Lanier v. Greenville 174 N. C., 311 560
Lasater, Oakley v. 172 N. C., 96 191
Lassiter v. Adams 196 N. C., 711 695, 737
Latham, Swindell v. 145 N. C., 144 112
Latham, Van Kempen v. 195 N. C., 389 236
Lathene, Havens v. 75 N. C., 505 564
Lattimore, Quinn v. 120 N. C., 426 679
Lawhorne, S. v. 66 N. C., 638 487
Lawrence v. Beck 185 N. C., 196 537
Lawrence v. Eller 169 N. C., 211 576
Lawrence, Harkrader v. 190 N. C., 441 735
Lawrence, S. v. 196 N. C., 562 30, 582, 686
Laws v. Christmas 178 N. C., 359 707
Leach v. Linde 108 N. C., 547 219
Leak v. Armfield 187 N. C., 625 273
Leak v. Gay 107 N. C., 468 423
Leak, S. v. 156 N. C., 643 26
Leak v. Wadesboro 186 N. C., 683 133
Leary, Wilson v. 120 N. C., 90 361
Leavister v. Piano Co. 185 N. C., 152 759
Leavitt, Johnson v. 188 N. C., 682 649
Ledbetter v. English 166 N. C., 125 84
Ledford v. Lumber Co. 183 N. C., 614 699
Lee v. Manly 154 N. C., 244 183
Lee v. Produce Co. 197 N. C., 714 695
Lee, S. v. 164 N. C., 533 27
Lee v. Thornton 176 N. C., 208 477
Lefler v. Lane 170 N. C., 181 266, 601
Lenoir, Davis v. 178 N. C., 668 317
Lenoir, Drug Co. v. 160 N. C., 571 474
Lenoir, Little v. 151 N. C., 415 678
Lenoir County v. Taylor 190 N. C., 336 54, 769
Leverette, Bank v. 187 N. C., 743 477
Lewis, Barnes v. 73 N. C., 138 418
Lewis, May v. 132 N. C., 115 490
Lewis, Morrison v. 197 N. C., 79 120, 253
Lewis v. Nunn 180 N. C., 159 113
Lewis, Poole v. 75 N. C., 417 240
Lewis v. Stancil 154 N. C., 326 161
Lewis v. Steamship Co. 132 N. C., 904 686
Liddell, Ward v. 182 N. C., 223 150
Light Co., Electric Co. v. 196 N. C., 766 743
Lilly v. Comrs. of Cumberland 69 N. C., 300 471
Lilly v. Taylor 88 N. C., 490 746
Limerick, S. v. 146 N. C., 649 137
Linde, Leach v. 108 N. C., 547 219

Lineberger v. Cotton Mills, 196 N. C., 506 ... 493
Lineberger v. Gastonia, 196 N. C., 449 ... 371
Linville v. Nissen, 162 N. C., 95 ... 711, 722
Lipscombe, Rhyne v., 122 N. C., 650 ... 734
Litchfield v. Roper, 192 N. C., 202 ... 251
Little v. Lenoir, 151 N. C., 415 ... 678
Livestock Co., Guano Co. v., 168 N. C., 442 ... 3, 297
Loan Assn., Pringle v., 182 N. C., 316 ... 537, 538
Logan v. Simmons, 38 N. C., 487 ... 201
Long, Davis v., 189 N. C., 129 ... 84
Long v. Jarratt, 94 N. C., 443 ... 370
Long v. Meares, 196 N. C., 211 ... 455
Long v. Waldraven, 113 N. C., 337 ... 279
Loomis, May v., 140 N. C., 350 ... 309
Loudermilk v. Butler, 182 N. C., 502 ... 362
Lucas, Hines v., 195 N. C., 376 ... 673
Lumber Co. v. Anderson, 196 N. C., 474 ... 164
Lumber Co., Bateman v., 154 N. C., 248 ... 674
Lumber Co., Cameron v., 118 N. C., 266 ... 100
Lumber Co., Carter v., 129 N. C., 203 ... 593
Lumber Co., Craig v., 189 N. C., 137 ... 343
Lumber Co., Dale v., 152 N. C., 651 ... 346
Lumber Co., Ensley v., 165 N. C., 687 ... 24
Lumber Co., Fulcher v., 191 N. C., 408 ... 714
Lumber Co., Glazener v., 167 N. C., 676 ... 375
Lumber Co., Hill v., 113 N. C., 173 ... 61
Lumber Co. v. Hotel Co., 109 N. C., 658 ... 498
Lumber Co., Ins. Co. v., 186 N. C., 269 ... 106, 142
Lumber Co., Ledford v., 183 N. C., 614 ... 699
Lumber Co. v. Lumber Co., 150 N. C., 282 ... 375
Lumber Co. v. Lumber Co., 180 N. C., 12 ... 369
Lumber Co., May v., 119 N. C., 96 ... 737
Lumber Co., Nicholson v., 156 N. C., 59 ... 524
Lumber Co. v. Pemberton, 188 N. C., 532 ... 770
Lumber Co., Phillips v., 151 N. C., 519 ... 273
Lumber Co., Porter v., 164 N. C., 396 ... 82
Lumber Co., Powell v., 168 N. C., 632 ... 346
Lumber Co., R. R. v., 114 N. C., 690 ... 383
Lumber Co., Sasser v., 165 N. C., 242 ... 173
Lumber Co., Smith v., 142 N. C., 26 ... 80
Lumber Co., Smith v., 155 N. C., 389 ... 490
Lumber Co., S. v., 153 N. C., 610 ... 191
Lumber Co., Steeley v., 165 N. C., 27 ... 590
Lumber Co., Stewart v., 193 N. C., 138 ... 393
Lumber Co., Tanner v., 140 N. C., 475 ... 24
Lumber Co., Thompson v., 168 N. C., 226 ... 524
Lunsford v. Alexander, 20 N. C., 166 ... 170
Lunsford v. Yarbrough, 189 N. C., 476 ... 41
Lupton, Rawls v., 193 N. C., 428 ... 309, 562
Luther, Hughes v., 189 N. C., 841 ... 714
Lutterloh v. Fayetteville, 149 N. C., 65 ... 744, 746
Lutterloh, S. v., 188 N. C., 412 ... 137
Lyman, Ewbank v., 170 N. C., 505 ... 463
Lynch v. Johnson, 171 N. C., 611 ... 538

Mc

McAdams v. Trust Co. 167 N. C., 494 97
McAdoo v. R. R. 105 N. C., 140 219
McAllister v. Pryor 187 N. C., 832 643
McArtan, R. R. v. 185 N. C., 201 318
McArthur, McDonald v. 154 N. C., 122 695, 737
McBryde, McDonald v. 117 N. C., 125 456
McCall v. Wilson 101 N. C., 598 247
McCanless, S. v. 193 N. C., 200 56
McCless v. Meekins 117 N. C., 34 452
McClure v. Fellows 131 N. C., 509 80
McClure, S. v. 166 N. C., 321 447
McCoin, Pettigrew v. 165 N. C., 472 80, 120
McCormick v. Monroe 46 N. C., 13 284
McCoy, Bryson v. 194 N. C., 91 284
McCullen v. Daughtry 190 N. C., 215 162
McDonald v. McArthur 154 N. C., 122 695, 737
McDonald v. McBryde 117 N. C., 125 456
McDraughon, S. v. 168 N. C., 131 127
McGinnas, Houser v. 108 N. C., 631 697
McIlhenney v. Wilmington 127 N. C., 146 312
McIntyre, McLaurin v. 167 N. C., 350 690
McIver v. McKinney 184 N. C., 393 221, 490
McIver, S. v. 175 N. C., 761 137, 627
McKaughan v. Trust Co. 182 N. C., 543 533
McKay, *In re* 183 N. C., 226 658
McKesson v. Smart 108 N. C., 17 525
McKinney, Bethell v. 164 N. C., 71 155
McKinney, McIver v. 184 N. C., 393 221, 490
McKinney v. Patterson 174 N. C., 483 191
McKinney, S. v. 175 N. C., 784 379
McKinney v. Sutphin 196 N. C., 318 183
McKinnon, S. v. 197 N. C., 576 686
McKinzie v. Sumner 114 N. C., 425 526
MacKnight, Junge v. 135 N. C., 105 193
MacKnight, Junge v. 137 N. C., 285 193
McLaurin v. McIntyre 167 N. C., 350 689
McLaurin v. McLaurin 106 N. C., 331 456
McLawhorn, Chapman v. 150 N. C., 166 256
McLeod, S. v. 196 N. C., 542 686
McMahan, S. v. 103 N. C., 379 447
McManus v. R. R. 174 N. C., 735 486
McNair v. Finance Co. 191 N. C., 710 309
McNair, Satchell v. 189 N. C., 472 24
McNinch, S. v. 90 N. C., 695 448

M

Maclin v. Smith 37 N. C., 371 707
Main v. Griffin 141 N. C., 43 3
Makely, Ayers v. 131 N. C., 60 182
Makely, Warren v. 85 N. C., 12 755
Malcolm v. Cotton Mills 191 N. C., 727 324
Manley, Lee v. 154 N. C., 244 183
Mann, *In re* 192 N. C., 248 575

Mann v. Mann 176 N. C., 353 418
Manuel, S. v. 20 N. C., 144 286
Mrg. Co. v. Assurance Co. 161 N. C., 88 388
Mfg. Co. v. Blaylock 192 N. C., 407 498
Mfg. Co., Bond v. 140 N. C., 381 9
Mfg. Co. v. Comrs. of Pender 196 N. C., 744 133
Mfg. Co., Davis v. 114 N. C., 321 565, 617
Mfg. Co., Dover v. 157 N. C., 324 710, 723
Mfg. Co., Furniture Co. v. 169 N. C., 41 4
Mfg. Co., Givens v. 196 N. C., 377 394, 396
Mfg. Co., Krachanake v. 175 N. C., 435 236
Mfg. Co., Perry v. 176 N. C., 68 643
Mfg. Co., R. R. v. 166 N. C., 168 560
Mfg. Co., Williams v. 153 N. C., 7 691
Mfg. Co., Williams v. 154 N. C., 205 691
Marcom v. Adams 122 N. C., 222 658
Margolis, Dewey v. 195 N. C., 307 266
Mar-Hof Co. v. Rosenbacker 176 N. C., 330 226
Markham v. Simpson 175 N. C., 135 678
Marlowe v. Bland 154 N. C., 140 711
Marshall v. Kemp 190 N. C., 491 564, 565
Martin v. Greensboro 193 N. C., 573 746
Martin v. Hanes Co. 189 N. C., 644 641
Martin, S. v. 188 N. C., 119 53, 54
Maslin, S. v. 195 N. C., 537 125
Mason, Chewning v. 158 N. C., 578 279
Massey v. R. R. 169 N. C., 245 621
Massey, S. v. 86 N. C., 658 686
Matthews, S. v. 66 N. C., 106 686
Matthews, S. v. 78 N. C., 523 15
Matthis v. Matthis 48 N. C., 132 686
Maultsby, Burr v. 99 N. C., 263 97
May v. Grove 195 N. C., 235 639
May v. Lewis 132 N. C., 115 490
May v. Loomis 140 N. C., 350 309
May v. Lumber Co. 119 N. C., 96 737
May v. Menzies 186 N. C., 144 681
May, Sanders v. 173 N. C., 47 456
May, S. v. 132 N. C., 1020 670
Mayberry v. Mayberry 121 N. C., 248 690
Mayer, S. v. 196 N. C., 454 602
Mayo v. Comrs. of Beaufort 196 N. C., 15 318
Mayo v. Jones 78 N. C., 402 219
Mayo, Rawls v. 163 N. C., 177 699
Meadows Co. v. Bryan 195 N. C., 398 308
Meares, Long v. 196 N. C., 211 455
Mebane, Ruffin v. 41 N. C., 507 112
Medlin v. Buford 115 N. C., 260 418
Meekins, McCless v. 117 N. C., 34 452
Mehaffey v. Construction Co. 194 N. C., 717 24, 65
Melton, S. v. 187 N. C., 481 685
Menzies, May v. 186 N. C., 144 681
Mercantile Co., Dillard v. 190 N. C., 255 574
Mercer v. Downs 191 N. C., 203 510
Merrick, S. v. 171 N. C., 788 16, 174

Mesic v. R. R. 120 N. C., 490 635
Meyer v. Fenner 196 N. C., 476 12
Meyers, S. v. 190 N. C., 239 30, 549
Mial v. Ellington 134 N. C., 131 406
Mial, Montague v. 89 N. C., 137 457
Middleton, Faison v. 171 N. C., 170 162
Midgett v. Gray 158 N. C., 133 732
Miller v. Asheville 112 N. C., 759 560
Miller, Drum v. 135 N. C., 204 593
Miller, Pickens v. 83 N. C., 543 54
Miller, Rippey v. 46 N. C., 479 686
Miller, S. v. 197 N. C., 445 485
Milliken v. Denny 135 N. C., 19 672
Millikin, Bradshaw v. 173 N. C., 432 7
Milling Co. v. Highway Com. 190 N. C., 692 561, 754
Mills, Norris v. 154 N. C., 474 590
Millsaps v. Estes 137 N. C., 536 660
Mills Co., Cannon v. 195 N. C., 119 769
Mills Co., Helderman v. 192 N. C., 626 164, 672
Mining Co., Cook v. 114 N. C., 617 194
Minus, Neely v. 196 N. C., 345 80
Misenheimer v. Hayman 195 N. C., 613 712, 717, 723, 726, 728
Mitchell v. R. R. 176 N. C., 645 590
Mocksville, Holton v. 189 N. C., 144 318, 423
Monroe, McCormick v. 46 N. C., 13 284
Montague v. Mial 89 N. C., 137 457
Montague, S. v. 195 N. C., 20 29, 685
Monument Co., Moore v. 166 N. C., 211 648, 678
Moore v. Accident Assurance Co. 173 N. C., 532 623
Moore v. Bank 173 N. C., 180 565
Moore v. Boudinot 64 N. C., 190 54
Moore, Crocker v. 140 N. C., 429 317
Moore v. Faison 97 N. C., 322 457
Moore v. Gherkin 44 N. C., 73 690
Moore, Holton v. 165 N. C., 549 173
Moore v. Ins. Co. 192 N. C., 580 26
Moore v. Monument Co. 166 N. C., 211 648, 678
Moore v. R. R. 173 N. C., 311 543
Moore, Robeson v. 168 N. C., 388 510
Moose v. Comrs. of Alexander 172 N. C., 419 317
Moose v. Crowell 147 N. C., 551 433
Morgan, Puckett v. 158 N. C., 344 491
Morganton v. Avery 179 N. C., 551 512
Morganton, Smith v. 187 N. C., 801 196
Morris v. Bogue Corp. 194 N. C., 279 271
Morris, Causey v. 195 N. C., 532 369
Morris v. Cleve 193 N. C., 389 255
Morris v. Cleve 194 N. C., 202 256
Morris, S. v. 84 N. C., 757 754
Morris Plan Co. v. Palmer 185 N. C., 109 660, 695
Morrison v. Hartley 178 N. C., 618 463
Morrison v. Lewis 197 N. C., 79 120, 253
Morse, S. v. 171 N. C., 777 658
Mortgage Co., Best v. 128 N. C., 351 681

Mortgage Co., Hanna v.---197 N. C., 184---273
Mortgage Corp., Ripple v.---193 N. C., 422---121
Moser, Holloway v.---193 N. C., 185---447
Motor Co. v. Jackson---184 N. C., 328---177
Motor Co. v. Reaves---184 N. C., 260---127
Mott, Parker v.---181 N. C., 435---428
Munford v. Power Co.---174 N. C., 743---643
Murdock v. R. R.---159 N. C., 131---398
Murphey, Corporation Com. v.---197 N. C., 42---36, 616
Murphy v. Greensboro---190 N. C., 268---120
Murphy v. Power Co.---196 N. C., 484---437
Murphy, S. v.---157 N. C., 614---447

N

Nance v. Hulin---192 N. C., 665---222
Nance, S. v.---195 N. C., 47---658
Nash v. Hospital---180 N. C., 59---331
Nash v. Shute---184 N. C., 383---285
Neal v. Nelson---117 N. C., 394---161, 524
Neal, Reid v.---182 N. C., 192---490, 491, 766
Neale, Cruden v.---2 N. C., 338---235
Neely v. Minus---196 N. C., 345---80
Nelson, Neal v.---117 N. C., 394---161, 524
New Bern, Harrison v.---193 N. C., 555---120
Newby v. Gallop---193 N. C., 244---537
Newell v. Green---169 N. C., 462---423
Newsom v. Cothrane---185 N. C., 161---561
Newsome, S. v.---195 N. C., 552---448, 487
Newton, Glisson v.---2 N. C., 336---121
Nichols v. Fibre Co.---190 N. C., 1---15
Nichols, Thomas v.---127 N. C., 319---108
Nicholson v. Lumber Co.---156 N. C., 59---524
Nissen, Linville v.---162 N. C., 95---711, 722
Nobles v. Davenport---183 N. C., 207---41
Nobles v. Nobles---177 N. C., 243---490
Norfleet-Baggs, Collins v.---197 N. C., 659---695
Norman v. Hallsey---132 N. C., 6---469
Norman, S. v.---82 N. C., 687---734
Norris v. Mills---154 N. C., 474---590
Norris, S. v.---174 N. C., 808---285
Norwood, Alexander v.---118 N. C., 381---81, 102, 103, 370
Nunn, Lewis v.---180 N. C., 159---113
Nye v. Williams---190 N. C., 129---7

O

Oakley v. Lasater---172 N. C., 96---191
Oakley, S. v.---176 N. C., 755---139, 685
Oates, Rankin v.---183 N. C., 517---465
Oats v. Bryan---14 N. C., 451---54
O'Brien v. Parks Cramer Co.---196 N. C., 359---643
Odom v. R. R.---193 N. C., 442---639
Odom v. Riddick---104 N. C., 515---273
Oil Co., Bank v.---150 N. C., 718---418
Oil Co. v. Burney---174 N. C., 382---232
Olive, R. R. v.---142 N. C., 257---383

O'Neal, S. v. 187 N. C., 22 15, 174
O'Quinn v. Crane 189 N. C., 97 706
Orr v. Rumbough 172 N. C., 754 242
Orvis v. Holt 173 N. C., 231 15
Osborne v. R. R. 160 N. C., 309 635
Overcash v. Electric Co. 144 N. C., 572 643
Overton v. Hinton 123 N. C., 1 158
Owens, Fisher v. 132 N. C., 686 412
Owens v. Wake County 195 N. C., 132 318
Owens v. Wright 161 N. C., 127 328
Oxford, Wood v. 97 N. C., 228 746

P

Page v. Ins. Co. 131 N. C., 115 388
Page, S. v. 127 N. C., 512 487
Palmer, Morris Plan Co. v. 185 N. C., 109 660, 695
Palmer, S. v. 197 N. C., 135 627
Palmore, S. v. 189 N. C., 538 271
Park Com., Yarborough v. 196 N. C., 284 5
Parker v. Debnam 195 N. C., 56 271
Parker, Jenkins v. 192 N. C., 188 739, 770
Parker v. Mott 181 N. C., 435 428
Parker v. R. R. 181 N. C., 95 639
Parker, S. v. 152 N. C., 790 249
Parks-Belk Co. v. Concord 194 N. C., 134 312
Parks-Cramer Co., O'Brien v. 196 N. C., 359 643
Parrish, Keller v. 196 N. C., 733 346
Parrish v. R. R. 146 N. C., 125 486
Parvin v. Comrs. of Beaufort 177 N. C., 508 317
Pate v. Banks 178 N. C., 139 512
Patterson, McKinney v. 174 N. C., 483 191
Patton v. Educational Co. 101 N. C., 408 284
Patton v. Heath 190 N. C., 586 428
Patton v. R. R. 96 N. C., 455 219
Paul v. Auction Co. 181 N. C., 1 191
Peace, Raleigh v. 110 N. C., 32 512
Pearce, Gwathmey v. 74 N. C., 398 155, 158
Pearce, Sharp v. 74 N. C., 600 374
Pearson, Bank v. 186 N. C., 609 375
Peebles v. Foote 83 N. C., 102 190, 192
Peel v. Peel 196 N. C., 782 346
Peele v. Powell 156 N. C., 554 346
Pemberton, Lumber Co. v. 188 N. C., 532 770
Pender County v. King 197 N. C., 50 305
Pendergrast v. Traction Co. 163 N. C., 553 759
Penn v. Ins. Co. 158 N. C., 29 124
Perkins v. Brinkley 133 N. C., 154 526
Perkins, S. v. 141 N. C., 797 251
Perrett v. Bird 152 N. C., 220 490
Perry v. Bottling Co. 196 N. C., 175 662
Perry v. Comrs. of Franklin 148 N. C., 521 746
Perry, Lamb v. 169 N. C., 436 9
Perry v. Mfg. Co. 176 N. C., 68 643
Perry v. R. R. 180 N. C., 290 634

Perry, Speed v. 167 N. C., 122 353
Person v. Watts 184 N. C., 499 93
Peters v. Tea Co. 194 N. C., 172 84
Peterson, Johnson v. 59 N. C., 12 201
Peterson v. Wilmington 130 N. C., 76 312
Pettie, S. v. 80 N. C., 367 286
Pettigrew v. McCoin 165 N. C., 472 80, 120
Pharr, Alexander v. 179 N. C., 699 733
Phillips v. Lumber Co. 151 N. C., 519 273
Piano Co., Leavister v. 185 N. C., 152 759
Pickens v. Miller 83 N. C., 543 54
Pickler v. Board of Education 149 N. C., 221 678
Pierce, S. v. 192 N. C., 766 549
Pierce, Trust Co. v. 195 N. C., 717 201
Pierce, Watford v. 188 N. C., 430 247
Pigford v. R. R. 160 N. C., 93 782
Pilley v. Sullivan 182 N. C., 493 490
Pippen v. Ins. Co. 130 N. C., 23 660
Platt Land, R. R. v. 133 N. C., 266 560
Plotkin v. Bank 188 N. C., 711 526
Plumbing Co., Handle Co. v. 171 N. C., 495 346
Plyler, S. v. 153 N. C., 630 30
Polson v. Strickland 193 N. C., 299 428, 456
Poole v. Lewis 75 N. C., 417 240
Poole v. Russell 197 N. C., 246 575
Poor, Fowler v. 93 N. C., 466 273
Pope v. Pope 176 N. C., 283 410
Porter v. Case 187 N. C., 629 97
Porter, Guilford v. 167 N. C., 366 7
Porter v. Lumber Co. 164 N. C., 396 82
Poston v. Gillespie 58 N. C., 258 201
Potato Co. v. Jeanette 174 N. C., 236 532
Potter v. Everett 42 N. C., 152 155
Potter v. R. R. 197 N. C., 17 401
Powell v. Benthall 136 N. C., 145 553
Powell v. Lumber Co. 168 N. C., 632 346
Powell, Peele v. 156 N. C., 554 346
Powell v. Powell 168 N. C., 561 510
Powell, Trust Co. v. 189 N. C., 372 537
Powell v. Water Co. 171 N. C., 290 105
Powell, Whitley v. 191 N. C., 476 272, 274
Power Co., Brown v. 140 N. C., 333 755
Power Co., Cherry v. 142 N. C., 404 526
Power Co., Edwards v. 193 N. C., 780 390
Power Co. v. Elizabeth City 188 N. C., 278 698
Power Co., Ellis v. 193 N. C., 357 436
Power Co., Graham v. 189 N. C., 381 436, 437
Power Co., Gurley v. 172 N. C., 690 722
Power Co. v. Hayes 193 N. C., 104 559, 560
Power Co., Haynie v. 157 N. C., 503 24
Power Co., Helms v. 192 N. C., 784 436, 437
Power Co., Hinnant v. 189 N. C., 120 343
Power Co., Hurt v. 194 N. C., 696 722
Power Co. v. Klutz 196 N. C., 358 85
Power Co., Munford v. 174 N. C., 743 643

Power Co., Murphy v. 196 N. C., 484 437
Power Co. v. Power Co. 171 N. C., 248 532
Power Co., Public Service Co. v. 179 N. C., 18 771
Power Co., Public Service Co. v. 179 N. C., 330 771
Power Co., Public Service Co. v. 180 N. C., 335 771
Power Co., Ramsey v. 195 N. C., 788 437, 643
Power Co. v. Taylor 191 N. C., 329 576
Power Co. v. Taylor 194 N. C., 231 740
Poythress, S. v. 174 N. C., 809 708
Price v. Edwards 178 N. C., 493 264
Price, Horney v. 189 N. C., 820 683
Price v. Price 188 N. C., 640 201
Price, S. v. 175 N. C., 804 708
Price v. Trustees 172 N. C., 84 312
Pridgen v. Gibson 194 N. C., 289 773
Prince, S. v. 182 N. C., 788 29
Pringle v. Loan Asso. 182 N. C., 316 537, 538
Pritchard v. Dailey 168 N. C., 330 667
Proctor, Durham v. 191 N. C., 119 752
Produce Co., Lee v. 197 N. C., 714 695
Prudden, Sanitary District v. 195 N. C., 722 89
Pryor, McAllister v. 187 N. C., 832 643
Public Service Co. v. Power Co. 179 N. C., 18 771
Public Service Co. v. Power Co. 179 N. C., 330 771
Public Service Co. v. Power Co. 180 N. C., 335 771
Puckett v. Morgan 158 N. C., 344 491
Pugh, S. v. 101 N. C., 737 448
Pugh v. York 74 N. C., 383 770
Pulliam, S. v. 184 N. C., 681 514, 692
Purvis v. Carstaphan 73 N. C., 575 158

Q

Quarles v. Taylor 195 N. C., 313 266, 440
Quinn v. Lattimore 120 N. C., 426 679

R

R. R. v. Ahoskie 192 N. C., 258 512
R. R. v. Armfield 167 N. C., 464 559
R. R., Attorney-General v. 28 N. C., 456 383, 384
R R., Attorney-General v. 197 N. C., 381 424
R. R., Austin v. 187 N. C., 7 203
R. R. v. Avery 64 N. C., 491 59
R. R., Bailey v. 149 N. C., 169 191
R. R., Bailey v. 196 N. C., 515 541, 714
R. R., Ballew 186 N. C., 704 191, 192
R. R., Barber v. 193 N. C., 691 223, 635
R. R., Barcliff v. 176 N. C., 39 104
R. R. v. Barnes 104 N. C., 25 418
R. R., Batchelor v. 196 N. C., 84 638
R. R., Beal v. 136 N. C., 298 562
R. R., Blum v. 187 N. C., 640 638
R. R., Bradley v. 126 N. C., 735 431
R. R., Brown v. 195 N. C., 699 789
R. R., Bucken v. 157 N. C., 443 722

R. R., Bunn v.---169 N. C., 648---21
R. R., Capps v.---183 N. C., 181---401
R. R. v. Cherokee County---195 N. C., 756---318
R. R., Cherry v.---174 N. C., 263---782
R. R., Cobia v.---188 N. C., 487---403
R. R. v. Comrs. of Mecklenburg---148 N. C., 220---317
R. R., Construction Co. v.---184 N. C., 179---714, 719
R. R., Corporation Com. v.---170 N. C., 560---703
R. R., Corporation Com. v.---196 N. C., 190---703
R. R., Cunningham v.---139 N. C., 427---106
R. R., Daniel v.---136 N. C., 517---711
R. R., Denmark v.---107 N. C., 187---219
R. R., Dobson v.---132 N. C., 900---641
R. R., Dudley v.---180 N. C., 34---638
R. R., Durham v.---185 N. C., 240---133
R. R., Earwood v.---192 N. C., 27---634
R. R., Edwards v.---129 N. C., 79---635
R. R., Edwards v.---132 N. C., 99---691
R. R., Elder v.---194 N. C., 617---109, 714
R. R., Eller v.---140 N. C., 140---104
R. R., Elmore v.---189 N. C., 658---712
R. R., Enloe v.---179 N. C., 83---242
R. R., Ferebee v.---167 N. C., 290---486
R. R., Ferrell v.---172 N. C., 682---436, 437, 438
R. R., Finch v.---195 N. C., 190---634, 638
R. R., Foot v.---142 N. C., 51---191
R. R., Franklin v.---192 N. C., 717---634
R. R., Furniture Co. v.---195 N. C., 636---12, 257
R. R., Goff v.---179 N. C., 216---635
R. R., Goforth v.---144 N. C., 569---431
R. R. v. Goldsboro---155 N. C., 356---133
R. R., Harris v.---190 N. C., 480---176
R. R., Harrison v.---194 N. C., 656---636
R. R., Hoggard v.---194 N. C., 256---789
R. R., Holton v.---188 N. C., 277---714
R. R., Inge v.---192 N. C., 522---401, 635
R. R., *In re* Assessment against---196 N. C., 756---133, 271
R. R., Jenkins v.---196 N. C., 466---786
R. R., Johnson v.---163 N. C., 431---273
R. R., Kerner v.---170 N. C., 94---544
R. R. v. Kitchen---91 N. C., 39---418
R. R., Lamb v.---179 N. C., 619---401
R. R. v. Lumber Co.---114 N. C., 690---383
R. R., McAdoo v.---105 N. C., 140---219
R. R. v. McArtan---185 N. C., 201---218
R. R., McManus v.---174 N. C., 735---486
R. R. v. Mfg. Co.---166 N. C., 168---560
R. R., Massey v.---169 N. C., 245---621
R. R., Mesic v.---120 N. C., 490---635
R. R., Mitchell v.---176 N. C., 645---590
R. R., Moore v.---173 N. C., 311---543
R. R., Murdock v.---159 N. C., 131---398
R. R., Odom v.---193 N. C., 442---639
R. R. v. Olive---142 N. C., 257---383
R. R., Osborne v.---160 N. C., 309---635

R. R., Parker v.---181 N. C., 95---639
R. R., Parrish v.---146 N. C., 125---486
R. R., Patton v.---96 N. C., 455---219
R. R., Perry v.---180 N. C., 290---634
R. R., Pigford v.---160 N. C., 93---782
R. R. v. Platt Land---133 N. C., 266---560
R. R., Potter v.---197 N. C., 17---401
R. R., Reid v.---180 N. C., 511---544
R. R. v. Reid---187 N. C., 320---317
R. R., Ridge v.---167 N. C., 510---592
R. R., Rigsbee v.---190 N. C., 231---634
R. R., Roberts v.---143 N. C., 176---722
R. R., Russell v.---118 N. C., 1098---634
R. R., Saunders v.---185 N. C., 289---242
R. R., Sawyer v.---142 N. C., 1---711
R. R., Shelby v.---147 N. C., 537---737
R. R., Shepard v.---166 N. C., 539---635
R. R., Sigman v.---135 N. C., 181---127
R. R., Stephenson v.---86 N. C., 455---573
R. R., Tedder v.---124 N. C., 342---375
R. R. v. Transit Co.---195 N. C., 305---7
R. R., Wearn v.---191 N. C., 575---113
R. R., Weston v.---194 N. C., 210---714
R. R., Williams v.---187 N. C., 348---635
R. R., Williams v.---190 N. C., 366---24
R. R., Wright v.---155 N. C., 325---714
Raleigh, Briggs v.---195 N. C., 223---746
Raleigh, Ellison v.---89 N. C., 125---678
Raleigh, Jefferson v.---194 N. C., 479---593
Raleigh v. Peace---110 N. C., 32---512
Ramsey v. Davis---193 N. C., 395---112
Ramsey, Freeman v.---189 N. C., 790---523
Ramsey v. Power Co.---195 N. C., 788---437, 643
Rand, Whitt v.---187 N. C., 805---594
Randall, S. v.---170 N. C., 757---378
Rankin v. Oates---183 N. C., 517---465
Rawls v. Lupton---193 N. C., 428---309, 562
Rawls v. Mayo---163 N. C., 177---699
Realty Co. v. Barnes---197 N. C., 6---226
Realty Corp. v. Fisher---196 N. C., 503---164
Reaves, Motor Co. v.---184 N. C., 260---127
Receivers, Everett v.---121 N. C., 519---191
Reed v. Engineering Co.---188 N. C., 39---89
Reed v. Schenck---13 N. C., 415---247
Reich v. Cone---180 N. C., 267---724
Reid, Alsbrook v.---89 N. C., 151---219
Reid v. Bank---159 N. C., 99---533
Reid, Ins. Co. v.---171 N. C., 513---71
Reid v. Neal---182 N. C., 192---490, 491, 766
Reid v. R. R.---180 N. C., 511---544
Reid, R. R. v.---187 N. C., 320---317
Rendleman v. Stoessel---195 N. C., 640---205, 206
Rhodes, Douglas v.---188 N. C., 580---272
Rhodes v. Durham---165 N. C., 679---196
Rhyne v. Lipscomb---122 N. C., 650---734

Rice, S. v. 158 N. C., 635 745
Richardson v. Strong 35 N. C., 106 696, 697
Richardson, Waugh v. 30 N. C., 470 284
Richmond, Jones v. 161 N. C., 553 706
Riddick, Odom v. 104 N. C., 515 273
Riddick, Vass v. 89 N. C., 6 418
Ridge v. R. R. 167 N. C., 510 592
Riggs, Jones v. 154 N. C., 281 732
Rigsbee v. R. R. 190 N. C., 231 634
Rinehart, Brown v. 112 N. C., 772 193
Rippey v. Miller 46 N. C., 479 686
Ripple v. Mortgage Corp. 193 N. C., 422 121
Ritch, Smith v. 196 N. C., 72 21
Road Comrs., Campbell v. 173 N. C., 500 560
Road Comrs., Comrs. of Yancey v. 165 N. C., 632 317
Roane v. Robinson 189 N. C., 628 279, 491, 707
Roberts, Fleming v. 84 N. C., 532 456
Roberts v. R. R. 143 N. C., 176 722
Roberts v. Saunders 192 N. C., 191 279
Roberts, S. v. 12 N. C., 259 486, 487
Roberts, Waters v. 89 N. C., 145 170
Robertson v. Halton 156 N. C., 215 297, 298
Robertson v. Robertson 190 N. C., 558 161
Robeson v. Moore 168 N. C., 388 510
Robinson, Davis v. 189 N. C., 589 7
Robinson, Roane v. 189 N. C., 628 279, 491, 707
Robinson, Rodman v. 134 N. C., 503 155
Robinson, S. v. 188 N. C., 784 447
Robinson, Wallace v. 185 N. C., 530 456
Robinson v. Williams 189 N. C., 256 151
Rocky Mount, Hines v. 162 N. C., 409 196
Rodman v. Robinson 134 N. C., 503 155
Rodman, S. v. 188 N. C., 720 487
Roe v. Journegan 175 N. C., 261 295
Rogers v. Booker 184 N. C., 183 122
Rogers v. Holt 62 N. C., 108 370
Rogers, Lane v. 113 N. C., 171 247
Rogers, S. v. 162 N. C., 656 514
Rohr, Faust v. 166 N. C., 187 226
Roofing Co., Supply Co. v. 160 N. C., 443 328
Roper, Litchfield v. 192 N. C., 202 251
Roseman, Shell v. 155 N. C., 90 561
Rosenbacker, Mar-Hof Co. v. 176 N. C., 330 226
Ross v. Cotton Mills 140 N. C., 115 643
Ross, *In re* 182 N. C., 477 219
Roulhac v. White 31 N. C., 63 641
Rountree, S. v. 181 N. C., 535 137
Rouse, Cain v. 186 N. C., 175 226
Rouse v. Kinston 188 N. C., 12 561
Rowland, Gardner v. 24 N. C., 247 508
Ruffin v. Mebane 41 N. C., 507 112
Rumbough, Orr v. 172 N. C., 754 242
Russell, Poole v. 197 N. C., 246 575
Russell v. R. R. 118 N. C., 1098 634

S

Sadler v. Wilson---- 40 N. C., 296---- 490
St. John's Lodge v. Callender--- 26 N. C., 335---- 219
Sales Co. v. White----183 N. C., 671---- 375
Salley, Allen v.----179 N. C., 147---- 81, 103, 104, 253, 370, 371
Sams v. Cochran----188 N. C., 731---- 565
Sanderlin, Thomas v.----173 N. C., 329---- 651
Sanders v. May----173 N. C., 47---- 456
Sanders, S. v.---- 84 N. C., 729---- 487
Sanford, Gunter v.----186 N. C., 452---- 133, 752
Sanitary District v. Prudden---195 N. C., 722---- 89
Sargent, Goins v.----196 N. C., 478---- 601, 673
Sasser v. Lumber Co.----165 N. C., 242---- 173
Satchell v. McNair----189 N. C., 472---- 24
Satterwhite, Hunt v.---- 85 N. C., 73---- 161
Saunders, Branch v.----195 N. C., 176---- 513
Saunders v. Gatling---- 81 N. C., 298---- 734
Saunders v. R. R.----185 N. C., 289---- 242
Saunders, Roberts v.----192 N. C., 191---- 279
Savage, Alston v.----173 N. C., 213---- 374
Sawyer v. R. R.----142 N. C., 1---- 711
Scales v. Trust Co.----195 N. C., 772---- 202
Scales v. Winston-Salem----189 N. C., 469---- 312, 744
Schenck, Reed v.---- 13 N. C., 415---- 247
Schiff, Hammond v.----100 N. C., 161---- 773
Schnibben, Bowen v.----184 N. C., 248---- 15
Screws, Butts v.---- 95 N. C., 215---- 465
Sea Food Co. v. Way----169 N. C., 679---- 227
Sears-Roebuck & Co. v. Banking Co. ----191 N. C., 500---- 324
Seawell v. Cole----194 N. C., 546---- 6
Security Co., Cooper v.----127 N. C., 219---- 59
Seed Co. v. Jennette Bros.----195 N. C., 173---- 328
Seip v. Wright----173 N. C., 14---- 455
Sellars, King v.----194 N. C., 533---- 522
Sermons v. Allen----184 N. C., 127---- 525
Sermon's Land, *In re*----182 N. C., 122----186, 537, 620
Sexton, Ellison v.----105 N. C., 356---- 418
Shapiro, Hanes v.----168 N. C., 24---- 592
Sharp v. Pearce---- 74 N. C., 600---- 374
Sharpe, Webster v.----116 N. C., 466---- 80
Shaw v. Handle Co.----188 N. C., 222---- 486, 561
Sheets v. Tobacco Co.----195 N. C., 149---- 350
Shelby v. R. R.----147 N. C., 537---- 737
Sheldon v. Kivett----110 N. C., 408---- 194
Shell v. Roseman----155 N. C., 90---- 561
Shepard, Cedar Works v.----181 N. C., 13---- 525
Shepard v. R. R.----166 N. C., 539---- 635
Shepard v. Telephone Co.----143 N. C., 244---- 643
Sherard, Justice v.----197 N. C., 237---- 344, 346
Shew, S. v.----194 N. C., 690---- 249, 476
Shields v. Allen---- 77 N. C., 375---- 504
Shipbuilding Co., Holeman v.---192 N. C., 236---- 642
Shipp v. Stage Lines----192 N. C., 475---- 699

Shober v. Hauser 20 N. C., 222 122
Short, Wise v. 181 N. C., 320 537
Shute, Nash v. 184 N. C., 383 285
Sigman v. R. R. 135 N. C., 181 127
Sigmon, S. v. 190 N. C., 684 26, 29, 582
Silk Co. v. Spinning Co. 154 N. C., 421 61
Silliman v. Whitaker 119 N. C., 89 161
Simmons, Blackledge v. 180 N. C., 535 491
Simmons v. Dowd 77 N. C., 155 456
Simmons, Logan v. 38 N. C., 487 201
Simmons v. Simmons 192 N. C., 825 201
Simmons, Stelges v. 170 N. C., 42 418
Simonton, Dobson v. 86 N. C., 492 361
Simpson, Markham v. 175 N. C., 135 678
Singletary, Harris v. 193 N. C., 583 525
Singleton, S. v. 183 N. C., 738 686
Sink, Cook v. 190 N. C., 620 523
Skinner, Hicks v. 71 N. C., 539 670
Skinner, Hill v. 169 N. C., 405 678
Slade, Cherry v. 7 N. C., 82 247
Sledge v. Elliott 116 N. C., 712 524
Smart, McKesson v. 108 N. C., 17 252
Smathers v. Bank 135 N. C., 410 362, 616
Smith, Allen v. 183 N. C., 222 279
Smith, Blake v. 163 N. C., 274 15
Smith v. Carr 128 N. C., 150 574
Smith, Carr v. 129 N. C., 232 574
Smith v. Ins. Co. 193 N. C., 446 142
Smith v. King 107 N. C., 273 201
Smith v. Kron 96 N. C., 392 488, 695
Smith, Land Co. v. 151 N. C., 70 606
Smith v. Lumber Co. 142 N. C., 26 80
Smith v. Lumber Co. 155 N. C., 389 490
Smith, Maclin v. 37 N. C., 371 707
Smith v. Morganton 187 N. C., 801 196
Smith v. Ritch 196 N. C., 72 21
Smith v. Smith 173 N. C., 124 510
Smith v. Smith 190 N. C., 764 279
Smith, S. v. 164 N. C., 475 670
Smith, S. v. 196 N. C., 438 628
Smith, Thompson v. 160 N. C., 256 41
Smith, Vick v. 83 N. C., 80 469
Smitherman, Baldwin v. 171 N. C., 772 242
Snowden v. Bell 159 N. C., 497 285
Snowden v. Snowden 187 N. C., 539 161
Sparks, Drainage Comrs. v. 179 N. C., 581 512
Speas v. Bank 188 N. C., 524 726, 740
Speed v. Perry 167 N. C., 122 353
Spencer v. Spencer 56 N. C., 404 201
Spencer, Trust Co. v. 193 N. C., 745 565
Spicer, Kornegay v. 76 N. C., 95 469
Spinning Co., Ferguson v. 196 N. C., 614 711, 722, 726
Spinning Co., Silk Co. v. 154 N. C., 421 61
Spivey v. Grant 96 N. C., 214 122, 374
Springs v. Cole 171 N. C., 418 346

Springs v. Springs, 182 N. C., 484, 706
Stadiem, Brittingham v., 151 N. C., 299, 592
Stage Lines, Shipp v., 192 N. C., 475, 699
Stamey v. Burnsville, 189 N. C., 39, 560
Stancil, Lewis v., 154 N. C., 326, 161
Stancil, Wilkie v., 196 N. C., 794, 711, 722, 726
Stancill, Carraway v., 137 N. C., 472, 504
Stancill, S. v., 178 N. C., 683, 642
Stanfield, Lancaster v., 191 N. C., 340, 574
Stansberry, S. v., 197 N. C., 350, 352
Stanton, Bobbitt v., 120 N. C., 253, 469
Starr, Burriss v., 165 N. C., 657, 433
S. v. Adams, 138 N. C., 688, 687
S. v. Adams, 193 N. C., 581, 379, 658
S. v. Alderman, 182 N. C., 917, 687
S. v. Allen, 166 N. C., 265, 514, 692
S. v. Allen, 190 N. C., 498, 353
S. v. Anderson, 92 N. C., 732, 116
S. v. Andrew, 61 N. C., 205, 487
S. v. Ashburn, 187 N. C., 717, 378
S. v. Aswell, 193 N. C., 399, 379
S. v. Bailey, 65 N. C., 426, 628
S. v. Baldwin, 193 N. C., 566, 586
S. v. Bank, 193 N. C., 524, 151, 718
S. v. Banks, 143 N. C., 652, 448
S. v. Barco, 150 N. C., 792, 31
S. v. Beam, 181 N. C., 597, 670
S. v. Beasley, 196 N. C., 797, 514
S. v. Bell, 61 N. C., 76, 296
S. v. Benson, 183 N. C., 795, 447, 448
S. v. Berry, 190 N. C., 363, 271
S. v. Blackwelder, 182 N. C., 899, 582, 686
S. v. Bohanon, 142 N. C., 695, 487
S. v. Bond, 49 N. C., 9, 296
S. v. Brackville, 106 N. C., 701, 686
S. v. Brady, 107 N. C., 822, 115
S. v. Bridgers, 172 N. C., 879, 686, 722
S. v. Brown, 100 N. C., 519, 770
S. v. Bynum, 175 N. C., 777, 686
S. v. Carlson, 171 N. C., 818, 582
S. v. Carr, 196 N. C., 129, 486
S. v. Caveness, 78 N. C., 484, 249, 476
S. v. Cherry, 154 N. C., 624, 549
S. v. Cloninger, 149 N. C., 567, 658
S. v. Clyburn, 195 N. C., 618, 692
S. v. Colson, 193 N. C., 236, 658
S. v. Crawford, 197 N. C., 513, 692
S. v. Crook, 115 N. C., 760, 628
S. v. Crook, 132 N. C., 1053, 457
S. v. Crook, 189 N. C., 545, 571
S. v. Crutchfield, 187 N. C., 607, 137
S. v. Dail, 191 N. C., 231, 249
S. v. Dalton, 168 N. C., 204, 115
S. v. Dalton, 185 N. C., 606, 692
S. v. Daniel, 136 N. C., 571, 352

S. v. Dean ---------- 35 N. C., 63---------- 116
S. v. Dowdy ----------145 N. C., 432---------- 286
S. v. Drake ---------- 82 N. C., 592---------- 487
S. v. Drake ----------113 N. C., 624---------- 487
S. v. Dry ----------152 N. C., 813---------- 549
S. v. Dunning ----------177 N. C., 559---------- 447
S. v. Durham ----------141 N. C., 741---------- 447
S. v. Earnhardt ----------170 N. C., 725---------- 31
S. v. Earp ----------196 N. C., 164---------- 582
S. v. Ellis ---------- 97 N. C., 447---------- 487
S. v. Evans ----------183 N. C., 758---------- 730
S. v. Falkner ----------182 N. C., 793----------663, 691
S. v. Farrington ----------141 N. C., 844---------- 286
S. v. Fisher ---------- 51 N. C., 478---------- 487
S. v. Fowler ----------151 N. C., 731---------- 448
S. v. Garrett ---------- 60 N. C., 144---------- 447
S. v. Gash ----------177 N. C., 595---------- 137
S. v. George ---------- 29 N. C., 321----------115, 116
S. v. George ---------- 50 N. C., 233---------- 487
S. v. Geurukus ----------195 N. C., 642---------- 585
S. v. Goodson ----------107 N. C., 798---------- 686
S. v. Gray ----------180 N. C., 697----------137, 139
S. v. Green ----------197 N. C., 624---------- 730
S. v. Gregory ----------153 N. C., 646---------- 249
S. v. Hannon ----------168 N. C., 215---------- 670
S. v. Harbert ----------185 N. C., 760----------351, 353
S. v. Hardie ---------- 23 N. C., 42---------- 734
S. v. Harrison ----------115 N. C., 706---------- 487
S. v. Hart ----------186 N. C., 582---------- 353
S. v. Hartsfield ----------188 N. C., 357----------514, 692
S. v. Hemphill ----------162 N. C., 632---------- 351
S. v. Hice ----------117 N. C., 782---------- 658
S. v. Holland ----------193 N. C., 713---------- 26
S. v. Holt ---------- 90 N. C., 749----------514, 692
S. v. Hopkins ----------130 N. C., 647---------- 670
S. v. Horton ----------139 N. C., 588---------- 137
S. v. Idol ----------195 N. C., 497---------- 658
S. v. Jackson ---------- 82 N. C., 565---------- 115
S. v. Jefferson ---------- 66 N. C., 309---------- 628
S. v. Jeffreys ----------192 N. C., 318---------- 126
S. v. Jenkins ---------- 84 N. C., 813---------- 549
S. v. Jessup ----------183 N. C., 771---------- 137
S. v. Jones ---------- 68 N. C., 443---------- 486
S. v. Jones ----------139 N. C., 613---------- 48
S. v. Jones ----------191 N. C., 753---------- 548
S. v. Kale ----------124 N. C., 816---------- 447
S. v. Kelly ---------- 97 N. C., 404---------- 549
S. v. Kline ----------190 N. C., 177---------- 353
S. v. Lambert ----------196 N. C., 524---------- 586
S. v. Lawhorne ---------- 66 N. C., 638---------- 487
S. v. Lawrence ----------196 N. C., 562----------30, 582, 686
S. v. Leak ----------156 N. C., 643---------- 26
S. v. Lee ----------164 N. C., 533---------- 27
S. v. Limerick ----------146 N. C., 649---------- 137
S. v. Lumber Co. ----------153 N. C., 610---------- 191

S. v. Lutterloh ---------- 188 N. C., 412 ---------- 137
S. v. McCanless ---------- 193 N. C., 200 ---------- 56
S. v. McClure ---------- 166 N. C., 321 ---------- 447
S. v. McDraughon ---------- 168 N. C., 131 ---------- 127
S. v. McIver ---------- 175 N. C., 761 ---------- 137, 627
S. v. McKinney ---------- 175 N. C., 784 ---------- 379
S. v. McKinnon ---------- 197 N. C., 576 ---------- 686
S. v. McLeod ---------- 196 N. C., 542 ---------- 686
S. v. McMahan ---------- 103 N. C., 379 ---------- 447
S. v. McNinch ---------- 90 N. C., 695 ---------- 448
S. v. Manuel ---------- 20 N. C., 144 ---------- 286
S. v. Martin ---------- 188 N. C., 119 ---------- 53, 54
S. v. Maslin ---------- 195 N. C., 537 ---------- 125
S. v. Massey ---------- 86 N. C., 658 ---------- 686
S. v. Matthews ---------- 66 N. C., 106 ---------- 686
S. v. Matthews ---------- 78 N. C., 523 ---------- 15
S. v. May ---------- 132 N. C., 1020 ---------- 670
S. v. Mayer ---------- 196 N. C., 454 ---------- 602
S. v. Melton ---------- 187 N. C., 481 ---------- 685
S. v. Merrick ---------- 171 N. C., 788 ---------- 16, 174
S. v. Meyers ---------- 190 N. C., 239 ---------- 30, 549
S. v. Miller ---------- 197 N. C., 445 ---------- 485
S. v. Montague ---------- 195 N. C., 20 ---------- 29, 685
S. v. Morris ---------- 84 N. C., 757 ---------- 754
S. v. Morse ---------- 171 N. C., 777 ---------- 658
S. v. Murphy ---------- 157 N. C., 614 ---------- 447
S. v. Nance ---------- 195 N. C., 47 ---------- 658
S. v. Newsome ---------- 195 N. C., 552 ---------- 448, 487
S. v. Norman ---------- 82 N. C., 687 ---------- 734
S. v. Norris ---------- 174 N. C., 808 ---------- 285
S. v. Oakley ---------- 176 N. C., 755 ---------- 139, 685
S. v. O'Neal ---------- 187 N. C., 22 ---------- 15, 174
S. v. Page ---------- 127 N. C., 512 ---------- 487
S. v. Palmer ---------- 197 N. C., 135 ---------- 627
S. v. Palmore ---------- 189 N. C., 538 ---------- 271
S. v. Parker ---------- 152 N. C., 790 ---------- 249
S. v. Perkins ---------- 141 N. C., 797 ---------- 251
S. v. Pettie ---------- 80 N. C., 367 ---------- 286
S. v. Pierce ---------- 192 N. C., 766 ---------- 549
S. v. Plyler ---------- 153 N. C., 630 ---------- 30
S. v. Poythress ---------- 174 N. C., 809 ---------- 708
S. v. Price ---------- 175 N. C., 804 ---------- 708
S. v. Prince ---------- 182 N. C., 788 ---------- 29
S. v. Pugh ---------- 101 N. C., 737 ---------- 448
S. v. Pulliam ---------- 184 N. C., 681 ---------- 514, 692
S. v. Randall ---------- 170 N. C., 757 ---------- 378
S. v. Rice ---------- 158 N. C., 635 ---------- 745
S. v. Roberts ---------- 12 N. C., 259 ---------- 486, 487
S. v. Robinson ---------- 188 N. C., 784 ---------- 447
S. v. Rodman ---------- 188 N. C., 720 ---------- 487
S. v. Rogers ---------- 162 N. C., 656 ---------- 514
S. v. Rountree ---------- 181 N. C., 535 ---------- 137
S. v. Sanders ---------- 84 N. C., 729 ---------- 487
S. v. Shew ---------- 194 N. C., 690 ---------- 249, 476
S. v. Sigmon ---------- 190 N. C., 684 ---------- 26, 29, 582

S. v. Singleton ---183 N. C., 738--- 686
S. v. Smith ---164 N. C., 475--- 670
S. v. Smith ---196 N. C., 438--- 628
S. v. Stancill ---178 N. C., 683--- 642
S. v. Stansberry ---197 N. C., 350--- 352
S. v. Stewart --- 89 N. C., 563--- 514
S. v. Sudderth ---184 N. C., 753--- 137
S. v. Suttle ---115 N. C., 784--- 284
S. v. Swindell ---189 N. C., 151--- 730
S. v. Swinson ---196 N. C., 100--- 29
S. v. Taylor ---194 N. C., 738--- 692
S. v. Terry ---173 N. C., 761--- 548
S. v. Thomas ---118 N. C., 1113--- 448
S. v. Thomas ---118 N. C., 1221--- 405
S. v. Thomas ---195 N. C., 458--- 692
S. v. Toney ---162 N. C., 635--- 669
S. v. Trammell --- 24 N. C., 379--- 115
S. v. Traylor ---121 N. C., 674--- 658
S. v. Tripp ---168 N. C., 150--- 628
S. v. Trollinger ---162 N. C., 618--- 137
S. v. Trott ---190 N. C., 674--- 137, 192
S. v. Tucker ---190 N. C., 708--- 687, 730
S. v. Turnage ---138 N. C., 566--- 137
S. v. Turner ---119 N. C., 841--- 116
S. v. Tyson ---133 N. C., 692--- 770
S. v. Utley ---126 N. C., 997--- 582
S. v. Van Pelt---136 N. C., 633--- 115
S. v. Vickers ---196 N. C., 239--- 62
S. v. Vinson --- 63 N. C., 335--- 29, 686
S. v. Walker ---179 N. C., 730--- 708
S. v. Walker ---193 N. C., 489--- 448, 548
S. v. Walton ---186 N. C., 485--- 26
S. v. Ward ---180 N. C., 693--- 692
S. v. Webb ---155 N. C., 426--- 628
S v. Weston ---197 N. C., 25--- 549
S. v. Whaley ---191 N. C., 387--- 16, 627
S. v. Wheeler ---185 N. C., 670--- 271, 353
S. v. Whitaker --- 89 N. C., 472--- 173, 249
S. v. White --- 89 N. C., 462--- 686
S. v. Whitener --- 93 N. C., 590--- 191
S. v. Whitener ---191 N. C., 659--- 487, 488
S. v. Whitfield --- 70 N. C., 356--- 488
S. v. Wiggins ---171 N. C., 813--- 126
S. v. Wilcox ---132 N. C., 1120--- 686, 773
S. v. Wilkerson ---164 N. C., 435--- 643
S. v. Williams ---158 N. C., 611--- 606
S. v. Winston ---116 N. C., 990--- 487
S. v. Wiseman --- 68 N. C., 203--- 628
S. v. Woolard ---119 N. C., 779--- 31
S. v. Yelverton ---193 N. C., 64--- 663, 670
S. v. Younger --- 12 N. C., 357--- 115
State Prison v. Bonding Co.---192 N. C., 391--- 574
State Treasurer, Comrs. of
Johnston v. ---174 N. C., 141--- 423
Staton, Tarboro v.---156 N. C., 504--- 751

Staub's Will, *In re*---172 N. C., 138---348
Steamship Co. Lewis v.---132 N. C., 904---686
Stearns, Crawley v.---194 N. C., 15---490
Steeley v. Lumber Co.---165 N. C., 27---590
Stelges v. Simmons---170 N. C., 42---418
Stephen's Will, *In re*---189 N. C., 267---348
Stephens, Foy v.---168 N. C., 438---331
Stephenson v. R. R.--- 86 N. C., 455---373
Stevens v. Turlington---186 N. C., 191---472
Stevenson, Askew v.--- 61 N. C., 288---681
Stevenson, Trust Co. v.---196 N. C., 29---219, 510, 511
Stewart, Avery v.---134 N. C., 287---525
Stewart v. Carpet Co.---138 N. C., 60---242, 643
Stewart v. Lumber Co.---193 N. C., 138---393
Stewart, S. v.--- 89 N. C., 563---514
Stewart v. Stewart---195 N. C., 476---336
Stoessel, Rendleman v.---195 N. C., 640---205, 206
Stoltz, Crye v.---193 N. C., 802---672
Store Co., Trust Co. v.---193 N. C., 122---324
Storm v. Wrightsville Beach---189 N. C., 679---318
Street v. Coal Co.---193 N. C., 178---486, 593
Strickland, Bissette v.---191 N. C., 260---284, 575
Strickland, Carter v.---165 N. C., 69---706
Strickland, Polson v.---193 N. C., 299---428, 456
Strong, Richardson v.--- 35 N. C., 106---696, 697
Sturtevant v. Cotton Mills---171 N. C., 119--- 82
Styron, Bonner v.---113 N. C., 30---183
Sudderth, S. v.---184 N. C., 753---137
Sullivan, Batts v.---182 N. C., 129--- 71
Sullivan, Pilley v.---182 N. C., 493---490
Summit, Devries v.--- 86 N. C., 132---660
Sumner, Bank v.---188 N. C., 687---650
Sumner, McKinzie v.---114 N. C., 425---526
Supply Co. v. Eastern Star Home ---163 N. C., 513---652
Supply Co. v. Roofing Co.---160 N. C., 443---328
Supply Co. v. Watt---181 N. C., 432---408
Supply Co. v. Windley---176 N. C., 18---240
Sutphin, McKinney v.---196 N. C., 318---183
Suttle, S. v.---115 N. C., 784---284
Swain v. Goodman---183 N. C., 531---673
Sweaney, Clark v.---176 N. C., 529---712, 723
Swift & Co. v. Aydlett---192 N. C., 330--- 3
Swindell v. Latham---145 N. C., 144---112
Swindell, S. v.---189 N. C., 151---730
Swinson, S. v.---196 N. C., 100--- 29
Syme v. Broughton--- 85 N. C., 367---219

T

Tabor v. Ward--- 83 N. C., 291---296
Talley, Carswell v.---192 N. C., 37---151
Tanner v. Lumber Co.---140 N. C., 475--- 24
Tanning Co., Watson v.---190 N. C., 840--- 16
Tanning Co., West v.---154 N. C., 44---590

Tarboro v. Forbes 185 N. C., 59 132
Tarboro v. Staton 156 N. C., 504 751
Tate v. Comrs. of Haywood 122 N. C., 812 421, 423
Taylor, Dail v. 151 N. C., 284 242
Taylor v. Drainage Comrs. 176 N. C., 217 513
Taylor, Dunn v. 186 N. C., 254 474
Taylor, Edgerton v. 184 N. C., 571 328
Taylor v. Hargrove 101 N. C., 145 522
Taylor, Harmon v. 98 N. C., 341 533
Taylor, Houghtalling v. 122 N. C., 141 732
Taylor v. Ins. Co. 182 N. C., 120 237
Taylor, Lenoir County v. 190 N. C., 336 54, 769
Taylor, Lilly v. 88 N. C., 490 746
Taylor, Power Co. v. 191 N. C., 329 576
Taylor, Power Co. v. 194 N. C., 231 740
Taylor, Quarles v. 195 N. C., 313 266, 440
Taylor, S. v. 194 N. C., 738 692
Tea Co. v. Doughton 196 N. C., 145 606
Tea Co., Peters v. 194 N. C., 172 84
Tedder v. R. R. 124 N. C., 342 375
Telephone Co., Shepard v. 143 N. C., 244 643
Terry, S. v. 173 N. C., 761 548
Thayer v. Thayer 189 N. C., 502 696
Thomas, Ballinger v. 195 N. C., 517 720
Thomas v. Houston 181 N. C., 91 428
Thomas v. Nichols 127 N. C., 319 108
Thomas v. Sanderlin 173 N. C., 329 651
Thomas, S. v. 118 N. C., 1113 448
Thomas, S. v. 118 N. C., 1221 405
Thomas, S. v. 195 N. C., 458 692
Thomas, Thresher Co. v. 170 N. C., 680 82
Thomasville, Gallimore v. 191 N. C., 648 131, 134
Thompson v. Buchanan 195 N. C., 155 524
Thompson v. Lumber Co. 168 N. C., 226 524
Thompson v. Smith 160 N. C., 256 41
Thompson, Wright v. 171 N. C., 88 594
Thornburg v. Burton 197 N. C., 193 681
Thornton, Houston v. 122 N. C., 365 80
Thornton v. Lambeth 103 N. C., 86 240
Thornton, Lee v. 176 N. C., 208 477
Threadgill, Bruner v. 88 N. C., 361 755
Thresher Co. v. Thomas 170 N. C., 680 82
Tilghman v. Hancock 196 N. C., 780 642
Timber Co. v. Eubank 196 N. C., 724 284
Timber Co., Kleybolte v. 151 N. C., 635 31
Tise v. Whitaker 146 N. C., 374 672
Tise v. Whitaker-Harvey Co. 144 N. C., 508 226
Tobacco Co., Sheets v. 195 N. C., 149 350
Tomlinson, Gatewood v. 113 N. C., 312 155
Toney, S. v. 162 N. C., 635 669
Townsend, Gore v. 105 N. C., 228 155, 156, 158
Traction Co., Houston v. 155 N. C., 4 643
Traction Co., Pendergrast v. 163 N. C., 553 759
Trammell, S. v. 24 N. C., 379 115
Transit Co., R. R. v. 195 N. C., 305 7

Transit Corp., Gillis v.---193 N. C., 346---84
Transportation Co., Cotton v.---197 N. C., 709---722, 726
Traylor, S. v.---121 N. C., 674---658
Tripp, S. v.---168 N. C., 150---628
Trollinger, S. v.---162 N. C., 618---137
Trott, S. v.---190 N. C., 674---137, 192
Troy v. Troy---60 N. C., 624---279
Trust Co. v. Bank---166 N. C., 112---500
Trust Co., Bank v.---172 N. C., 344---441
Trust Co. v. Benbow---135 N. C., 303---155
Trust Co. v. Boykin---192 N. C., 262---574
Trust Co., Ellington v.---196 N. C., 755---161
Trust Co. v. Hayes---191 N. C., 542---428, 456
Trust Co. v. Ins. Co.---173 N. C., 558---387
Trust Co. v. Jenkins---193 N. C., 761---36, 204, 615
Trust Co., McAdams v.---167 N. C., 494---97
Trust Co., McKaughan v.---182 N. C., 543---533
Trust Co. v. Pierce---195 N. C., 717---201
Trust Co. v. Powell---189 N. C., 372---537
Trust Co., Scales v.---195 N. C., 772---202
Trust Co. v. Spencer---193 N. C., 745---565
Trust Co. v. Stevenson---196 N. C., 29---219, 510, 511
Trust Co. v. Store Co.---193 N. C., 122---324
Trust Co., Willis v.---183 N. C., 267---492
Trustees, Price v.---172 N. C., 84---312
Tucker, S. v.---190 N. C., 708---687, 730
Turlington, Stevens v.---186 N. C., 191---472
Turnage, S. v.---138 N. C., 566---137
Turner, Brown v.---70 N. C., 93---734
Turner v. Gaither---83 N. C., 357---696
Turner, S. v.---119 N. C., 841---116
Tuttle v. Tuttle---146 N. C., 484---463
Typewriter Co., Weston v.---183 N. C., 1---324
Tyson v. Frutchey---194 N. C., 750---724
Tyson, S. v.---133 N. C., 692---770

U

Utilities Co., Fry v.---183 N. C., 281---710, 712
Utilities Co., Gentry v.---185 N. C., 285---642
Utley, S. v.---126 N. C., 997---582
Utter, Hogan v.---175 N. C., 332---699

V

Van Gilder v. Bullen---159 N. C., 291---297
Van Kempen v. Latham---195 N. C., 389---236
Van Pelt, S. v.---136 N. C., 633---115
Vann, Hines v.---118 N. C., 3---732
Vann, Kearney v.---154 N. C., 311---31
Vass v. Riddick---89 N. C., 6---418
Vaughan v. Farmer---90 N. C., 607---221
Vick v. Smith---83 N. C., 80---469
Vickers, S. v.---196 N. C., 239---62
Vickers v. Vickers---188 N. C., 448---201

Vinson v. Gardner---185 N. C., 193---492
Vinson, S. v.---63 N. C., 335---29, 683
Von Glahn v. DeRosset---81 N. C., 467---361
Von Glahn v. Harris---73 N. C., 323---361

W

Wadesboro, Harrington v.---153 N. C., 437---436
Wadesboro, Leak v.---186 N. C., 683---133
Wadford v. Gillette---193 N. C., 413---693
Wake County, Owens v.---195 N. C., 132---318
Waldraven, Long v.---113 N. C., 337---279
Walker, Aman v.---165 N. C., 224---462
Walker, Gilmore v.---195 N. C., 460---54
Walker, S. v.---179 N. C., 730---708
Walker, S. v.---193 N. C., 489---448, 548
Wallace v. Robinson---185 N. C., 530---456
Wallace v. Wallace---181 N. C., 158---491
Wallace v. Wilkesboro---151 N. C., 614---678
Walston, Chemical Co. v.---187 N. C., 817---158
Walter v. Kilpatrick---191 N. C., 458---308
Walton, S. v.---186 N. C., 485---26
Ward v. Elizabeth City---121 N. C., 1---406
Ward v. Liddell---182 N. C., 223---150
Ward, S. v.---180 N. C., 693---692
Ward, Tabor v.---83 N. C., 291---293
Ware, *In re*---187 N. C., 693---187, 537
Warehouse, Graham v.---189 N. C., 533---258, 533
Warren, Chard v.---122 N. C., 75---523
Warren, Handley v.---185 N. C., 95---428
Warren v. Makely---85 N. C., 12---755
Water Co., Powell v.---171 N. C., 290---106
Waters v. Comrs. of Buncombe---186 N. C., 719---251
Waters v. Garris---188 N. C., 305---299, 495, 526
Waters v. Roberts---89 N. C., 145---170
Watford v. Pierce---188 N. C., 430---247
Watson, Bank v.---187 N. C., 107---621
Watson, Harrell v.---63 N. C., 454---433
Watson v. Tanning Co.---190 N. C., 840---16
Watt, Supply Co. v.---181 N. C., 432---408
Watts, Person v.---184 N. C., 499---93
Waugh v. Richardson---30 N. C., 470---284
Way, Sea Food Co. v.---169 N. C., 679---227
Wearn v. R. R.---191 N. C., 575---113
Weaver v. Kirby---186 N. C., 387---706
Webb, Comrs. of Henderson-
ville v.---148 N. C., 120---451, 452
Webb, S. v.---155 N. C., 426---628
Webster v. Sharpe---116 N. C., 466---80
Welch v. Gibson---193 N. C., 684---491
Welch v. Ins. Co.---196 N. C., 546---71
Welch v. Wiggins---196 N. C., 546---291
Wells v. Williams---187 N. C., 134---707
Wentz v. Land Co.---193 N. C., 32---7, 455, 493
West v. Tanning Co.---154 N. C., 44---590

Westall, Brittain v.---137 N. C., 30---112
Wester v. Bailey---118 N. C., 193---433
Weston v. R. R.---194 N. C., 210---714
Weston, S. v.---197 N. C., 25---549
Weston v. Typewriter Co.---183 N. C., 1---324
Whaley, S. v.---191 N. C., 387---16, 627
Wharton v. Greensboro---146 N. C., 356---405, 746
Wheeler, S. v.---185 N. C., 670---271, 353
Whichard, Jones v.---163 N. C., 241---491
Whitaker, Silliman v.---119 N. C., 89---161
Whitaker, S. v.---89 N. C., 472---173, 249
Whitaker, Tise v.---146 N. C., 374---672
Whitaker-Harvey Co., Tise v.---144 N. C., 508---226
White v. Hickory---195 N. C., 42---120
White v. Hines---182 N. C., 275---203, 643
White, Hoell v.---169 N. C., 640---612
White, Roulhac v.---31 N. C., 63---641
White, Sales Co. v.---183 N. C., 671---375
White, S. v.---89 N. C., 462---686
Whitener, S. v.---93 N. C., 590---191
Whitener, S. v.---191 N. C., 659---487, 488
Whitfield v. Garris---134 N. C., 24---490
Whitfield, S. v.---70 N. C., 356---488
Whitley, Canal Co. v.---172 N. C., 102---512
Whitley v. Powell---191 N. C., 476---272, 274
Whitt v. Rand---187 N. C., 805---594
Wiggins, S. v.---171 N. C., 813---126
Wiggins, Welch v.---196 N. C., 546---291
Wikel v. Comrs. of Jackson---120 N. C., 451---678
Wilcox, S. v.---132 N. C., 1120---686, 773
Wilkerson, Daniel v.---35 N. C., 329---67
Wilkerson, S. v.---164 N. C., 435---643
Wilkesboro, Wallace v.---151 N. C., 614---678
Wilkie v. Stancil---196 N. C., 794---711, 722, 726
Wilkins, Anderson v.---142 N. C., 154---296
Williams v. Best---195 N. C., 324---490
Williams, Brown v.---196 N. C., 247---245
Williams v. Comrs. of Craven---119 N. C., 520---317
Williams, Garrison v.---150 N. C., 674---695, 737
Williams, Goss v.---196 N. C., 213---84, 633
Williams v. Mfg. Co.---153 N. C., 7---691
Williams v. Mfg. Co.---154 N. C., 205---691
Williams, Nye v.---190 N. C., 129---7
Williams v. R. R.---187 N. C., 348---635
Williams v. R. R.---190 N. C., 366---24
Williams, Robinson v.---189 N. C., 256---151
Williams, S. v.---158 N. C., 611---606
Williams, Wells v.---187 N. C., 134---707
Willis v. Trust Co.---183 N. C., 267---492
Wilmington, Henderson v.---191 N. C., 269---421
Wilmington, McIlhenney v.---127 N. C., 146---312
Wilmington, Peterson v.---130 N. C., 76---312
Wilson, Adams v.---191 N. C., 392---523
Wilson, Christopher v.---188 N. C., 757---161
Wilson v. Clark---110 N. C., 364---590

Wilson v. Leary---120 N. C., 90---361
Wilson, McCall v.---101 N. C., 598---247
Wilson, Sadler v.---40 N. C., 296---490
Wilson v. Wilson---189 N. C., 85---450
Wilson v. Wilson---190 N. C., 819---15
Winborne v. Cooperage Co.---178 N. C., 88---593
Winchester v. Byers---196 N. C., 383---38
Winders, Blackmore v.---144 N. C., 212---56
Winders v. Hill---141 N. C., 694---151
Windley, Supply Co. v.---176 N. C., 18---240
Winkler v. Killian---141 N. C., 575---245
Winstead v. Bowman---68 N. C., 170---220
Winston, S. v.---116 N. C., 990---487
Winston-Salem, Angelo v.---193 N. C., 207---493
Winston-Salem v. Ashby---194 N. C., 388---132
Winston-Salem v. Coble---192 N. C., 776---132
Winston-Salem, Scales v.---189 N. C., 469---312, 744
Wise v. Short---181 N. C., 320---537
Wiseman, S. v.---68 N. C., 203---628
Wofford v. Hampton---173 N. C., 686---369
Womble v. Grocery Co.---135 N. C., 474---643
Wood v. Bellamy---120 N. C., 212---406
Wood v. Kincaid---144 N. C., 393---12
Wood v. Oxford---97 N. C., 228---746
Woodall v. Highway Com.---176 N. C., 377---317
Woolard, S. v.---119 N. C., 779---31
Wooley v. Bruton---184 N. C., 438---538
Wooten, Kinston v.---150 N. C., 295---751
Worth, Driller Co. v.---117 N. C., 515---739
Worthington, Cunningham v.---196 N. C., 778---161
Worthington v. Gilmers---190 N. C., 128---362
Worthington, Hooker v.---134 N. C., 283---463
Wray v. Harris---77 N. C., 77---98
Wright, Durham v.---190 N. C., 568---285
Wright, Howard v.---173 N. C., 339---641
Wright, Owens v.---161 N. C., 127---328
Wright v. R. R.---155 N. C., 325---714
Wright, Seip v.---173 N. C., 14---455
Wright v. Thompson---171 N. C., 88---594
Wrightsville Beach, Storm v.---189 N. C., 679---318
Wynn v. Grant---166 N. C., 39---418

Y

Yarborough v. Park Com.---196 N. C., 284---5
Yarbrough, Lunsford v.---189 N. C., 476---41
Yates v. Ins. Co.---166 N. C., 134---648
Yates, Johnson v.---183 N. C., 24---375
Yelverton, Bank v.---185 N. C., 314---667
Yelverton, S. v.---196 N. C., 64---663, 670
York, Pugh v.---74 N. C., 383---770
Young, Gilmer v.---122 N. C., 806---232
Younger, S. v.---12 N. C., 357---115

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1929

T. G. HYMAN v. N. L. BROUGHTON.

(Filed 3 April, 1929.)

1. **Sales A a—Evidence of total worthlessness of article sold admissible to show failure of consideration—Warranties.**

Where a seller contracts for the sale of a cotton gin and delivers to the purchaser an article that is worthless except for junk, there is a failure of consideration, and evidence that the gin was worthless except for junk is admissible in the seller's action for the purchase price.

2. **Sales H d—Vendee may not set up counterclaim for breach of warranty when contract contains no express warranty and excludes parol.**

The vendee may not recover damages for the delivery of a cotton gin on the ground that it was inferior in quality to the one purchased in the face of a stipulation in the written contract of sale that any agreement, verbal or otherwise, not in the writing would not be considered.

3. **Sales H e—When the article sold is worthless vendee is not bound by stipulation that notice of defect be given vendor—Fraud.**

Where the article sold is worthless there is a failure of consideration and the vendee may resist the vendor's action for the purchase price without alleging or proving fraud in the procurement of the contract or compliance with a stipulation of the contract requiring notice of defects and an opportunity to remedy same, be given the vendor.

CIVIL ACTION, before *Nunn, J.*, at November Term, 1928, of CRAVEN.

The plaintiff instituted an action against the defendant to recover the sum of $2,000 evidenced by four promissory notes in the sum of $500 each. The notes were given in payment of the purchase price of a certain gin sold by the plaintiff to the defendant. The contract of sale was in writing, containing the usual stipulation that "no agreement, oral or otherwise, other than is set forth herein, forms any part of this contract." The defendant admitted the execution of the notes, but denied that he was indebted to the plaintiff by reason of the fact that the plaintiff "represented, warranted and guaranteed . . . a certain gin equipment; . . . that same was practically new and in number one condition, . . . when in truth and in fact said gin and equipment was in bad condition; . . . that said engine is still unsatisfactory and cannot be operated but a very short time without overheating and is not only unsatisfactory, but worthless and of no value."

The defendant further alleged "that by reason of the wrongful misrepresentation by the plaintiff and breach of said warranties, all of which were relied on by the defendant, the defendant has sustained a loss of $700, money expended on repairs and transportation, and $2,000 loss of earnings on account of not being as represented and warranted," etc.

There was a written warranty on the back of the sales contract providing in substance that if the machinery did not give satisfaction notice should be given in a reasonable time to enable the vendor to remedy any defect. The defendant offered evidence tending to show that the vendor was informed of the purpose for which this machinery was to be used, and that it could not be used during the season at all; that the motor could not be put in condition to run; that the motor could not be started." All of this testimony was excluded by the court.

One witness for defendant testified that he "did not consider the engine worth anything—only junk." Another witness testified: "Engine worth only junk price at time I started to work on it. Worthless as a running engine."

At the conclusion of the testimony the trial judge directed the jury to answer the issue in favor of plaintiff in the sum of $2,000 with interest.

From judgment rendered the defendant appealed.

Whitehurst & Barden for plaintiff.

T. A. Banks, Ward & Ward and Smith & Joyner for defendant.

BROGDEN, J. The contract of sale was in writing and contained the usual stipulation that no oral agreement formed any part of the contract. The allegations in the counterclaim or cross-action of defendant

are not sufficient to raise the issue of fraud in the inducement of the contract. *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406; *Colt v. Conner,* 194 N. C., 344, 139 S. E., 694. However, the defendant contends that in all sales of personal property without inspection there is an implied warranty that the property can be used for the purpose for which it was purchased. It is to be observed that there was an express warranty contained in the contract. The law is that "an express warranty of quality will exclude an implied warranty of fitness for the purpose intended; but an express warranty on one subject does not exclude an implied warranty on an entirely different subject, an illustration of the latter being, that an express warranty of title will not exclude an implied warranty of soundness or merchantability. We have recognized the principle that there can be no implied warranty of quality in the sale of personal property where there is an express warranty, and that where a party sets up and relies upon a written warranty he is bound by its terms and must comply with them (*Main v. Griffin,* 141 N. C., 43), and the further principle, applied by us in that case, that a failure by the purchaser to comply with the conditions of the warranty is fatal to a recovery for breach of the warranty in an action on it, or where, as in this case, damages for the breach are pleaded as a counterclaim in an action by the seller for the purchase money." *Guano Co. v. Livestock Co.,* 168 N. C., 442, 84 S. E., 774.

The defendant in his counterclaim or cross-action does not allege or offer evidence tending to show that notice was given to the vendor as required by the written warranty, but the defendant says that this principle does not apply because the property was utterly worthless and that he attempted to offer competent evidence to that effect, which was erroneously excluded by the court. This aspect of the case is governed by the principle declared in *Swift v. Aydlett,* 192 N. C., 330, 135 S. E., 141. "It ought not and cannot be held as law that a vendor who has sold a well-known article which has value only for a definite, specific purpose, by implication of law, warrants that the article delivered is the article sold, and may in the contract of sale stipulate that he shall be relieved of his obligation to deliver the very article which he has agreed to deliver in performance of his contractual obligation." In other words, if a vendor contracts to sell a gin, he cannot receive the purchase money for a gin and deliver junk. Such transaction would result in a total failure of consideration for the note evidencing the purchase price. Of course, in the absence of fraud, the defendant cannot recover upon his counterclaim in the light of the facts presented in the record, merely because the gin was of poorer quality of workmanship than he anticipated. His right to recover upon the record as now presented depends

entirely upon the application of the principles of law announced in the *Aydlett case, supra*, and the case of *Furniture Co. v. Mfg. Co.*, 169 N. C., 41, 85 S. E., 35.

The evidence of the worthlessness of the property or total failure of consideration of the note sued on should have been submitted to the jury with proper instructions from the court. Failure to do so constituted error, and a new trial is awarded.

New trial.

STATE OF NORTH CAROLINA v. SUNCREST LUMBER COMPANY ET AL.

(Filed 3 April, 1929.)

1. Statutes A b—Statute creating Park Commission Constitutional.

The provisions of the act creating the North Carolina Park Commission are constitutional and valid. Chapter 48, Public Laws of 1927.

2. Eminent Domain B a—State is proper party in condemnation proceedings by Park Commission—Demurrer.

Under the provisions of chapter 48, Public Laws of 1927, the North Carolina Park Commission is neither a body politic nor corporate in the ordinary sense, but an agency of the State clothed with the power of eminent domain to be exercised in behalf of the State and in its name, and a demurrer to the petition of the State in condemnation of lands for the purposes of the act, on the ground that the commission and not the State was the proper party, is bad.

3. Eminent Domain B a—Verification of petition in condemnation proceedings by Park Commission properly made by its chairman.

The verification of a petition, in a proceeding to condemn land for the purpose of a park authorized by chapter 48, Public Laws of 1927, to restrain cutting of timber on land sought to be condemned, is properly made by the chairman of the North Carolina Park Commission.

APPEAL by respondents from *McElroy, J.*, at Murphy, N. C., 21 January, 1929. From BUNCOMBE.

Special proceeding, instituted by virtue of chapter 48, Public Laws 1927, to condemn lands for park and recreational purposes in the Great Smoky Mountains of North Carolina.

The substance of the petition is:

1. That the State of North Carolina is one of the sovereign States of the United States of America, clothed with the right of eminent domain, subject to its Constitution and laws enacted in pursuance thereof, and that by virtue of an act of the General Assembly of North Carolina, ratified 25 February, 1927, entitled "An act to provide for the acquisition of parks and recreational facilities in the Great Smoky Moun-

tains of North Carolina," the same being chapter 48, Public Laws 1927, the petitioner is vested with the power of acquiring in the name of and in behalf of the State of North Carolina, and to condemn for park purposes, lands and other properties, located or situate within the area of the Great Smoky Mountains as described and set out in the act above mentioned.

2. That the respondents are the owners of certain tracts of land situate in said area, and that the Sunerest Lumber Company is now engaged in cutting the timber on the lands sought to be condemned, which will enormously diminish its value for park purposes unless restrained from such cutting.

Wherefore, the petitioner asks for condemnation against the respondents and restraint from further timber-cutting on the part of the Sunerest Lumber Company.

The petition is verified by the chairman of the North Carolina Park Commission, who alleges that he is duly authorized to make such verification.

A demurrer was interposed by the respondents on the grounds:

1. That there is a defect of parties plaintiff, in that, the proceeding, if validly authorized at all, should have been instituted by the North Carolina Park Commission and not by the State itself.

2. That the petition does not state facts sufficient to constitute a cause of action against the respondents, or any one of them, as the State of North Carolina has not been duly authorized to institute the proceeding, and further it does not appear from the petition that the chairman of the North Carolina Park Commission is an officer of the State or has any power or authority to verify said petition.

From a judgment overruling the demurrer and continuing the restraining order to the hearing, the respondents appeal, assigning error.

Attorney-General Brummitt and Assistant Attorney-General Varser for petitioner.

Byron F. Ely, Thos. S. Rollins, J. Bat Smathers and Alfred S. Barnard for respondents.

STACY, C. J., after stating the case: The constitutionality of chapter 48, Public Laws 1927, was asserted in *Yarborough v. Park Commission*, 196 N. C., 284, 145 S. E., 563, and *Sunerest Lumber Co. v. North Carolina Park Commission*, 29 Fed. (2d), 823, S. c., 30 Fed. (2d), 121.

These cases also hold that the North Carolina Park Commission, while denominated in the act as a "body politic and corporate," is not a municipal or private corporation in the ordinary sense, but rather an agency of the State clothed with the power of eminent domain to be

exercised on behalf of the State of North Carolina and in its name. Section 18. The demurrer, therefore, was properly overruled on the first ground.

Likewise, on authority of these same cases, the demurrer was properly overruled on the second ground set out therein. It would serve no useful purpose to repeat what has been so recently said in the cases cited. They apparently dispose of all the questions debated before us.

In considering the present appeal, we are restricted to the grounds specified and designated in the demurrer. C. S., 512; *Glass Co. v. Hotel Corp., post*, 10; *Seawell v. Cole*, 194 N. C., 546, 140 S. E., 85.

Affirmed.

NEW HOPE REALTY COMPANY v. ED BARNES AND ALEX BARNES.

(Filed 3 April, 1929.)

1. Injunctions D b—Irreparable injury grounds for continuing order restraining building contrary to covenant in deed to final hearing.

Where injunctive relief is sought to restrain the violation of warranties and covenants in deed restricting the location of residences on a lot sold in a development plan under a deed duly recorded, and a serious question is presented as to whether such violation would cause substantial and irreparable injury to the development company, the restraining order will be continued to the hearing until the matters may be determined at the trial.

2. Appeal and Error J d—Burden of showing error on appellant.

While the burden is on the plaintiff in an action seeking injunctive relief to show irreparable injury entitling him to the equitable relief sought, where the equity has been granted in the Superior Court, it is upon the appealing defendant to show error in the Supreme Court.

APPEAL by defendants from *Devin, J.*, at Chambers, 20 September, 1928, September Term, 1928, of DURHAM. Affirmed.

This is a civil action brought by plaintiff in which injunctive relief was prayed against defendant, Alex Barnes, the owner of lots 27 and 28, as shown on the plat of the South Street property of the plaintiff, and Ed Barnes, a contractor, to stop constructing a house for Alex Barnes on said lots facing on an unnamed street, in violation of a covenant in a certain deed made by plaintiff to one R. L. McDougald. The deed was made and executed by plaintiff to the said McDougald on 14 March, 1927, and was duly recorded in the office of the register of deeds for Durham County in Book 74, p. 659. The deed contained the following covenant: "It is expressly understood and agreed by the parties hereto that any residence erected or placed on the above-mentioned lot shall

face South Street, and that no residence shall be constructed or licensed to be erected on said lots or front on said unnamed street, this being one of the conditions in the sale of the above property, and this agreement is hereby made a covenant running with the land."

The defendant, Alex Barnes, purchased the above-named lots in the development from R. L. McDougald, "without any restrictive covenants whatsoever." Alex Barnes conveyed one-half interest to one Pratt.

The plaintiff alleges: "That if the said Ed Barnes and Alex Barnes are allowed to continue the construction of the said house, the plaintiff's property will be greatly damaged thereby; that the erection of the said house by the said defendants will greatly injure the beauty and attractiveness of the said Forest Hills, and will be a continuous aggravation to the plaintiff, and will usurp the plaintiff's rights and be a great damage to the value of the said property owned by the plaintiff, for the reason that the value of the said property consists largely in the beauty and attractiveness of the lots as they are situated on the plaintiff's said development. That if the defendants are allowed to continue the erection of the said dwelling the plaintiff will be irreparably injured."

There was evidence to sustain plaintiff's allegations. The defendants denied the allegations of plaintiff and there was evidence introduced by defendants to sustain their contentions.

W. S. Lockhart for plaintiff.
R. McCants Andrews for defendants.

CLARKSON, J. The plaintiff contends that the question involved: "Is this covenant of such a nature as to justify a restraint of its violation until all questions of fact relating thereto can be determined?" We think so.

Ordinarily, the right to injunctive relief to compel the observance of covenants and restraintive clauses, is recognized in this jurisdiction. *Church v. Bragaw*, 144 N. C., 126; *Guilford v. Porter*, 167 N. C., 366; *Bradshaw v. Millikin*, 173 N. C., 432; *Davis v. Robinson*, 189 N. C., 589; *Nye v. Williams*, 190 N. C., 129.

In *Wentz v. Land Co.*, 193 N. C., at p. 34, it is said: "On the record, as to material facts, there is serious conflict. In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *R. R. v. Transit Co.*, 195 N. C., 305.

In *Ohio Oil Co. v. Conway, Supervisor of Public Accounts, et al.* (La.), U. S. Supreme Court, per curiam opinion filed 5 March, 1929,

speaking to the subject, it is said: "But enough appears to make it plain that there is a real dispute over material questions of fact which cannot be satisfactorily resolved upon the present affidavits and yet must be resolved before the constitutional validity of the amendatory statute can be determined. . . . Where the questions presented by an application for an interlocutory injunction are grave, and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor, will be considerable, or may be adequately indemnified by a bond, the injunction usually will be granted. *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed., 321, 331-332."

The defendants have filed an elaborate brief, but inapplicable on the present state of the record. On the record as to material facts there is serious conflict. The burden is on defendants to assign and show error. The presumption is that the judgment and proceedings in the court below are correct. For the reasons given the judgment of the court below is

Affirmed.

MATTIE J. GILLIKEN, EXECUTRIX, v. GEORGE D. NORCOM AND WIFE, BESSIE NORCOM ET AL.

(Filed 3 April, 1929.)

Deeds and Conveyances A g—Evidence of mental incapacity to make deed held for jury—Undue Influence—Fraud.

In an action by the grantor's daughter-in-law and devisee to set aside a deed to the unrelated tenant of the grantor, evidence that tends to show that the grantor was a woman seventy-one years of age, feeble in body, easily influenced, and with the mind of a child, and that the consideration recited in the deed was ten dollars and other consideration, and the grantor refuses to testify as to the amount of the consideration paid: *Held*, sufficient to take the case to the jury under proper instructions from the court.

CIVIL ACTION, before *Nunn, J.*, at October Term, 1928, of CRAVEN.

The plaintiff, Mattie J. Gilliken, is the daughter-in-law of the deceased, Mary E. Davis. Mary E. Davis had one son who married the plaintiff in 1905, and who lived with his mother until his death in 1919. The plaintiff lived with her mother-in-law, Mary E. Davis, until March, 1923, when she married William L. Gilliken and then moved away. Mary E. Davis died on 12 June, 1924, leaving a last will and testament devising to the plaintiff a tract of land containing about 50 acres. On

23 July, 1923, or about eleven months before her death, Mary E. Davis executed a deed for said land to the defendant, George D. Norcom, which deed recited a consideration of ten dollars and other valuable consideration. Norcom was a tenant of the grantor and was not related to her by blood or otherwise.

The plaintiff brought a suit to set aside said deed, alleging that at the time said deed was made that the grantor, Mary E. Davis, was without sufficient mental capacity to execute a deed, and furthermore, that the defendant exerted undue influence in procuring said deed. At the conclusion of the testimony for plaintiff a judgment of nonsuit was entered, from which the plaintiff appealed.

Abernethy & Abernethy and Ward & Ward for plaintiff.
C. R. Wheatley and J. F. Duncan for defendant.

BROGDEN, J. The sole question presented is whether there was sufficient evidence of mental incapacity to be submitted to the jury.

The law recognizes the same standard of mental capacity for testing the validity of both deeds and wills, although it is suggested that perhaps a court would scrutinize a deed more closely than a will. *Bond v. Mfg. Co.,* 140 N. C., 382, 52 S. E., 929. The degree of mental capacity requisite for the valid execution of a deed is thus stated in *Lamb v. Perry,* 169 N. C., 436, 86 S. E., 179: "A want of adequate mental capacity of itself vitiates the deed, while mere mental weakness or infirmity will not do so, if sufficient intelligence remains to understand the nature, scope and effect of the act being performed. But while this is true, weakness of mind, whether natural or induced by the excessive use of drugs or any other cause, when accompanied by such circumstances as tend to show what advantage was taken of it by the party who procured the deed, or when it appears that there is not only weakness of mind, but inadequacy of consideration, especially when it is gross, and the situation of the parties is so unequal, by reason of the weakness of the one and the mental superiority of the other, or for other reason, the jury may infer fraud, or undue influence, which in law is the same thing."

The evidence tended to show that the deceased at the time of executing the deed was about seventy-one years of age and was suffering with paralysis. "Her physical condition was very bad, and her mental condition just about like a child—just as childish as could be. She was deaf and could not hear. From about the first of 1923, until her death, her sense was about like that of a little child; seemed she couldn't remember. Most anybody could influence her. She had hardly any mind in June, 1924. Prior to her death she was perfectly helpless and had no mind."

A physician, who treated Mary E. Davis, the grantor, in the fall of 1923, testified that "she was childish and her mentality was below that of a twelve-year-old child. . . . You could not reason with her; she was more like an irrational child than an intelligent woman."

Another physician, who treated the grantor at the time she was crippled in October or November, 1922, testified "that at that time her mind was not any better than that of a twelve-year-old child."

Another witness testified that prior to March, 1923, "the mental condition . . . of Mrs. Davis was not more than a child's; could be persuaded almost any way by almost anybody; didn't have sense enough to know when she was right or wrong till it was too late."

There was testimony that the property was worth $5,000. The deed recited a consideration of $10. The defendant testified in his own behalf and was asked by the court what he paid for the land. He replied: "I gave her a consideration."

It is our opinion that the evidence should have been submitted to the jury with proper instructions from the court.

Reversed.

PITTSBURGH PLATE GLASS COMPANY v. HOTEL CORPORATION ET AL.

(Filed 3 April, 1929.)

1. Fraud B c—Demurrer to reply alleging ratification of fraud should be overruled—Demurrer—New Cause of Action—Indemnity Bonds.

Where in an action to recover for material furnished the contractor for the erection of a building, involving the liability of the surety on the contractor's bond, the defense of fraud in the procurement of the bond was pleaded, to which the plaintiff replied alleging a compromise by the surety and the owner in a certain sum, to which last pleading a demurrer was interposed on the ground that it set up a new cause of action: *Held*, the alleged compromise being for the benefit of the material furnishers who were protected by the bond, it enured to their benefit, and was a ratification of the surety's liability on the original bond, and the demurrer was bad: and, *Held further*, the interpretation of the compromise agreement was not before the Supreme Court on this appeal.

2. Appeal and Error E h—On appeal from the sustaining of a demurrer matters outside of pleading will not be considered.

On appeal from the sustaining of a demurrer the only question presented is the sufficiency of the pleading, taking its allegations to be true, and matters outside of pleading will not be considered.

APPEAL by plaintiff from *Cranmer, J.*, at December Term, 1928, of NEW HANOVER.

Civil action to recover for materials furnished by plaintiff and used by the contractor in the construction of a hotel in the city of Wilmington.

Plaintiff seeks to hold the Fidelity and Deposit Company of Maryland liable for its claim by reason of a $418,896 bond given for the faithful performance of the contract existing between Walter Clark, contractor, and G. L. Miller & Company, Inc., owner or representative of the owners of the building.

Liability of the surety is denied on the ground of fraud alleged to have been practiced in the procurement of said bond. The surety company further sets up, by way of defense, that upon certain conditions being performed by G. L. Miller & Company, a compromise agreement has been reached between the owners and the bonding company whereby the said surety is to be released from all claims, including plaintiff's, upon the payment of $40,000.

To this defense plaintiff replies, alleging, in substance:

1. That said compromise agreement necessarily inures to plaintiff's benefit and to the benefit of other creditors.

2. That such agreement, made with full knowledge of the facts, is a ratification of the original bond, so far as plaintiff is concerned, and waives any fraud that may have existed.

A demurrer was interposed to this reply of the plaintiff on the ground that it undertakes to set up a new cause of action not in existence at the time of the commencement of the suit; and further that said reply does not state facts sufficient to constitute a cause of action against the demurring defendant.

From a judgment sustaining the demurrer of the Fidelity and Deposit Company of Maryland and dismissing plaintiff's reply, the plaintiff appeals, assigning errors.

Peacock & Dawson, Cyrus D. Hogue and Bryan & Campbell for plaintiff.

Rountree & Carr and I. C. Wright for defendant, Fidelity and Deposit Company of Maryland.

STACY, C. J., after stating the case: The first appeal in this case was heard at the Spring Term, 1927, and is reported in 193 N. C., 769, 138 S. E., 143, reference to which may be had for a fuller statement of the facts.

Conceding, without deciding, that plaintiff may not recover in the present action on the alleged compromise agreement between the Fidelity and Deposit Company of Maryland and G. L. Miller & Company, still the demurrer was improvidently sustained, for it is alleged in plaintiff's

reply that said compromise agreement was made with full knowledge of all the facts, and that such action on the part of the surety company amounted to a waiver of any fraud that may have existed, and constituted a ratification of the original bond so far as plaintiff is concerned. This is admitted by the demurrer. To strike out the reply, therefore, would deny to the plaintiff the right to show ratification, if it can.

The compromise agreement is not before us for construction, as we are not permitted to look beyond the allegations of the reply, or travel outside the scope of the demurrer, in dealing with the present appeal. *Furniture Co. v. R. R.*, 195 N. C., 636, 143 S. E., 242; *Brick Co. v. Gentry*, 191 N. C., 636, 132 S. E., 800.

A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting, for the purpose, the truth of the allegations of fact contained therein. *Meyer v. Fenner*, 196 N. C., 476; *Wood v. Kincaid*, 144 N. C., 393, 57 S. E., 4.

Reversed.

MRS. J. E. WILLIAMS v. EASTERN CAROLINA COACH COMPANY ET AL.

(Filed 3 April, 1929.)

Trial E c—Court must charge law arising on all features of case—Negligence—Bus lines.

In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of C. S., 564, requiring that the court instruct the jury on the law arising from all substantial features of the case, and constitutes reversible error.

APPEAL by defendants from *Harwood, J.*, at March Term, 1928, of UNION. New trial.

In the month of November or December, 1926, the plaintiff was a passenger on one of the motor vehicles of the defendant Coach Company going from Monroe to Charlotte. She occupied the seat next to the last seat at the rear of the coach. Connecting with the end of this seat, and extending across the passageway was a seat called a "flap seat," or

"folding seat," which could be raised for the convenience of passengers going to and from the rear seat. It was attached to the wall by hinges; and there was evidence tending to show that a strap and snap were provided by which it could be held in an upright position. The plaintiff's right hand was resting on the end of the seat she occupied. There was evidence tending to show that when the bus turned into Jefferson Street it stopped to admit a passenger, and that when it turned into Charlotte Avenue the raised seat fell on the plaintiff's hand and inflicted injury from which she subsequently suffered.

In her complaint the plaintiff alleged that the defendant had negligently failed to provide for the fastening of the seat and had negligently left it unsecured when raised; that she was not given a safe place in which to ride, and that the driver was negligent in the operation of the bus. The material allegations were denied by the defendants; and at the trial the issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff. The defendants excepted and appealed.

Vann & Milliken and John C. Sikes for plaintiff.
John W. Hester and W. B. Love for defendants.

ADAMS, J. As there was no error in overruling the motion for nonsuit, the pivotal question is raised by an exception to the charge upon the ground that his Honor failed to observe the requirements of section 564 of the Consolidated Statutes. This section makes it the duty of the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." It is contended that this mandate was disregarded in the instructions given the jury upon the first issue—a position which involves the consideration of the evidence pertaining to the issue, the charge in reference to it, and the principles of law which are deemed to be applicable.

There was evidence tending to show that the "folding seat" was a part of the seat occupied by the plaintiff, and that it could be raised on hinges against the wall for the benefit of passengers going to or from the rear of the coach; that it had no spring or other device for securing it to the wall; that it was raised and unsecured when the bus left the hotel; and that by the driver's negligence it was caused to fall upon and seriously to injure the plaintiff's hand. There was other evidence tending to show that the defendant had provided a strap and snap for keeping the folding seat in position when raised against the wall, and that the defendant had in other respects used due care to assure the safety of the plaintiff. It was contended, and there was evidence from which the jury might have inferred that the seat, if raised, had been raised by a

passenger and left unsecured. Upon the evidence two diverse theories arose. It was argued by the plaintiff that the seat as constructed was inherently defective and unsafe; that the Coach Company was responsible for its condition and was negligent in maintaining it, and that the company's negligence was the proximate cause of the plaintiff's injury. The defendant insisted that the plaintiff's evidence was uncertain as to the position of the folding seat when she became a passenger; that she did not know whether it was up or down, fastened or unfastened; that it was in fact down when she came in, but if raised, that it had not been raised by the company, and that the defendant is not liable for an injury caused by an intervening agency.

Upon the first issue—whether the plaintiff had been injured by the negligence of the Coach Company—the trial judge correctly stated the law as to the burden of proof and as to the constituent elements of actionable negligence: (1) Want of due care, ordinary or due care being such as is commensurate with the hazards incident to the business; (2) injury to the plaintiff, and (3) proximate cause. He gave a synopsis of the material evidence, and a statement of the contentions. Then after telling the jury to consider the evidence he concluded his charge upon the first issue by saying that they should answer it in the affirmative if they found by the greater weight of the evidence that the Coach Company had been negligent, and that its negligence had proximately caused the plaintiff's injury, and if they did not so find to answer it in the negative. The identical instruction had previously been given; and these two were the only instructions pointing out the circumstances under which the issue should be answered "yes" or "no." Detached from this single proposition the remainder of the charge consists of nothing more than a definition of actionable negligence, a statement as to the burden of proof and of the degree of care required of public carriers of passengers, and an abridged recital of the evidence and of the contentions of the parties. For these reasons the charge does not satisfy the demands of the statute. Let us assume, merely by way of illustration, that the jury should find from the evidence, as insisted by the plaintiff, that the Coach Company failed in the exercise of due care to provide adequate means for securing the seat when raised to the wall, or to see that the seat was in other respects reasonably safe, or that the bus was carefully driven. Let us assume further, as contended by the defendant, that the seat was down when the plaintiff entered the bus and that a passenger afterwards raised it and carelessly left it unsecured, though a sufficient device for fastening it had been provided. The charge contains no rule or formula to aid the jury in determining which of these circumstances would or would not constitute negligence. The judge simply charged as to the plaintiff's contention that certain

facts would make a case of negligence and the defendant's contention that other facts would not; but without appropriate instructions how could the jury know whether the facts as found did or did not amount to negligence as defined by the law?

Section 564 confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. *Wilson v. Wilson*, 190 N. C., 819; *S. v. O'Neal*, 187 N. C., 22, 24. As was said in *S. v. Matthews*, 78 N. C., 523, 537, its requirements are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. While the manner in which the law shall be applied to the evidence must to an extent be left to the discretion of the judge, he does not perform his duty if he fails to instruct the jury on the different aspects of the evidence and to give the law which is applicable to them, or if he omits from his charge an essential principle of law. *Blake v. Smith*, 163 N. C., 274; *Bowen v. Schnibben*, 184 N. C., 249.

In *Orvis v. Holt*, 173 N. C., 231, the defense was that the note sued on had been given for margins upon "futures." The judge instructed the jury that the burden of showing the illegality of the contract was on the defendant corporation, and if it had shown that the contract was illegal to answer the third issue "yes" and if not, to answer it "no." In reviewing the charge this Court said, *Walker, J.* writing the opinion: "We do not think this was an adequate charge or a compliance with the statute. All the evidence tended to show that the contracts for the pretended sales of cotton were condemned by our statute. Revisal, secs. 1689, 3823, 3824. There was no instruction or intimation to the jury as to what would be an illegal contract, and in this respect the jury were left, without any aid from the court, to pass upon the validity of the note according to their own notion of the law. The statute requires that 'The judge shall state in a plain and correct manner the evidence given in the case and declare, and explain, the law arising thereon.' This was not done. The jury were not told what would constitute an 'illegal consideration' or a 'gambling contract' under the statute in cases of this kind. Nor was anything of the kind said to them which was calculated to enlighten their minds upon this vital question in the case."

The case of *Nichols v. Fibre Co.*, 190 N. C., 1, was brought by an employee to recover damages for personal injury. The trial judge defined actionable negligence, stated the contentions at length, and concluded his charge without definite instructions as to the law. In an opinion written by *Connor, J.*, the Court said: "We do not find in the charge any instruction to the jury as to the law arising upon and applicable to the facts which they may find from the evidence. His Honor did not declare and explain the duties which the law imposed

upon defendant as employer of plaintiff with respect to any of the matters involved in the allegations of negligence. Nor did he instruct the jury as to the law with respect to the breach of any of these duties, and the relation of such breach to the injuries as the proximate or concurrent cause thereof. The statement of the general principles of law, without an application to the specific facts involved in the issue, is not a compliance with the provisions of the statute. *Hauser v. Furniture Co.*, 174 N. C., 463; *S. v. Merrick*, 171 N. C., 788. . . . 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."

Watson v. Tanning Co., 190 N. C., 840, also, is directly in point. There the trial court defined actionable negligence, gave the rule as to the burden of proof, fully stated the contentions of the parties, and instructed the jury to answer the issue of negligence in the affirmative if the plaintiff had satisfied them by the greater weight of the evidence that he had been injured by the negligence of the defendant as alleged, and if not, to return a negative answer. A new trial was granted, the Court saying: "In several cases recently decided we have stressed the necessity of observing the requirements of section 564 and have reiterated the suggestion that a statement of the contentions accompanied with the bare enunciation of a legal principle is not sufficient; it is imperative that the law be declared, explained and applied to the evidence."

A statement of the contentions of the parties is not required as a necessary part of the instructions (*Wilson v. Wilson, supra; S. v. Whaley*, 191 N. C., 387), but when the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. Such failure is to be considered, not as a subordinate feature of the cause, but as a substantial defect which may be raised by an exception to the charge. *Hauser v. Furniture Co., supra; S. v. Merrick*, 171 N. C., 788. For the error complained of there must be a

New trial.

H. L. POTTER, BY HIS NEXT FRIEND, J. H. POTTER, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 3 April, 1929.)

1. Master and Servant E a—In action under Federal Employer's Liability Act Federal decisions apply.

In an action brought under the Federal Employers' Liability Act in the State Court against a railroad company to recover damages caused to a servant, the Federal statutes and decisions control.

2. Master and Servant E b—Tools and appliances under Federal Employer's Liability Act—Negligence—Nonsuit.

The duty of a railroad company to provide for its employees engaged in interstate commerce reasonably safe and suitable cars, engines, appliances, machinery, track, roadbed, works, etc., "or other implements" as required by the Federal Employer's Liability Act is held to mean such instrumentalities and appliances as are personal or movable, or implements and appliances of manual operation, and where such negligent failure is relied on in respect to such "appliances," defendant's motion as of nonsuit will be granted unless there is some evidence that the implements complained of fall within the class intended by the Federal Statute.

3. Master and Servant E b—Federal Employer's Liability Act—Safe place to work—Assumption of risk—Nonsuit.

While it is the nondelegable duty of the railroad company to furnish its employees engaged in interstate commerce a reasonably safe place to work, in the exercise of due care, the plaintiff's evidence is insufficient when it tends only to show that he was experienced in the work, and that the injury in suit occurred under the usual conditions ordinarily obtaining in like work, he being held to have assumed the risk under the Federal Employer's Liability Act, under which the action has been brought in the State Court, and defendant's motion as of nonsuit upon this evidence should be allowed.

APPEAL by defendant from *Cranmer, J.*, at September Term, 1928, of BRUNSWICK. Reversed.

The plaintiff, a minor 19 years of age, brought suit against the defendant to recover damages for personal injury alleged to have been caused by the negligence of the defendant. The defendant was engaged in interstate commerce; the plaintiff was in its employ; and the case was tried under the Federal Employers' Liability Act.

The plaintiff alleged in substance that he and other employees of the defendant were repairing a trestle spanning Hood's Creek, in Brunswick County, on the defendant's road extending from Wilmington through Navassa to Florence, South Carolina; that in the course of the work it was found necessary to remove pieces of timber called "bolsters" from their place under heavy timber which supported the cross-ties and the steel rails; that after the pieces were removed they were to be

slidden towards the end of cap sills which rested on piling; that near the ends of each piece ropes were to be fastened, and then extended over the stringers or guard rails at the end of the cross-ties and given to men on the trestle; that the men were to raise the bolsters upon the trestle, pulling the rope over the guard rails; that while they were doing so one of the bolsters was caught under the end of cross-ties and the plaintiff was ordered to push it from the cross-ties and thereby to release it so that the men using the ropes could pull the bolster on the trestle; and that while in the act of obeying the order the plaintiff slipped or lost his balance, fell to the ground and was injured. He alleged, further, that the defendant was negligent in that it required him to release the bolster when the cross-ties and stringers were wet and slick, when the stringers were rounded on top, when the defendant had not furnished him any tools, appliances, or equipment and had not taken any other efficient measures to prevent him from falling, and that the defendant's negligence was the proximate cause of his injury.

The defendant answered the complaint denying the material allegations and pleaded contributory negligence and assumption of risk. The issues of negligence, assumption of risk and damages were answered in favor of the plaintiff and the issue of contributory negligence was answered in favor of the defendant. Judgment was given for the plaintiff and the defendant appealed, assigning error.

Bryan & Campbell for plaintiff.
V. E. Phelps, L. J. Poisson and Robert W. Davis for defendant.

ADAMS, J. The plaintiff admits that the controversy is to be determined under the provisions of the Federal Employers' Liability Act, and that the two decisive questions are involved in the first and third issues. The defendant in apt time moved to dismiss the action as in case of nonsuit on the grounds that the plaintiff had not shown any act of negligence on the part of the defendant, and, if he had shown negligence, that the plaintiff had assumed the risk of personal injury and was barred of his alleged right to recover damages. The motion was denied. We are therefore first concerned with the question whether the evidence when construed most favorably for the plaintiff is sufficient to make a case of actionable negligence entitling the plaintiff to an affirmative answer to the first issue.

Negligence, which is not defined by the Employers' Liability Act, must be determined by applying the principles of the common law. *Brundege v. R. R.*, 154 N. E. (Ill.), 433. In general terms it signifies a failure to exercise that degree of care which the circumstances demand and which prudent men ordinarily observe. *R. R. v. Richardson*, 91 U. S., 454, 23 Law Ed., 356. In the case of a passenger the fact of an

accident usually carries with it a presumption of negligence; but a different rule imposes upon an employee the burden of showing as an affirmative fact that the employer has been negligent. *Patton v. Railway Co.*, 179 U. S., 655, 45 Law Ed., 361. And in determining an issue of negligence under the Federal Act the decisions of the Supreme Court of the United States must control. That Court has held that submission to the jury of contested issues of fact is not required in the Federal courts if there is only a scintilla of evidence; that it is the duty of the judge to direct the verdict when the testimony and all inferences which the jury could justifiably draw therefrom would be insufficient to support a verdict for the other party; and, further, that this Federal rule must be applied by State courts in cases arising under the act. *R. R. v. Hughes*, ... U. S., ..., decided 18 February, 1929.

Section 1 of the Act of 1908 (45 U. S. Code, Annotated) provides that every common carrier by railroad while engaging in interstate commerce shall be liable in damages . . . for injury or death resulting in whole or in part from the negligence of any of its officers, agents, or employees, 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 equipment.

The plaintiff's brief is confined to alleged negligent acts of omission—the defendant's failure to exercise due care to provide for him a reasonably safe place in which to work and reasonably safe tools, appliances and equipment.

"The word 'equipment' as used in a contract or statute relating to railroads has been held to mean the necessary adjuncts to the operation of a railroad, such as cars, locomotives, and other movable property. The term cannot, however, be construed to include everything that is necessary to the operation of the road and is not broad enough to include structures such as machine shops, round-houses, and the like." 22 R. C. L., 902; *Elliott v. Payne*, 239 S. W. (Mo.), 851, 23 A. L. R., 706. In the latter citation it is said that the word "equipment" is applied more to personal and movable property than to fixed or real property; and we think it manifest that the words "tools and appliances," as used in the complaint, were intended to apply to implements or instruments of manual operation. We have found no evidence of the defendant's negligent failure to provide such instrumentalities for the benefit of the plaintiff. There is nothing in the record to show that any tool or appliance was essential to the prosecution of the work in which the plaintiff was engaged, or was approved and in general use by persons doing the same or similar work. The plaintiff made use of a bar to slide the bolster to the end of the cap sills, and immediately after he had worked the bolster from under the stringer he undertook to assist in raising it;

but it was brought up by means of ropes and not by the use of tools. For this part of the work no tool or appliance was requested; apparently none was needed. These facts, it would seem, leave as the only basis of the cause of action the defendant's alleged negligent failure to provide a reasonably safe place for the plaintiff while carrying on his work.

Upon this cause of action the plaintiff must fail. Of course the defendant owed him the nondelegable duty to exercise due care to provide a reasonably safe place in which to work; but the question is whether the evidence tends to show a breach of this duty. The answer, we think, may be found in the plaintiff's own testimony. He was 19 years of age when injured. He had worked on the defendant's trestle force in 1926; again for two months immediately before he was injured; also at some other time in the defendant's carpenter department. In his testimony he said: "I was replacing a bolster, which is a piece of timber which goes between the stringers and cap sills. The cap sills sit upon the piling that is driven down. I think the trestle was about eighteen or twenty feet high. The bolster sits on the cap sills and the stringers are on top of the bolster and the cross-ties on the stringers. There is a guard rail at the end of the cross-ties. The bolsters are twenty-one inches wide and about six or seven inches thick. They consist of three pieces of 7 x 14 timbers bolted together. They are about seven feet in length. On this day we were repairing bolsters and trestles. In order to do the work we had to take out the bolsters. At the time I was hurt we had taken the bolster out from under the stringer. It had to be taken out in order to repair it. They placed two ropes, one under each end of the bolster and around it on the outside of the guard rail and brought it up. The rope was looped around the bolster, one at each end. The men who were pulling on it were on top of the trestle. In pulling it up it got fastened under the cross-ties and I was instructed to help them. I was told to get it out from under the track. I went there like I was told, and I braced myself and reached over and got overbalanced. I braced myself by bearing against the guard rail and bracing; the guard rail was round and I lost my balance and slipped and had no way to catch my hold. I was trying to get the bolster loose so they could bring it over the track when I fell. I struck on a cross piece with my back, which was about nine feet from the top of the trestle and slipped off and fell to the ground. . . . On top of the stringers were laid the cross-ties and at the end of the cross-ties on each end were the guard rails running parallel with the railroad lines in the middle of the trestle. The cap sills extended beyond the guard rail about twenty inches. The guard rail was about six inches above the cross-ties. In taking the bolster from under the trestle you jack up the stringer, carrying with it the cross-ties, guard rail and railroad rail, and this had been jacked up at

the time to clear the bolsters. I slid the bolster to the end of the cap sills using a piece of bar, working it out from under the stringer. The ropes were fastened to the rail and passed over the guard rail and cross-ties and around under the bolster, and the loose ends were brought up. One rope on each end of the bolster. The men were pulling the bolster up on top of the track. As they pulled on the ropes the bolster rolled up on the trestle against the guard rail. I went there to get it loose from the cross-ties. The bolster was right underneath the cross-ties. The cross-ties extend about an inch beyond the guard rail usually. I do not know whether these extended or not. It was about twenty-two inches from the cap sill to the top of the trestle. I went there to help raise the bolster and slipped and fell over. It had been raining practically all that day."

J. H. Potter testified that the plaintiff had told him that he put his foot against the stringer which had a "rounding edge and everything being slick, he got overbalanced and there was nothing to protect him and nothing to do but fall."

That the stringer had a "rounding edge" can hardly be regarded as evidence of a negligent omission of the defendant's duty. The principle that an employer is required in the exercise of due care to provide for his employee a reasonably safe place in which to work does not usually apply to "ordinary everyday conditions requiring no special care, preparation, or prevision, where the defects are readily observable, and there is no reason to suppose that the injury complained of will result." *Bunn v. R. R.*, 169 N. C., 648; *Smith v. Ritch*, 196 N. C., 72. Indeed, under the Federal Act, except as provided in section 4, the employee assumes, not only the ordinary risks of his employment, but such as are extraordinary or due to the negligence of his employer, when they are obvious or fully known and appreciated. *R. R. v. Koske*, ... U. S., ..., decided 18 February, 1929.

All the defendant's evidence tends to show that its work was done in the customary method; and while, as the plaintiff insists, the test of responsibility is whether the employer has exercised due care, still if such methods of performing the work are adopted as are generally used by prudently conducted roads engaged in the same business and surrounded by like circumstances, the employer as a rule will not be liable. *Railway Co. v. Barrett*, 166 U. S., 617, 41 Law Ed., 1136.

The defendant insists that the plaintiff's injury resulted from chance or casualty, or from his assumption of risk, and that in either event the defendant cannot be held to respond in damages. We concur to the extent of saying that the evidence is not sufficient to warrant the verdict which was returned or the judgment which was signed and entered of record. The motion for nonsuit should have been granted.

Judgment reversed.

MAUDE MEHAFFEY, ADMINISTRATRIX, v. APPALACHIAN CONSTRUCTION COMPANY.

(Filed 3 April, 1929.)

Master and Servant C b—Employer liable for failure to furnish reasonably safe transportation when he assumes this service—Independent contractors.

An employer of labor who assumes to transport his employees to and from work is held in the exercise of ordinary care to do so with reasonable safety, and is liable in damages to one of them injured by the negligent acts of an agent or authorized representative he has selected for that purpose when such injury is thereby proximately caused, irrespective of whether the agency thus selected and acting is an independent or subcontractor, or has contracted to do so for compensation or otherwise.

CIVIL ACTION, before *Deal, J.*, at February Term, 1928, of HAYWOOD.

The evidence tended to show that Kenneth Mehaffey, a boy about fourteen years of age, was employed by the defendant to sprinkle concrete in Hazelwood, with the understanding that he was not to be moved to any point outside thereof. The work in Hazelwood was finished about dinner time on 26 May. The defendant had a contract for the construction of a highway and was working upon highway No. 10 at Balsam, a distance of from four to eight miles from Hazelwood. On the afternoon of 26 May the mixer foreman of the defendant directed one Leatherwood, a truck driver for the defendant, to take Kenneth Mehaffey to Balsam in order to sprinkle concrete at that point. That afternoon at quitting time Stevenson, who was superintendent or foreman in charge of the work, remarked in the presence of plaintiff's intestate and other employees that Leatherwood should wait and take the finishers in and that the other employees could "catch Justice's other cement trucks." Kenneth Mehaffey, together with some other employees, climbed on Justice's truck and started to Hazelwood where he lived. The truck of Justice was running close behind another cement truck operated by a man named Freeman. Freeman intended to turn into a side road on his left and "pulled to the right to make his swing around into the road, and Mr. Justice went to come around Mr. Freeman on the left-hand side of the road, and when Mr. Freeman came across the road to the left Mr. Justice threw his truck back to the right and that threw the little boy off into the center of the highway. . . . The little boy was standing up with his back against the cab with his hand on the side. . . . When he made a quick turn to the right the truck went off on the other side of the road. . . . The little boy fell off on the left-hand side of the road, in the center. Before Mr. Freeman

went to make his turn into the road to the left he threw out his sign—threw his hand up that way— . . . put his hand out on the right-hand side of the truck."

Kenneth Mehaffey was picked up and hurried to the hospital, but died on the way.

There was evidence tending to show that after the road force was moved to Balsam that employees of defendant frequently rode on the cement truck of Justice morning and night to and from Hazelwood and Balsam; and further, that Mr. Stevenson had said he would furnish transportation for what men could ride on the company's trucks, but ordinarily they were out of commission and could not carry the men, and he said, "You can go on the cement trucks." The evidence further tended to show that Mr. Stevenson had requested Mr. Justice to haul the men backward and forth. He just told him "the company's trucks could not haul all the men, and he wanted to transport men back and forth from Hazelwood to the works. Mr. Justice told him he would." Justice and Freeman were employed by the Lee Transportation Company to run trucks and haul sand and gravel to the works. The Lee Transportation Company was an independent contractor and had no relationship with the defendant except to carry out the terms of its subcontract in furnishing certain material for the work. There is no evidence that the defendant paid Justice or Freeman for any services connected with the transportation of employees.

The evidence for the defendant was strong and contradicted the evidence offered by the plaintiff.

The issues and answers of the jury thereto were as follows:

1. Did the defendant contract with the father of the deceased to work deceased only in the town of Hazelwood, and not on highway No. 10, outside of Hazelwood, as alleged in the complaint? Answer: Yes.

2. Did the defendant contract or undertake, expressly or by implication, to transport plaintiff's intestate to and from his work outside of the town of Hazelwood? Answer: Yes.

3. Was Decatur Justice in the employ of the defendant at the time of the injury and death of plaintiff's intestate? Answer: Yes.

4. Was Tom Freeman in the employ of the defendant at the time of the injury and death of plaintiff's intestate? Answer: Yes.

5. Was the plaintiff's intestate injured and killed by the negligence of the defendant, Appalachian Construction Company, as alleged in the complaint? Answer: Yes.

6. Did the plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: No.

7. What damage, if any, is the plaintiff entitled to recover? Answer: $7,000.

From judgment upon the verdict the defendant appealed.

Morgan & Ward and Alley & Alley for plaintiff.
A. Hall Johnston for defendant.

BROGDEN, J. What duty is imposed by law upon an employer who undertakes to transport workmen?

This case was considered by the Court upon a former appeal, and is reported in 194 N. C., 717, 140 S. E., 716. A new trial was awarded upon the ground that the jury had not been properly instructed upon the question as to whether the defendant contracted to provide transportation for the deceased or whether he was riding upon the truck at the invitation or by the license of the owner or the driver.

It is to be observed that the issues in the case at bar are much more comprehensive than those appearing in the former opinion.

Certain principles relating to the question of law involved, have been discussed and enunciated by this Court. In *Haynie v. Power Co.*, 157 N. C., 503, 76 S. E., 198, the Court declared: "We do not mean to hold that the defendants became insurers of the intestate's life, but if the agreement be as testified to by plaintiff, it was the duty of defendants to use due diligence and care to keep him away from the machinery and at the work he was hired to perform or else to return him to his father." *Ensley v. Lumber Co.*, 165 N. C., 687, 81 S. E., 1010; *Satchell v. McNair*, 189 N. C., 472, 127 S. E., 417.

Again, in *Tanner v. Lumber Co.*, 140 N. C., 475, 53 S. E., 287, the Court said: "The rigorous rule that once obtained has been greatly modified. The true rule now is more humane and holds the master is liable for negligence in respect to such acts and duties as he is required, or assumed to perform, without regard to the rank or title of the agent entrusted with their performance. As to such acts the agent occupies the place of the master and he is liable for the manner in which they are performed." To the same effect is *Williams v. R. R.*, 190 N. C., 366, 129 S. E., 816, in which the principle of law applicable is thus expressed: "Where the master undertakes to furnish his laborers transportation to and from their work, it is his duty, in the exercise of ordinary care, to see to it that such transportation is rendered as reasonably safe as the character of it will permit."

The clear meaning of these decisions is that an employer of labor, who either contracts to furnish transportation or assumes the task and responsibility of so doing, is required by law to exercise ordinary care in discharging such obligation, and is therefore liable for the negligence of the person who undertakes for him and by his direction to transport employees. This is true whether the person actually transporting workmen be called servant, agent or independent contractor.

The jury has found from proper evidence that the defendant had assumed the obligation of transporting workmen from Balsam to Hazelwood, and that Justice was the person employed by the defendant for returning Kenneth Mehaffey and others to their homes; and further, that the death of plaintiff's intestate was proximately caused by the negligence of the defendant.

There is some contention that there is no evidence that Freeman was employed by the defendant to transport laborers, but the recovery can be sustained irrespective of either the employment or negligence of Freeman, because there is positive evidence that the truck driven by Justice was especially selected by Stevenson, superintendent of the defendant, for returning plaintiff's intestate to his home. Moreover, there is sufficient evidence of the negligence of Justice. A close scrutiny of the record discloses no error of law warranting a new trial, and the judgment is affirmed.

No error.

STATE v. ED WESTON.

(Filed 10 April, 1929.)

1. Criminal Law G p—Foot tracks are competent evidence of identity.

Where the foot tracks of the defendant on trial for the unlawful possession of intoxicating liquor are relevant to the inquiry, the similarity between them and the shape of the defendant's identified shoes is competent to be testified to by the witnesses, being a "shorthand statement of the fact" of identification resulting from a mental conclusion made by them at the time.

2. Appeal and Error E b—Matters not set out in record deemed without error.

Where there is exception on appeal to the charge of the court, the charge will be presumed to be correct where it is not set out in case on appeal.

3. Intoxicating Liquor B a—Constructive possession of intoxicating liquor is sufficient—Circumstantial Evidence.

Possession of intoxicating liquor necessary to convict of the offense under our prohibition law may be constructive and shown by circumstantial evidence, which in this case is held sufficient to sustain the verdict of the jury for conviction.

4. Criminal Law G n—Sufficiency of circumstantial evidence.

Where the evidence as to the possession of intoxicating liquor is capable of two inferences, one sufficient to convict and one to acquit the defendant, the case should be submitted to the jury, and on the defendant's appeal from an adverse verdict, the question of the sufficiency of the evidence to be submitted to the jury will be determined in the Supreme Court.

STATE v. WESTON.

APPEAL by defendant from *Cranmer, J.*, at October Term, 1928, of BRUNSWICK. *No error.*

This is a criminal action in which the defendant is charged with the unlawful possession of intoxicating liquor, in Brunswick County, on or about 11 May, 1928. There was a verdict of guilty.

From judgment on the verdict, defendant appealed to the Supreme Court.

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

Newman & Sinclair for defendant.

CONNOR, J. Defendant was convicted in the recorder's court of Brunswick County upon a warrant charging him with the unlawful possession of intoxicating liquor. He appealed from the judgment on said conviction to the Superior Court of said county. From the judgment on the verdict at the trial in the Superior Court, he has appealed to this Court. He relies here chiefly upon his assignment of error based on his exception to the refusal of the trial court to allow his motion for judgment of nonsuit, aptly made under C. S., 4643.

Assignments of error based on exceptions to the rulings of the court with respect to the evidence have been duly considered. These assignments present no questions which require discussion; they cannot be sustained. No authorities are cited in defendant's brief in support of his exceptions. The testimony of witnesses that the tracks on and about defendant's premises were similar to the tracks on the path, and at the stills, was competent. The similarity of the tracks was a fact, observable by the witnesses; their testimony was the result of a mental conclusion made by them at the time and is a "shorthand" statement of such conclusion. *S. v. Holland*, 193 N. C., 713, 138 S. E., 8; *Moore v. Ins. Co.*, 192 N. C., 580, 135 S. E., 456; *S. v. Walton*, 186 N. C., 485, 119 S. E., 886; *S. v. Leak*, 156 N. C., 643, 72 S. E., 567. The witnesses were, of course, subject to cross-examination for the purpose of testing the probative value of their testimony.

There is no exception in the record to the charge of the court to the jury. The charge is not included in the case on appeal. It is, therefore, presumed that the charge is free from error, and that the jury was properly instructed as to the law arising upon the evidence, as required by statute. C. S., 564. *S. v. Sigmon*, 190 N. C., 684, 130 S. E., 854, and cases therein cited.

The only question presented for decision, which seems to require discussion, is whether the evidence was sufficient, as a matter of law, for submission to the jury, as tending to show, as a matter of fact, that

the defendant had intoxicating liquor in his possession, actual or constructive, in Brunswick County, on or about 11 May, 1928, in violation of the statute. Possession, either actual or constructive, is sufficient. *S. v. Lee,* 164 N. C., 533, 80 S. E., 405.

There was evidence tending to show that on the morning of 11 May, 1928, certain officers went upon defendant's premises in Brunswick County, to search for stolen property; that no stolen property was found on said premises; that while making said search, the officers found in the smokehouse on said premises, a pair of boots; that these boots were wet, and had "mash" on them, indicating that they had been recently used by some person at a whiskey still; and that defendant owned these boots, and frequently used them, while walking about his premises, and about the neighborhood.

There was evidence, also, tending to show that there were tracks, made by some person wearing boots, on and about defendant's premises, and on a path leading from the road, which runs by said premises, through the woods, to a creek—a distance of about a quarter of a mile; that just across the creek, on the side opposite defendant's premises, there were two whiskey stills; and that about these stills there were boot tracks, indicating by their appearance that they had been recently made. All the boot tracks—those on defendant's premises, those on the path, and those at the stills, were fresh. Witnesses testified that in their opinion, all these tracks were made by the same person wearing the boots found in the smokehouse on defendant's premises, and owned by him.

The evidence tended to show, further, that at a distance of about thirty or thirty-five yards from defendant's premises, on or near the path along which there were boot tracks, leading from said premises, the officers found two hot-water bottles; these bottles were in a hole, covered up by fresh dirt and by grass. There was an odor of whiskey about these bottles; there was no whiskey, however, in them, when they were found by the officers. Fifteen feet from the hot-water bottles, a witness found a half-gallon jug. Following the tracks on the path to a landing on the creek, a witness found, near the landing, sacks containing half-gallon jars, filled with whiskey. The jars contained more than seven gallons of whiskey. Just across the creek, from the landing, were two whiskey stills. In addition to the fresh boot tracks found at the still and along the path leading from the stills to defendant's premises, there were older tracks. Both the old and the fresh tracks appeared to have been made by the same person.

Defendant was not at his home when the officers first arrived there; he came up, however, within about thirty minutes, after they arrived. He came from a direction opposite the path leading to the whiskey

still. He testified that he had been to Wilmington to see his son who was sick and in a hospital; that he had not been on the path where the tracks were found by the officers, within two or three days; that he had not been to the landing on the creek, where the whiskey was found, within a month. Defendant denied that the whiskey found by the officers was or had ever been in his possession. He testified that he did not own a drop of the whiskey. There was evidence tending to show that defendant's character is bad, especially for handling and dealing in intoxicating liquor. There was no evidence to the contrary.

There was no direct evidence that the fresh tracks on defendant's premises, or on the path leading from his premises to the landing at the creek, or at the stills, across the creek, were made by defendant; that these tracks were made by defendant, while wearing the boots found in his smokehouse, shortly before they were seen by the witnesses is, however, a reasonable inference from the facts and circumstances which the jury might well find from the evidence and is altogether consistent with these facts and circumstances; whether or not such inference should be drawn, as a matter of fact, from all the evidence, was for the jury. It cannot be held, as a matter of law, that the inference could not reasonably be drawn by the jury for that such inference was not altogether consistent with the facts and circumstances established by the evidence.

There was no direct evidence that defendant, at any time, had had the whiskey found by the officers at or near the landing on the creek, in his possession, either actual or constructive; if, however, the jury should find from all the evidence that the tracks on the path leading from defendant's premises to the landing, were made by defendant, shortly before the whiskey was found, the further fact that the whiskey had been, shortly before it was found, in the actual possession or when it was found, was in the constructive possession of defendant, was an inference which could be reasonably drawn from all the evidence by the jury. It cannot be held, as a matter of law, that such inference was unreasonable, and merely a conjecture, or that the evidence raised no more than a strong suspicion of the existence of the essential fact involved in the issue to be determined by the jury.

It is admittedly difficult to formulate a rule, or to state the principle upon which a rule may be formulated, for the decision of the question presented by this appeal. Where there is no direct evidence as to the essential fact involved in the issue to be passed upon by the jury, such fact may nevertheless be inferred by the jury from facts and circumstances which they may find from the evidence. Where such inference may be reasonably drawn by the jury, and is altogether consistent with the facts and circumstances which the jury may find from the evidence,

the evidence should be submitted to them; where the inference cannot be thus reasonably drawn, it should be withdrawn from the jury. The question as to whether the inference may be reasonably drawn by the jury from all the evidence, must in the first instance be decided by the trial court, as a matter of law; from its decision, adverse to the defendant in a criminal action, defendant may appeal to this Court. On such appeal, it becomes the duty of this Court, in the exercise of its appellate jurisdiction, to review the decision, and to determine whether or not, there was error as a matter of law or legal inference in such decision.

On an appeal to this Court, from a judgment in a criminal action on a verdict of guilty, where the decision of the trial court, resulting in the submission of the evidence to the jury, subject to an exception by the defendant, is assigned as error, as said by *Brogden, J.*, in *S. v. Montague,* 195 N. C., 20, "the whole matter resolves itself into an interpretation of the record. As to this, different minds will make different conclusions." There is, therefore, always room for much, and frequently for wide difference of opinion as to whether the evidence in the case, where merely circumstantial, was sufficient, as a matter of law, to be submitted to the jury. But as said by *Adams, J.*, in his dissenting opinion in the *Montague case,* "Not only is circumstantial evidence an accepted instrumentality in the ascertainment of truth, it is essential to the administration of justice." In *S. v. Sigmon,* 190 N. C., 684, 130 S. E., 854, we held that the evidence, although circumstantial, was sufficient, and that there was no error in the refusal of the court to sustain defendant's motion for judgment as of nonsuit. In *S. v. Swinson,* 196 N. C., 100, we were of the opinion that the evidence was not sufficient, as a matter of law, for submission to the jury; we, therefore, reversed the judgment on a verdict which was supported only by circumstantial evidence. In that case, it is said that when the essential fact in controversy in the trial of a criminal action can be established only by an inference from other facts, there must be evidence tending to establish these facts. Evidence which leaves the facts from which the inference as to the essential fact must be made a matter of conjecture and speculation, is not sufficient, and should not be submitted to the jury. *S. v. Prince,* 182 N. C., 788, 108 S. E., 330, and *S. v. Vinson,* 63 N. C., 335. However, where there is sufficient evidence from which the jury may find the facts and circumstances, from which the inference as to the essential fact must be made, and the inference is reasonable, and consistent with such facts and circumstances, and the essential fact is not left to mere conjecture and speculation, the evidence should be submitted to the jury. A full and lucid statement of the law, with respect to this matter, may be found in the opinion of *Brown,*

J., in *S. v. Plyler*, 153 N. C., 630, 69 S. E., 269, cited and approved by *Clarkson, J.*, in *S. v. Lawrence*, 196 N. C., 562.

In the instant case, although the evidence is wholly circumstantial, we are of the opinion that the essential facts, involved in the issue to be determined by the jury, could be reasonably inferred from the facts which the jury could well find from the evidence. Therefore, we find no error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, under C. S., 4643. See *S. v. Meyers*, 190 N. C., 239, 129 S. E., 606. The judgment is affirmed.

No error.

CHAMPION SHOE MACHINERY CO. v. G. B. SELLERS.

(Filed 10 April, 1929.)

1. Statutes B a—General rules for construction of statutes—Legislative Intent.

A statute will be interpreted in accordance with the meaning and intent of the Legislature as gathered from its terms, and where a technical interpretation will destroy the manifest spirit, the latter will prevail.

2. Same—Title to Acts.

Where the meaning of a statute is at all in doubt, reference may be had to the title and context as legislative declarations of its purpose.

3. Warehousemen A a—Statutory warehouseman's lien applies only to those operating warehouse for compensation.

Under the provisions of C. S., 2459, construed in *para materia* with sections 8107, 2459, 2460, 4925(a), *et seq.*, 5118, the persons, firms or corporations entitled to the possession and lien on property stored in warehouses applies to such as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant.

APPEAL by defendant from *Sinclair, J.*, at December Term, 1928, of ROBESON. No error.

On 6 November, 1925, the plaintiff entered into a written agreement with B. F. Gleaves, of Maxton, by the terms of which the plaintiff for value delivered to Gleaves one Champion F-89 Finisher and one Peerless Stitcher No. 16121, and retained title as security for payment of the purchase price. The agreement was duly registered on 5 December, 1925. Gleaves put the machines in a building which he had rented from the defendant as a shoe shop and a store, and went out of business 1 January, 1927. He left the machines in the defendant's building. The defendant thereafter wrote the plaintiff two letters, in

one of which he said he must have a reasonable rent for the space occupied by the machines, and in the other that he was entitled to storage. There was testimony that the defendant told a representative of the plaintiff that he had to have storage.

The plaintiff brought suit for possession of the machines and these issues were submitted to the jury:

1. Is the plaintiff the owner and entitled to the possession of the machinery described in the complaint?

2. Has the defendant a lien upon the property described in the complaint?

3. In what sum, if any, is the plaintiff indebted to the defendant for storage on the machinery referred to in the pleadings?

The judge instructed the jury, if they believed the record evidence and found the facts to be as testified to by all the witnesses, to answer all the issues in favor of the plaintiff. The plaintiff recovered a judgment and the defendant excepted and appealed.

J. E. Carpenter for plaintiff.
Johnson, Johnson & Floyd for defendant.

ADAMS, J. In his brief the appellant admits that the only question for decision is whether an individual is entitled to a lien for the storage of personal property by virtue of C. S., 2459, under the facts above stated. The section is in these words: "Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid."

The appellant's position cannot be maintained unless the statute is given a strictly literal interpretation and its spirit and purpose are disregarded. It has been said that the letter of the law is its body; the spirit, its soul; and the construction of the former should never be so rigid and technical as to destroy the latter. *Kleybolte v. Timber Co.*, 151 N. C., 635, 638; *Kearney v. Vann*, 154 N. C., 311. According to the rule that the object of all interpretation and construction of statutes is to ascertain the meaning and intention of the Legislature, a statute should receive a strict or liberal construction as the one or the other will accomplish the legislative intent. Black's Int. of Laws, 35; *S. v. Barco*, 150 N. C., 792; *Abernethy v. Board*, 169 N. C., 631; *S. v. Earnhardt*, 170 N. C., 725. When the meaning of a statute is at all in doubt reference may be had to the title and the context as legislative declarations of the purpose of the act. *S. v. Woolard*, 119 N. C., 779. The title of the original act (Public Laws 1913, ch. 192, amended by

Public Laws 1915, ch. 190) does not refer in express terms to warehouses as places of storage; but all provisions, chapters, subdivisions, and sections contained in the Consolidated Statutes were enacted into a composite body of law on 10 March, 1919, and as such became effective on the first day of the following August. C. S., 8107. When they went into effect under the act of 1919 (ch. 238, sec. 8) sections 2459 and 2460 composed the whole of chapter 49, article 4, which was entitled by the General Assembly "Warehouse Storage Liens." This title is a legislative declaration of the tenor of the sections; they apply only when the enumerated articles are delivered to and accepted by a person, firm, or corporation engaged in the business of storage and safe-keeping for compensation. Not only the title of the article but the wording of the sections is in support of this position. The phrase "every person, firm, or corporation who furnishes storage room" evidently does not contemplate a single act as in the case before us, but such continuous acts as occupy the time and attention of men for the purpose of profit. A warehouse system to aid in the marketing of leaf tobacco is authorized by section 5124 *et seq.*, and in the marketing of cotton by 3 C. S., 4925(a) *et seq.* Chapter 91, article 5, authorized the operation of public warehouses. Section 5118 provides: "Any person or any corporation organized under the laws of this State and whose charter authorizes it to engage in the business of a warehouseman, may become a public warehouseman and authorized to keep and maintain public warehouses for the storage of cotton, goods, wares, and other merchandise as hereinafter prescribed and upon giving the bond hereinafter required."

The words "goods, wares, and merchandise" are used in section 2459 and in section 5118. The first provides for the storage of furniture and tobacco; the other for the storage also of cotton. The chapter on "Warehouse Receipts" defines "goods" as "chattels or merchandise in storage, or which has been or is about to be stored," and "warehouseman" as a person lawfully engaged in the business of storing goods for profit. It gives the warehouseman a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for the storage and preservation of the goods. C. S., 4067. It was probably in consideration of public service or the performance of a statutory duty, such as the payment of a privilege tax or the execution of an official bond, that the Legislature granted to warehousemen a lien on goods in storage. Construing the several statutes in *pari materia* we are convinced that section 2459 applies only to those engaged in the business of accepting goods for storage and making a charge therefor at the time they are received.

No error.

BOARD OF EDUCATION OF WAKE COUNTY AND JOHN C. LOCKHART, SUPERINTENDENT OF PUBLIC INSTRUCTION OF WAKE COUNTY, *v.* DELIA BANKS PEGRAM AND HUSBAND, MONROE PEGRAM.

(Filed 10 April, 1929.)

1. Schools and School Districts B a—Board of Education has power to condemn additional land to enlarge school district.

Construing C. S., 5469, in connection with the former statutes giving the county board of education the power to condemn lands necessary for public school purposes within the limitation of ten acres, it is *Held*, the fact that one of these schools had already acquired a less amount of land did not preclude the county board of education from acquiring by another proceeding sufficient lands to meet the enlarged and necessary requirements of the school for additional lands within the limitation imposed by statute.

2. Same—Construction of Statutes.

Where the county board of education has the power to condemn land under former statutes the question of whether a later statute is declaratory of the existing law or whether it confers additional power upon the board becomes academic.

CIVIL ACTION, before *Harris, J.*, at November Term, 1928, of WAKE.

The facts found by the clerk were substantially as follows: The Willow Springs School in Wake County acquired a school site containing two acres, in 1905. In 1927 the school district was greatly enlarged and was thereafter known as the Willow Springs Consolidated School, and "it is necessary that the site be enlarged by reason of the great increase in number of children attending the consolidated school." The defendants owned approximately seven acres of land adjacent to said school, and on 4 January, 1928, the board of education undertook pursuant to law to condemn two and a half acres of the land of the defendants as a school site, which would give the said school a site containing four and a half acres, more or less.

Upon the foregoing facts the clerk was of the opinion that the plaintiff had no power to acquire additional land by virtue of the provision of chapter 136, section 61, Public Laws 1923, which is embodied in C. S., 5469.

Upon appeal from the clerk to the judge of the Superior Court the ruling of the clerk was affirmed, and the plaintiff appealed.

J. C. Little for plaintiff.
Briggs & West for defendants.

BROGDEN, J. The defendants contend that the county board of education, having selected a site containing two acres, was without power to

condemn additional land under the law as it existed at the time of instituting the suit. This contention is based upon the theory that C. S., 5469 does not authorize a county board of education to exercise the power of condemnation but once; and thus, when a site has been acquired, the power to condemn is exhausted, irrespective of the growth of the school and the imperative necessity for an enlarged site.

Apparently, the power to condemn was first bestowed upon county boards of education by section 31, chapter 4, Public Laws 1901. This statute permitted schools to condemn not more than one acre for a site; provided, however, that improved land was not to be taken unless absolutely necessary. Section 13, chapter 435, Public Laws 1903, substituted two acres for one acre. Section 8, chapter 533, Public Laws 1905, amended the act of 1901, by permitting additional land to be secured for a school site provided the original site plus the additional land acquired did not exceed two acres. Section 1-b, chapter 149, Public Laws 1913, provided that additional land could be acquired and added to the original site provided the total amount of land did not exceed three acres. Section 61, chapter 136, Public Laws 1923, now incorporated as a part of C. S., 5469, provided for a school site of "not more than ten acres." It appears, therefore, that since 1901 boards of education have been authorized to condemn land for suitable school sites. Section 1-b, chapter 149, Public Laws 1913, incorporated in 2 C. S., 5416, undertook to provide for a minimum and a maximum school site. In other words, the board of education was authorized to condemn "not more than two acres," but it could thereafter acquire an additional acre, making a maximum of three acres. However, 5469 prescribes no minimum at all, but fixes the maximum school site at "not more than ten acres." Evidently, it was contemplated that a school site was an elastic quantity, varying as the expansion and needs of the school systems might require. This idea is embodied in the term "suitable site" appearing in the statute. Where the power of condemnation is expressly conferred and a maximum of land prescribed, we can see no just or logical reason why the power would be exhausted by one exercise thereof unless of course the maximum quantity of land had been acquired.

One phase of the question now presented, was considered by this Court in *Board of Education v. Forrest,* 190 N. C., 753, 130 S. E., 621. The decision was based upon the fact that the board of education had originally selected the land in dispute as a part of the school site and had purchased a part of the site and erected a building thereon, and being unable to secure the other portion so selected, proceeded to condemn the same, and therefore the purchase of one portion and the condemnation of the other were merely separate stages in the same

transaction. Hence the question of law presented in the present appeal was neither discussed nor decided in the *Forrest case.*

However, the General Assembly amended C. S., 5469, in March, 1929, by providing that "where sites have already been acquired and additional adjacent lands are necessary, such additional lands may be acquired as in this section provided, which lands, together with the old site, shall not exceed ten acres." Whether the act of 1929 was merely declaratory of the law then existing, or whether it was intended to confer an additional power of condemnation is now wholly immaterial and academic.

Reversed.

F. C. DARDEN v. J. H. COWARD ET AL.

(Filed 10 April, 1929.)

Banks and Banking H a—Statutory liability does not lie where stock was sold before insolvency but not transferred through neglect of transfer agent.

Where a former owner of shares of stock in a bank has sold, and, on the certificate, assigned his shares to a purchaser, and sometime thereafter the bank has become insolvent and the liquidating agent of the bank appointed by the Corporation Commission has assessed the shares against the former owner whose name still appears as such owner on the books of the bank owing to the neglect of the transfer agent to reissue the shares to the purchaser: *Held,* the ostensible owner should be relieved of the assessment so made against him.

APPEAL by defendants from *Nunn, J.,* at September Term, 1928, of PITT.

Controversy without action submitted on an agreed statement of facts:

1. On 30 November, 1927, W. H. Woolard was appointed liquidating agent of the Bank of Ayden by the Corporation Commission of North Carolina agreeably to the provisions of chapter 113, Public Laws, 1927.

2. Thereafter, in accordance with the terms of the statute, assessments were levied and filed in the office of the Superior Court of Pitt County against the stockholders of said bank, including an assessment of $500.00 against the plaintiff, F. C. Darden, whose name appeared on the books of the bank as the owner of 10 shares of its capital stock at the time of its insolvency.

3. The plaintiff sold his stock in the Bank of Ayden during the month of November, 1926, assigned the certificate in blank, and the same was

owned by J. D. McGlohon, cashier and stock-transfer agent of said bank at the time of its failure, though no transfer had been made on the books of the bank.

4. The said J. D. McGlohon admits that he was, and had been for nearly a year prior to the closing of the bank, the owner of the 10 shares of stock, originally issued to the plaintiff, and that the certificate should have been transferred to him on the books of the bank and canceled as against the plaintiff.

5. The parties agree that "the sole question presented here is whether the said judgment against F. C. Darden in the sum of $500.00 should not have been entered against the said J. D. McGlohon instead, and that the judgment against F. C. Darden should not be vacated and set aside for the reason that F. C. Darden was not the true owner of the stock and that said judgment filed was irregularly obtained and void."

From a judgment declaring the assessment to be null and void as against the plaintiff, and ordering that the same be vacated and set aside, the defendants appeal, assigning error.

F. C. Harding for plaintiff.
Blount & James for defendants.

STACY, C. J. The plaintiff sold his 10 shares of stock in the Bank of Ayden long before its insolvency, and the certificate, duly endorsed in blank, was purchased by J. D. McGlohon, cashier and transfer agent of said bank. It is conceded that the failure to transfer the stock on the books of the bank was due to the neglect of the cashier and transfer agent, and not to any fault of the plaintiff. We concur in the judgment of the trial court that, under the facts agreed, the plaintiff is entitled to be relieved of the assessment levied against him as an ostensible stockholder in the Bank of Ayden at the time of its failure. The case of *Whitney v. Butler*, 118 U. S., 655, 30 L. Ed., 266, is a direct authority for the position, while *Trust Co. v. Jenkins*, 193 N. C., 761, 138 S. E., 139, is distinguishable, in that, in the *Jenkins case* the certificate of stock was not surrendered to the bank for transfer on its books. See, also, *Havens v. Bank*, 132 N. C., 214.

No point is made of the fact that, under chapter 113, Public Laws 1927, the proper method of procedure was for the plaintiff to appeal to the Superior Court from the levy of assessment made by the Corporation Commission. See *Corporation Commission v. Murphey, post*, 42. The correct result has been reached and we are disposed to affirm the judgment.

Affirmed.

MINNIE GENEVA SYKES v. T. J. SYKES AND HIS WIFE, JENNIE SYKES.

(Filed 10 April, 1929.)

1. **Water and Water Courses C a—Upper proprietor does not incur liability for merely accelerating flow of surface waters.**

The upper proprietor of adjoining lands has the right to accelerate the flow of water upon his own lands without changing its course upon the lands of the lower proprietor without liability for damage to the land of the lower proprietor.

2. **Same—Upper proprietor does not incur liability for filling in ditch of private road on his land.**

Where the evidence is conflicting as to whether a ditch was on the land of an upper proprietor or on a public roadway the question is for the jury under proper instructions from the court, and upon their finding that the roadway was private the upper proprietor is not liable for damages caused to the land of the lower proprietor by filling the ditch and accelerating the flow of surface water.

APPEAL by plaintiff from *Harris, J.*, at November Term, 1928, of FRANKLIN. No error.

Action to recover damages resulting from injuries to plaintiff's land, caused by the alleged wrongful act of defendants in filling a ditch, and thereby causing water from defendants' land to overflow plaintiff's land.

The answer to the first issue submitted to the jury was determinative of plaintiff's right to recover in this action. The jury found that plaintiff had not been damaged by the negligence of defendants.

From judgment that plaintiff recover nothing of defendants, plaintiff appealed to the Supreme Court.

H. L. Godwin, Yarborough & Yarborough and G. M. Beam for plaintiff.

Cooley & Bone and Ben T. Holden for defendants.

CONNOR, J. Plaintiff and defendants own adjoining tracts of land, situate in Franklin County; both tracts front on the Louisburg and Nashville highway. They are divided by a road, which plaintiff alleges is a public road, known as the Spring Hope road; this allegation is denied by defendants. They contend that this dividing road, is merely a neighborhood path, located partly on their land and partly on plaintiff's land. The ditch which plaintiff contends defendants filled up by plowing over same, is on defendants' side of this road or path. The natural drainage from defendants' land is toward plaintiff's land.

The court instructed the jury as follows: "Before the plaintiff can recover the court charges you that you must find (1) that this was a public road; (2) that there was a ditch or furrow on the east side of that public road, and (3) that that ditch was stopped up by defendants. If you shall find from the evidence that this was not a public road, then the plaintiff cannot recover."

Plaintiff excepted to this instruction and assigns same as error. The evidence as to the character of the road was conflicting. We find no error in the instruction. If the ditch was not on a public road, but on defendants' land, defendants had the right to fill it, and are not liable to plaintiff for damages, if any, caused by filling the ditch. Defendants, as the upper proprietors, had the right to accelerate and even increase the flow of water from their land to the land of plaintiff, the lower proprietor. *Winchester v. Byers,* 196 N. C., 383. There was no evidence that the water was diverted from its natural course. Nor was there evidence tending to show that the ditch had been constructed and maintained by mutual agreement as part of a general system of drainage for both plaintiff's and defendants' lands. If the ditch was on defendants' land, and not on a public road, defendants' act in filling the ditch was not a wrongful act; if damage resulted to plaintiff's land, defendants are not liable.

Other assignments of error have been duly considered; they cannot be sustained. The judgment is affirmed. There is

No error.

L. A. SUTTON AND WIFE v. HINES BROTHERS LUMBER CO.

(Filed 10 April, 1929.)

Deeds and Conveyances F b—Demand of price according to contract for renewal of right to cut timber necessary to declare forfeiture thereof.

In an action to declare a forfeiture in a timber deed for nonpayment of the sum of money stipulated to be paid on demand for a renewal period, the plaintiff must show a proper demand according to the terms of the deed, and upon the failure of evidence in this respect a nonsuit is properly granted.

CIVIL ACTION, before *Nunn, J.,* of DUPLIN.

On 4 August, 1916, J. McR. Grady conveyed certain standing timber upon four tracts of land to the Enterprise Lumber Company. The defendant by proper conveyances has acquired the rights of the grantee in said deed. The grantee and its successors had ten years to cut and remove said timber with the further agreement as follows: "It is

agreed that in consideration of the amount as above set forth it shall have as much as five years longer in which to cut and remove said timber by paying to the said J. McR. Grady of the first part the sum of one hundred and twenty dollars per year for each and every additional year that it may consume in cutting and removing the said timber, the said payment to be due each year and payable upon demand of the parties of the first part and upon failure to pay when demanded in any year of such additional time all right of the said party of the second part shall cease, but no forfeiture shall be made unless upon demand and refusal to pay."

On 2 December, 1921, Grady conveyed a part of said land, containing about 103 acres to his daughter, the plaintiff in this action. The evidence tended to show that the extension money for the year 1926 was paid to Grady, the grantor, the plaintiff acquiescing in such payment. Grady wrote the defendant on 18 July, 1928, stating that he was due $90.00, and his daughter, the plaintiff, $30, as that was the amount paid in 1926. However, it was admitted that this was an error, because one-fifth of $120.00 would amount to only $24.00. On 4 August, 1927, plaintiffs made demand upon one Nufer for one-fifth of the extension money. It does not appear in the evidence who Nufer was, but it does appear that a man named Hoffler was the agent of the defendant "who attended to these extensions for the company." No demand was ever made by anyone upon Hoffler until Grady wrote a letter demanding $96.00. This amount was promptly paid, and Grady testified that he claimed no forfeiture. On the same day Hoffler offered to pay plaintiff $24.00, and she declined to accept, contending that a forfeiture had resulted. Whereupon, the sum of $24.00 was paid to the clerk by the defendant for the use of plaintiff.

At the conclusion of plaintiff's evidence, there was judgment of nonsuit, and the plaintiff appealed.

Henry E. Faison, D. M. Jolly and Dawson & Jones for plaintiff.
Rouse & Rouse and Gavin & Boney for defendant.

PER CURIAM. We see no evidence in the record tending to establish the claim of the plaintiff. It appears that the plaintiff and Grady were confused about the division of the extension money through no fault of defendant. While there is evidence of a demand, it does not appear that the demand was made upon the agent having the matter in charge for the defendant. Upon the entire record it appears to us that the trial judge was correct in his ruling.

Affirmed.

J. W. PASCHAL, ADMINISTRATOR, v. JOHN B. PASCHAL.

(Filed 10 April, 1929.)

1. Executors and Administrators C c—Administrator may not recover from deceased's son money expended in joint enterprise.

Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise.

2. Wills F c—Definition of Advancement.

An advancement is a gift *in præsenti* by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement.

APPEAL by plaintiff from *Clement, J.*, at December Term, 1928, of CASWELL.

Proceedings to require John B. Paschal to account to the estate of Martha F. Paschal, deceased, for certain insurance premiums paid by the deceased on an insurance policy carried on the life of John B. Paschal and made payable to Martha F. Paschal, mother of the insured, in case she survived him, otherwise to the estate of the insured. It is alleged by the administrator that the insurance premiums paid by the deceased were advancements to John B. Paschal and as such should be accounted for by him.

From a judgment of nonsuit entered at the close of the evidence, the administrator appeals, assigning error.

Luther M. Carlton and Robert T. Wilson for plaintiff.
E. F. Upchurch and Glidewell, Dunn & Gwyn for defendant.

STACY, C. J. The transaction between the deceased and her son, relative to the insurance policy in question, seems to have been a joint enterprise. Some of the premiums were paid by the parent, some by the child. Both benefited thereby. We think the trial court correctly held that such payments on the part of the mother, under the fact situation disclosed by the record, could not be regarded as gifts or advancements to the son.

An advancement may be defined as a gift *in præsenti* or provision made by a parent on behalf of a child for the purpose of advancing said

child in life, and thus to enable him to anticipate his inheritance to the extent of such advancement. C. S., 1654, rule 2; *Lunsford v. Yarbrough*, 189 N. C., 476, 127 S. E., 426; *Nobles v. Davenport*, 183 N. C., 207, 111 S. E., 180; *Thompson v. Smith*, 160 N. C., 256, 75 S. E., 1010; *Kyle v. Conrad*, 25 W. Va., p. 774.

Affirmed.

LAURA COWANS v. NORTH CAROLINA BAPTIST HOSPITALS, INC.

(Filed 10 April, 1929.)

Hospitals B b—Charitable hospital is liable for negligent injury to employees.

A charitable hospital not operated for gain but only for benevolent purposes is liable in damages for a negligent injury inflicted by it on an employee as distinguished from a patient therein. *Green v. Biggs*, 167 N. C., 417; *Hoke v. Glenn*, 167 N. C., 594, cited and distinguished.

APPEAL by defendant from *Moore, J.*, at February Term, 1929, of FORSYTH.

Civil action by plaintiff, servant or employee of defendant, to recover damages for an alleged negligent injury, tried in the Forsyth County Court on the usual issues of negligence, contributory negligence and damages, which resulted in a verdict and judgment for the plaintiff. On appeal to the Superior Court, all exceptions and assignments of error were overruled and the judgment of the county court affirmed.

From the judgment of the Superior Court, the defendant appeals, assigning errors.

Richmond Rucker and John J. Ingle for plaintiff.

A. Wayland Cooke and Fred S. Hutchins for defendant.

STACY, C. J. The chief question presented by the appeal is whether a charitable hospital, operated not for gain, but for benevolent purposes, can be held liable in damages for the negligent injury to a servant or employee. We think so. 5 R. C. L., 378; *McInerny v. St. Luke's Hosp. Asso.* (1913) (Minn.), 46 L. R. A. (N. S.), 548; *Bruce v. Central M. E. Church* (1907), 10 L. R. A. (N. S.), 74, 11 Ann. Cas., 150 (Mich.); *Hewett v. Women's Hosp. Aid Asso.* (1906), 7 L. R. A. (N. S.), 496, 64 Atl., 190 (N. H.); *Hordern v. Salvation Army* (1910), 32 L. R. A. (N. S.), 62, 93 N. E., 626.

Plaintiff was a servant or employee of the defendant, and not a beneficiary of its charity. This distinguishes the case from *Green v.*

Biggs, 167 N. C., 417, 83 S. E., 553, and *Hoke v. Glenn*, 167 N. C., 594, 83 S. E., 807, where it was held that an eleemosynary institution or a charitable hospital was not liable to a patient for the *tort* of its servants or agents, when due care was exercised in the selection or retention of said servants or agents, and no duty was undertaken requiring the exercise of special art or skill. See, also, *Johnson v. Hospital*, 196 N. C., 610.

Affirmed.

CORPORATION COMMISSION OF THE STATE OF NORTH CAROLINA v. D. S. MURPHEY.

(Filed 10 April, 1929.)

1. Banks and Banking H a—Chapter 113, Public Laws 1927, in regard to liability of stockholders of defunct bank, Constitutional—Due Process of Law.

Section 13, chapter 113, Public Laws 1927, is constitutional and valid, and is not in contravention of the Due Process Clause of the Federal Constitution or the Law of the Land Clause of the State Constitution, since under its provisions the statutory liability of a stockholder of an insolvent bank is not enforceable by execution under the order of the Corporation Commission until after he has been given notice and an opportunity to be heard in the course and practice of our courts, and an appeal has the effect of staying execution until his defense has been determined before a jury.

2. Constitutional Law I b—Federal Constitution does not bind State as to procedure under Due Process Clause.

The Fourteenth Amendment to the Federal Constitution does not control the power of the State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives notice and a fair opportunity to be heard.

STACY, C. J., concurs in result only. BROGDEN, J., concurs with opinion in which CLARKSON, J., concurs.

APPEAL by petitioner, D. S. Murphey, from *Grady, J.*, at Chambers, Jacksonville, N. C., on 13 January, 1929. Affirmed.

This is a motion made by the petitioner, D. S. Murphey, upon a special appearance, in a proceeding for the liquidation of an insolvent banking corporation, organized and doing business under the laws of this State. The proceeding was begun on 28 May, 1928, and is now prosecuted in the Superior Court of Duplin County by the Corporation Commission of the State under and pursuant to the provisions of chapter 113, Public Laws 1927.

The petitioner, D. S. Murphey, challenges the validity of an assessment made against him in said proceeding, by reason of his statutory liability as a stockholder of said insolvent corporation. The assessment was made by the Corporation Commission on 4 October, 1928, in accordance with the provisions of section 13, chapter 113, Public Laws 1927. The assessment, has been duly docketed in the office of the clerk of the Superior Court of Duplin County. The petitioner has failed to pay said assessment; the Corporation Commission has requested the clerk of the Superior Court to issue an execution on said assessment, to be levied on the property of petitioner, for its collection.

The petitioner contends that the statute under which the assessment was made is unconstitutional and that, therefore, the assessment is void. He prays that said assessment be declared void by the court, and that proceedings to enforce the same be enjoined.

The court was of opinion that the statute is constitutional in all respects, and that, upon the facts agreed at the hearing of the motion, the assessment is valid, and so adjudged.

From an order, in accordance with said opinion, the petitioner, D. S. Murphey, appealed to the Supreme Court.

I. M. Bailey and Beasley & Stevens for the Corporation Commission.
Shaw & Jones for the petitioner, D. S. Murphey.

CONNOR, J. The sole question decided by the court below and now presented to this Court for decision, is whether section 13, chapter 113, Public Laws 1927, is constitutional; no other question was or is presented for decision.

It is conceded that the proceeding for the liquidation of the Farmers Bank & Trust Company of Wallace, N. C., was duly begun by the Corporation Commission, and has been duly prosecuted in accordance with the provisions of chapter 113, Public Laws 1927; that said Bank & Trust Company is insolvent, unless there shall be included among its assets, the claim of said company against its officers and directors for damages resulting from their wrongful acts as such officers and directors; and that the petitioner, D. S. Murphey, is a stockholder of said company.

It is further conceded that the assessment by the Corporation Commission against the petitioner, D. S. Murphey, by reason of his statutory liability as a stockholder, was made in strict conformity with the provisions of section 13, chapter 113, Public Laws 1927. The said assessment is, therefore, valid unless said chapter 113, Public Laws 1927, and particularly section 13 of said chapter, is void, for that the same is unconstitutional, as contended by the petitioner.

Prior to the enactment of chapter 113, Public Laws 1927, it was held by this Court that under the statutes then in force, prescribing the procedure for the enforcement of the statutory liability of stockholders of a banking corporation, as individuals, upon the insolvency of said corporation, assessments could not be made against said stockholders, until the deficiency between the amount of the liabilities of the insolvent corporation, and the amount of its assets, in the hands of its receiver, available for the payment of dividends on the claims of depositors and other creditors, had first been determined. *Corp. Com. v. Bank*, 193 N. C., 113, 136 S. E., 362; *Corp. Com. v. Bank*, 192 N. C., 366, 135 S. E., 48. It was also held that the claim of the corporation against its officers and directors for damages, resulting from the wrongful acts of said officers and directors, was an asset of the corporation and that upon the insolvency of the corporation, and the appointment of a receiver, such claim passed to and ordinarily must be enforced by said receiver. *Douglass v. Dawson*, 190 N. C., 458, 130 S. E., 195. The procedure under the statutes in force prior to the enactment of chapter 113, Public Laws 1927, for the enforcement of the statutory individual liability of stockholders of an insolvent banking corporation, often proved ineffective, especially when long and expensive litigation became necessary to enforce claims against officers and directors for damages, resulting in or contributing to the insolvency of the corporation. Depositors and other creditors of an insolvent banking corporation, for whose security the statute imposing individual liability upon stockholders was enacted, often lost the benefit of the statute, because of delay in making assessments, and also because of difficulties encountered by receivers, appointed by the courts, in enforcing them.

To remedy the defects in the procedure under the former statutes, section 13, chapter 113, Public Laws 1927, was enacted. This section is the only provision of said chapter, directly affecting stockholders of insolvent banking corporations, as individuals. It is as follows:

"After the expiration of thirty days from the date of the filing of the notice of the taking possession of any bank, in the office of the clerk of the Superior Court, the Corporation Commission may levy an assessment equal to the stock liability of each stockholder in the bank, and shall file a copy of such levy in the office of the clerk of the Superior Court, which shall be recorded and indexed as judgments, and shall have the force and effect of a judgment of the Superior Courts of this State; and the same shall become due and payable immediately, and if not paid execution may at the instance of the Corporation Commission issue against the stockholder delinquent, and actions on said assessment may be instituted against any nonresident stockholders in the same manner as other actions against nonresidents of the State. Any stockholder may

appeal to the Superior Court from the levy of assessment; the issue raised by the appeal may be determined as other actions in the Superior Court. At any time before the determination of said appeal such stockholder may petition the resident or presiding judge to relieve his property of the lien, pending the determination of the question raised by said appeal; and such relief may be granted in the discretion of the judge hearing the petition and upon such terms as he may fix. The rights of levy and assessment herein given shall not affect the right of the Corporation Commission to enforce the liability of legal or equitable owners of stock not named in the certificate and the liability of transferers of stock as provided in section two hundred and nineteen (d). All sums collected under the levy shall become immediately available as general assets of the bank for distribution as other assets; *Provided, however,* that whenever the expenses of liquidation have been paid and all of the liabilities to depositors and other creditors shall have been discharged, the money then remaining in the hands of the Corporation Commission shall be applied pro rata to the repayment of the amounts paid in by the stockholders."

The contention that the foregoing statute is in violation of provisions of the Constitution of the United States and also of the Constitution of this State, in that stockholders of insolvent banking corporations, under the procedure prescribed therein, may be deprived of their property, without due process of law, or contrary to the law of the land, cannot be sustained.

Stockholders of banking corporations, organized and doing business under the laws of this State, are liable, as individuals, for the contracts, debts and engagements of the corporation, by statute, within the limitation prescribed therein. 3 C. S., 219(a). Such stockholders subscribe for or purchase stock in such corporations with notice of their statutory liability, as individuals. When a banking corporation is adjudged insolvent, because its assets, available for the payment of its liabilities, are not sufficient for the payment of the same, each stockholder has notice that he is liable to an assessment on account of his individual, statutory liability. He is interested then only in the amount or amounts for which he may be assessed on account of such liability. Under the procedure prescribed by the statute, he has notice that the corporation has been adjudged insolvent; he also has notice of the amount of the assessment made against him. He may appeal from the assessment to the Superior Court of the county in which the proceeding for the liquidation of the corporation is pending; on his appeal, all issues raised by him, whether of law or of fact, involving his liability on the assessment, will be determined, in accordance with the procedure for the trial of actions brought and prosecuted in the Superior Court. The stockholder

is thus assured that he cannot be deprived of his property without due process of law, or contrary to the law of the land. He is given an opportunity to be heard before his property can be sold under execution for the payment of his assessment. *Davidson v. New Orleans,* 96 U. S., 97, 24 L. Ed., 616.

It cannot be held that under the procedure prescribed by the statute, an assessment can be made against a stockholder of an insolvent banking corporation without notice to him, or without an opportunity to be heard as to the validity of the assessment. Provision is made in the statute for notice to all persons that the Corporation Commission, as an agency of the State, has taken possession of the corporation and of its business; this notice must be filed in the office of the clerk of the Superior Court of the county in which the principal office of the corporation is located. Stockholders as well as others are affected by this notice. No assessment can be made by the Corporation Commission until the expiration of thirty days from the date of the filing of this notice. In the meantime the corporation has ceased to do business, and the Corporation Commission has had exclusive possession and control of its affairs; officers, directors and stockholders have been deprived of possession and control of the corporation. Notice of the insolvency of the corporation is sufficient notice to each stockholder of his liability to an assessment for the benefit of depositors and other creditors of the insolvent corporation. *Bernheimer v. Converse,* 206 U. S., 516, 51 L. Ed., 1163. To hold otherwise would seem to be "sticking in the bark"; it would be to ignore the facts apparent to all.

The statute further provides that a copy of assessments made against stockholders, on account of their individual liability, imposed by statute for the benefit of depositors and other creditors, shall be filed in the office of the clerk of the Superior Court. Each stockholder is thus notified of the amount due by him on his assessment. If a stockholder, or any person assessed as a stockholder, has a defense to the assessment, he may appeal to the Superior Court; there he will be heard, as to any matters of law or fact, upon which he relies for his defense. Thus ample notice of his liability to assessment, and full opportunity to be heard as to its amount is provided by the statute for each stockholder or person assessed as a stockholder, by the Corporation Commission. The fact that the opportunity to be heard is given by an appeal to the Superior Court, after the assessment has been made, does not deprive him of due process of law. *Coffin Bros. & Co. v. Bennett,* 277 U. S., 29, 48 Sup. Ct. Rep., 422. In his opinion in the cited case, decided 30 April, 1928, speaking of a provision in the Banking Act of Georgia, similar to the statute now under consideration, *Mr. Justice Holmes* says:

"A reasonable opportunity to be heard and to present the defense is given, and if a defense is presented, the execution is the result of a trial in court . . . . The fact that the execution is issued in the first instance by an agent of the State, but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia, and is open to no objection. If a debtor does not demand a trial, the execution does not need the sanction of a judgment; the plaintiffs in error by becoming stockholders had assumed the liability on which they are to be held."

Doubtless, in the administration of this statute, the Corporation Commission will, as a matter of practice, in addition to the constructive notice to stockholders, as provided by statute, which we hold is sufficient to uphold the statute, give actual, personal notice to each stockholder, by mail or otherwise, before the assessment is made, and also before execution is issued to enforce the assessment. Execution can be issued only when the stockholder has failed to pay the assessment, upon demand by the Corporation Commission, and is, therefore, delinquent.

The assessment, although duly docketed and indexed as required by the statute, in order to make the assessment a lien on the property of the stockholder, is not a judgment in the sense that it is conclusive; it can be enforced by execution only where there is no appeal from the assessment. An appeal stays execution to enforce the assessment; provision is made by the statute by which the stockholder may have his property relieved of the lien of the assessment, pending the hearing of his appeal. Opportunity is given to the stockholder, even after execution has been issued on the assessment, and is in the hands of the sheriff, by appeal to the Superior Court, to interpose a defense, if any he has, to the assessment or to his liability therefor. The property of the stockholder, upon which the execution has been levied, cannot be sold without personal notice to the stockholder, at least ten days before the sale. C. S., 689.

It has been held by the Supreme Court of the United States that the essential elements of due process of law are notice and opportunity to defend, and that in determining whether such rights are denied, that Court will be governed by the substance of things, and not by the mere form, *Simon v. Craft,* 182 U. S., 427, 21 Sup. Ct. Rep., 836, 45 L. Ed., 1165, that the Fourteenth Amendment safeguards fundamental rights and not the mere form which a state may see proper to designate for the enforcement and protection of such rights, *Cincinnati Street R. Co. v. Snell,* 193 U. S., 30, 24 Sup. Ct. Rep., 319, 48 L. Ed., 604, and that the Fourteenth Amendment in no way controls a state in determining the process by which legal rights and obligations may be asserted or enforced, provided the method of procedure adopted for that purpose

gives reasonable notice and fair opportunity to be heard before the issues are decided, *Iowa C. R. Co. v. Iowa,* 160 U. S., 389, 16 Sup. Ct. Rep., 344, 40 L. Ed., 467.

It has also been held that the words "due process of law" as used in the Constitution of the United States do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts. *Davidson v. New Orleans,* 96 U. S., 97, 24 L. Ed., 616; due process is not necessarily a judicial process, *Reetz v. Michigan,* 188 U. S., 505, 23 Sup. Ct. Rep., 390, 47 L. Ed., 563. Public officers and boards in determining the existence of facts and the application to them of rules of law, perform administrative, not judicial, duties, and their proceedings are due process of law, *Den ex Dem Murray v. Hoboken Land & Imp. Co.,* 18 How., 272, 15 L. Ed., 372.

It has been held by this Court that although a statute providing for the condemnation of land for street purposes contains no express requirement for notice to the landowner whose land is to be taken for that purpose, such requirement will be implied from other provisions of the statute, and that the statute, therefore, does not violate constitutional provisions with respect to due process of law, or with respect to the taking of property contrary to the law of the land. *S. v. Jones,* 139 N. C., 613, 52 S. E., 240, 2 L. R. A. (N. S.), 313. In the instant case, the statute requires notice to the stockholders, by the filing of the notices in the clerk's office that the Corporation Commission has taken possession of the corporation, and has made the assessments; no proceeding for the enforcement of an assessment is authorized until the stockholder has become delinquent, *i. e.,* has failed or refused, without appeal, to pay the assessment, upon demand. Actual, personal notice to the stockholder is required before execution can be issued. Upon receiving such notice, the stockholder may at once appeal from the assessment to the Superior Court where full opportunity is given him to make his defense to the assessment.

Other grounds upon which it is contended that the statute is unconstitutional are involved in the contention that the statute is in contravention of constitutional provisions relative to due process of law. Contentions based upon these grounds have been duly considered; they cannot be sustained. The Corporation Commission, in making assessments against stockholders, under the statute, and in enforcing the same, acts as an agency of the State, and not in its own interest. It exercises powers, *quasi*-judicial, as well as administrative, both in making the assessments and in enforcing the same. It does not exercise these powers for its own benefit, but for the benefit of depositors and other creditors of the insolvent corporation who have relied upon the statutory liability of the stockholders of the banking corporation and also for the

benefit of stockholders. All assessments made by the Corporation Commission are subject to review by the Superior Court, upon appeal by the stockholder, or person assessed, both with respect to matters of law and of fact. The philosophy of the statute is that depositors and other creditors of a banking corporation, who have been induced to make deposits, and to enter into contracts with the corporation, by assurance that the stockholders are by statute individually liable for the contracts, debts and engagements of the corporation, shall be protected upon the insolvency of the corporation, and shall not be unduly delayed in the enforcement of their claims against the corporation by litigation.

As to whether the claim of a banking corporation against its officers and directors for damages caused by their wrongful acts, should be considered in determining whether or not the corporation is insolvent, and stockholders are, for that reason, liable to assessment, is not presented by this record. This claim is an asset of the corporation, which upon its insolvency passes to and vests in the Corporation Commission, as its statutory receiver. It is usually involved in litigation, and is not ordinarily available for the payment of depositors and other creditors, until after long and expensive litigation. This must be considered in determining its value, as an asset, and therefore whether or not, notwithstanding the claim, the corporation is insolvent at the time assessments are to be made, or was insolvent at the time they were made against stockholders. The finding of the Corporation Commission that a banking corporation is insolvent, and that therefore its stockholders are liable to assessment, is presumed to be correct. In any event, stockholders who have paid their assessments, after the expenses of the liquidation have been paid, and all of the liabilities to depositors and other creditors have been discharged, are entitled to the money remaining in the hands of the Corporation Commission, to be paid to them pro rata.

We concur with the learned judge who presided at the hearing in the Superior Court that the statute does not violate provisions of the Constitution of the United States, or of the Constitution of this State, with respect to due process of law; that the statute is constitutional in all respects, and that, upon the facts agreed at the hearing, the assessment is valid. The order is

Affirmed.

STACY, C. J., concurs in result only.

BROGDEN, J., concurring in result. I have grave doubt as to the constitutionality of the statute because it does not provide for notice to the stockholder before judgment and execution. Execution cannot issue

except upon a regular judgment, regularly obtained according to law. I do not agree that the judgment mentioned in the statute, is a tadpole judgment. It appears to me that it is a full fledged frog from the beginning. Furthermore, the only case cited to support this phase of the statute is the *Bennett case*. It is to be noted, however, that the Georgia statute expressly provides for personal notice before judgment.

It is declared in the opinion, "An appeal stays execution to enforce the assessment." Consequently, a stockholder cannot be compelled to pay until his defense has been determined by a jury. This result saves the day.

I am authorized to say that *Clarkson, J.*, concurs in this view of the case.

PENDER COUNTY, NORTH CAROLINA, v. A. W. KING, SHERIFF OF PENDER COUNTY, AND THE NATIONAL SURETY COMPANY OF NEW YORK: J. E. HENRY, N. H. LOCKHART, JAMES A. DEW, J. M. MARSHALL, R. E. MOORE, C. D. McGOWAN, R. L. BATTS AND MRS. LORENA B. HUMPHREY, ADMINISTRATRIX OF J. T. BLAND, DECEASED.

(Filed 10 April, 1929.)

1. Principal and Surety B a—Separate cause of action exists on each bond of sheriff given for successive terms.

The various bonds separately required to be given by the sheriff for the proper accounting for and paying of moneys received by him as sheriff by the provisions of C. S., 3930, impose a distinct liability on the sureties on each bond separately for the terms of office for which given, and where one is given by the same surety for the same sheriff for more than one successive term, the giving of the bond for the succeeding term does not discharge the bond previously given nor release the surety from liability thereon, and a separate cause of action lies against the surety on the bond for each term.

2. Principal and Surety B c—Liability of surety on sheriff's bond unaffected by statutes changing salary.

The liability of a surety on a sheriff's bond, given under the provisions of C. S., 3930, is not affected by the fact that the sheriff, pending the life of the bond, has been put upon a salary instead of a fee basis, or the amount of his salary has been changed under the authority of a statute.

3. Principal and Surety B c—Liability of surety on sheriff's bond when he is appointed by county commissioners.

Where under the provisions of C. S., 3932, the board of county commissioners has declared the office of sheriff of that county vacant for his failure to give the bonds required by C. S., 3930, and has appointed another who likewise failed to give the bonds, and has again appointed the former sheriff, who gives the necessary bonds and then qualifies, his

term is by virtue of his appointment by the board of county commissioners, and the liability of the sureties on his official bonds commences from the time of his appointment.

4. Pleadings D c—Demurrer for misjoinder of parties and causes in action against sheriff and his sureties on bonds for successive terms.

Where a sheriff has been elected for successive terms of office, and appointed for a third term by the county commissioners after the office for his third term had been declared vacant, an action against him and the sureties on his bonds given under the provisions of C. S., 3930, for defalcation during the successive terms is a misjoinder of parties and causes of action, and a demurrer thereto is good.

APPEAL by plaintiff from *Harris, J.*, at January Term, 1929, of PENDER. Affirmed.

Facts alleged in complaint: (1) A. W. King was duly elected sheriff of Pender County, at the general election of 1922, for a term of two years, and filed an "execution" bond, as required by law, in the sum of $5,000. He also filed a bond with the National Surety Company of New York, defendant, as surety, in the sum of $35,000, as required by law, for the collection and accounting for all county and other local taxes, and entered upon the discharge of his duties on the first Monday in January, 1923. (2) He was reëlected at the general election in 1924, for a term of two years and filed an "execution" bond, as required by law, in the sum of $5,000, and also filed a bond with the National Surety Company, defendant, as surety, in the sum of $35,000, as required by law, for the collection and accounting for all county and other local taxes, and entered upon the discharge of his duties, on the first Monday in December, 1924. (3) He was reëlected at the general election in 1926, and held over until 3 January, 1927, when the board of county commissioners of Pender County declared the sheriff's office vacant and appointed another sheriff, on account of the said King having failed to account for and settle the taxes for the year 1925, and file bond as required by law. On 4 April, 1927, the said board of county commissioners of Pender County declared the office vacant on account of the appointee of the board having failed to file bond as required by law and appointed defendant, King, sheriff, who filed an "execution" bond in the sum of $5,000, as required by law, with the National Surety Company of New York, as surety; also a bond for the faithful collection and accounting for all county and other local taxes, as required by law, in the sum of $30,000, with J. T. Bland, Sr., J. E. Henry, N. H. Lockhart, James A. Dew, J. M. Marshall, R. E. Moore, C. D. McGowan, and R. L. Batts. All of the bonds are recorded in the office of the register of deeds of Pender County. That one of the duties of the office of the sheriff of Pender County is to collect

the taxes, and the said defendant has been the only tax collector for Pender County since he was first inducted into office on the first Monday in January, 1923, and continued to collect taxes from 3 January, 1927, to 4 April, 1927, and thereafter.

The following taxes, etc., collected by defendant King, sheriff, have not been accounted for by him:

Garysburg Mfg. Co., 1926 taxes, collected 4-30-27	$5,676.57
P. S. Carr, 1926 taxes	158.10
D. D. Sparkman, Jr., 1926 taxes, collected 6-29-27	184.74
Sheriff's fees	375.65
	$6,395.06

$17.00 from Ransom Tate, col., on 1923 taxes in Union Township, paid 31 December, 1923.

$24.73 from C. B. Bordeaux for 1922 taxes, in Canetuck Township, paid 19 April, 1924.

$93.00 from G. Kornegay for 1923 taxes, in Burgaw Township, paid 14 October, 1924.

That the plaintiff has made demand on defendant, A. W. King, for settlement of said amounts, and he has failed and refused to settle same. That J. T. Bland, Sr., is dead and Lorena B. Humphrey has been duly appointed administratrix of his estate.

The following demurrer was filed by defendants: "1. There is a misjoinder of causes of action, and also a misjoinder of parties defendant, for that the complaint alleges that the defendant, A. W. King, was sheriff of Pender County for three separate terms of two years each, that the National Surety Company was on his bond as tax collector for two terms, and the other defendants were sureties on his tax bond for the term beginning 4 April, 1927, and ending the first Monday in December, 1928, and that the individual defendants, sureties on said last mentioned bond, are not in any way liable for, or interested in, any alleged shortage for any time prior to the date of the bond, and for that the National Surety Company is not interested or suable for any alleged shortage or failure to account on the part of the sheriff for funds that came into his hands during his last term of office. (2) For that there is a misjoinder of causes of action, for that causes of action are alleged growing out of the first term of office and of the second term of office, and the third term of office of Sheriff King, whereas, the law requires settlement to be made with the sheriff every year, and that certainly the alleged shortages during each term of office would be necessarily a separate cause of action. (3) There is a defect as to

parties defendant, in that the National Surety Company is not interested in the causes of action against the individual defendants other than A. W. King, and said individual defendants are not in any way interested in the causes of action alleged against the National Surety Company and A. W. King.

The court below sustained the demurrer. The plaintiff assigned error and appealed to the Supreme Court.

C. E. McCullen for plaintiff.
Isaac C. Wright and David H. Bland for defendants.

CLARKSON, J. C. S., 3930, is as follows: "*Sheriff to execute three bonds.* The sheriff shall execute three several bonds, payable to the State of North Carolina, as follows: One conditioned for the collection and settlement of State taxes according to law, a sum not exceeding the amount of the taxes assessed upon the county for State purposes in the previous year. One conditioned for the collection and settlement of county and other local taxes according to law, a sum not exceeding the amount of such county and other local taxes for the previous year. The third bond, for the due execution and return of process, payment of fees and moneys collected and the faithful execution of his office as sheriff, shall be not more than five thousand dollars, in the discretion of the board of county commissioners, and shall be conditioned as follows:

"The condition of the above obligation is such that, whereas the above bounden ..... is elected and appointed sheriff of ..... County; if, therefore, he shall well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all fees and sum of money by him received or levied by virtue of any process into the proper office into which the same, by the tenor thereof, ought to be paid, or to the person to whom the same shall be due, his executors, administrators, attorneys, or agents; and in all other things well and truly and faithfully execute the said office of sheriff his continuance therein, then the above obligation to be void; otherwise to remain in full force and effect." The State now assesses no tax on land in a county for State purposes. In the present action the second and third bonds were given. C. S., 3931, county commissioners to take and approve bonds. C. S., 3932, duty of county commissioners when bond insufficient, etc.

"After a thorough examination of the authorities this Court held in *S. v. Martin,* 188 N. C., 119, that each bond of a clerk is liable only for defalcations occurring during the term for which the bond is given, even though the principal and surety be the same for all terms. *Stacy, J.,*

writing for the Court, said: 'Each term, like every tub of Macklinian allusion, must stand on its own bottom.'" *Gilmore v. Walker*, 195 N. C., at p. 464. *Jacksonville v. Bryan*, 196 N. C., 721.

It is settled in this jurisdiction that when the term of office is more than one year official bonds given by an officer during any one term of office are cumulative, and the new bond does not discharge the old one. *S. v. Martin, supra; Oats v. Bryan*, 14 N. C., 451; *Bell v. Jasper*, 37 N. C., 597; *Moore v. Boudinot*, 64 N. C., 190; *Pickens v. Miller*, 83 N. C., 544; *Fidelity, etc., Co. v. Fleming*, 132 N. C., 332.

The National Surety Company of New York, as surety, was liable for the alleged defalcation of Sheriff King for (1) The first term of two years—King qualified the first Monday in January, 1923 (should have qualified first Monday in December); (2) Second term of two years qualified first Monday in December, 1924. King was reëlected in general election of 1926, and held over until 3 January, 1927, and on account of not making settlement and filing bond the office was declared vacant. C. S., 3926, 3931. *Lenoir County v. Taylor*, 190 N. C., 336. The appointee of the board of county commissioners of Pender County, having failed to give bond, the office again was declared vacant and King appointed sheriff. He filed, on 4 April, 1927, an "execution" bond in the sum of $5,000, with National Surety Company of New York, as surety, and for the faithful collection and accounting for all county and local taxes as required by law a bond in the sum of $30,000, with J. T. Bland, Sr., and others as sureties.

All the taxes and fees unaccounted for by King, sheriff, appear from the record were collected in the years that the National Surety Company of New York was on his bond, except taxes $5,676.57, collected 30 April, 1927, and $184.74 collected 29 June, 1927.

The third term King held the office of sheriff, not by virtue of his election, as he failed to comply with the law and was disqualified, another was appointed and he did not qualify, and King was then appointed sheriff by the board of county commissioners of Pender County, and held the office by virtue of the statute.

It is said in *Lenoir County v. Taylor, supra:* "Upon the failure of a sheriff-elect to give bonds required by law, the board has power to elect some suitable person in the county as sheriff for the unexpired term." C. S., 3932.

The board it is presumed elected a suitable person sheriff, who did not qualify and his office was declared vacant, and King was appointed sheriff and qualified and gave the bonds required. He held by virtue of his appointment, not his election. Chapter 482, Public-Local Laws 1921, applicable to Pender County, put the sheriff and other officers on a salary basis. Section 7, is as follows: "The officers hereinbefore

mentioned shall faithfully perform all the duties of their several offices imposed upon them by law, and shall receive no other compensation or allowance whatsoever for any extra or additional service rendered to the county or State governmental agencies, and they shall be liable to all the pains and penalties now or hereafter provided for failure to perform the duties of their several offices." This act merely placed the sheriff on a salary instead of a commission basis.

In *Commissioners v. Bain,* 173 N. C., at p. 378-9, it is said: "It has been the custom in this State for the retiring sheriff to collect the taxes due on tax lists already in his hands, and this custom has the sanction of numerous judicial decisions: In *Fitts v. Hawkins,* 9 N. C., 396, *Taylor, C. J.,* says: 'A sheriff who is elected for the first time has nothing to do with the list of the preceding year before he was in office. The clerk has delivered them to his predecessor, who alone has authority to collect under them; and the law makes no provision for setting them over to the new sheriff, as in case of prisoners and writs. If he receive the lists and collect the taxes, it must be in consequence of some private arrangement between the predecessor and himself, which cannot undoubtedly bind his sureties in this form of proceeding, for if it could they would be responsible for two years instead of one (at that time sheriff's term was one year). If the sheriff is reëlected he is then bound to collect the taxes of the preceding year; but this is by virtue of his former appointment, and under the responsibility of his old bond.'" See cases cited in the opinion.

The appointment of King as sheriff by the board of commissioners of Pender County on 4 April, 1927, made him a new sheriff, he did not comply with Public-Local Laws 1927, chapter 123. Section 10 of the act, relative to other things, also increased the sheriff's salary to $4,800 per annum.

It may be noted the decisions on the questions involved are often governed by local as well as general statutes.

The question involved: Can *one action,* under the facts and circumstances of this case, be brought against King, for alleged defalcations, and the National Surety Company of New York, his surety, on the bonds for the first two terms mentioned and on the "execution" bond for appointment term and against J. T. Bland, Sr. (his administratrix) and others, his sureties, for the term which he was appointed and not elected? We think not.

In *Bank v. Angelo,* 193 N. C., at p. 578, citing numerous authorities, it is said: "It is well settled that where there is a misjoinder, both of parties and causes of action, a demurrer is interposed upon this ground, the demurrer should be sustained and the action dismissed."

King and his sureties all demurred to the complaint. The demurrer must be sustained. *Blackmore v. Winders,* 144 N. C., 212, is not applicable from the facts on this record.

Is Sheriff King's "execution" bond liable for fees which it is alleged that he collected as sheriff when he was placed on a salary basis? We think so.

The third bond and the form set forth by the statute requires, in clear language, payment of fees and money collected. The bond required shall not be more than $5,000. C. S., 3930, *supra.* Under Public-Local Laws 1921, ch. 482, sec. 7, *supra,* the salary basis does not affect the provisions of the bond. The statute, section 7, says "Shall be liable to all the pains and penalties now or hereafter provided for failure to perform the duties of their several offices." To the same effect is section 10 of chapter 123, Public-Local Laws 1927.

As to the second ground of demurrer, as to misjoinder of several causes of action, see C. S., 507, 516; *S. v. McCanless,* 193 N. C., 200.

As to the third ground of demurrer, as to defect of parties, see N. C. Code 1927, annotated; C. S., 511. We think it unnecessary to consider the second and third grounds of demurrer.

The demurrer is sustained as to all the defendants. For the reasons stated, the judgment below is

Affirmed.

WINDSOR REDRYING COMPANY BY AND THROUGH ITS RECEIVERS, M. B. GILLAM AND J. H. BONNER, BY THE COURT REGULARLY APPOINTED, *v.* W. B. GURLEY, J. C. BELL, J. L. PRITCHARD, J. T. STOKES AND W. L. POWELL, TRADING AS POWELL & STOKES; H. M. BELL, P. R. GILLAM AND THOMAS GILLAM, JR., EXECUTORS OF THOMAS GILLAM; E. L. GATLING, MARY G. FREEMAN, ADMINISTRATRIX OF J. W. FREEMAN; J. B. GILLAM, C. W. SPRUILL, W. S. PRITCHARD, B. GOLDSTEIN, P. R. GILLAM, ADMINISTRATOR OF FRANCIS GILLAM; P. R. GILLAM, ASA B. PHELPS BY S. E. PHELPS, RECEIVER, AND J. E. WHITE.

(Filed 10 April, 1929.)

1. Limitation of Actions A b—Construction of statutes in action for amount unpaid on capital stock of corporation.

The application of the three-year statute of limitations, C. S., 441(1), will be construed in regard to the unpaid balance due a corporation by a subscriber to its capital stock, *in pari materia* with C. S., 1165, authorizing a call on them for assessments by the directors of the corporation from time to time, and C. S., 1160, creating an obligation on each stockholder, enforcible by the receiver, for the amount due on his subscription necessary to satisfy the creditors of the corporation.

2. Limitation of Actions A b—Limitation of action for amount unpaid on capital stock of insolvent corporation.

While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. C. S., 441(1), 1160, 1165.

APPEAL by plaintiffs from *Midyette, J.*, and a jury, at August Term, 1928, of BERTIE. Reversed.

A corporation, known as the Windsor Redrying Company, was organized under the laws of North Carolina, on 25 February, 1920, to further the tobacco market in the town of Windsor, N. C., Bertie County, and that section of the State, by redrying tobacco. Numerous persons subscribed for stock in the corporation. Some of the defendant subscribers to stock have paid part of their subscription and the balance is unpaid. The main defense relied on by the defendants was the statute of limitations, which each plead.

Four calls of 25 per cent for payment of subscriptions to stock were made by order of the directors and stockholders of the corporation, on each of the defendants who are being sued, between 1 March and 1 September, 1920.

H. M. Bell, Secretary of the corporation, testified: "Q. In what installments, if any, were you directed and authorized to make the calls? Ans. Twenty-five per cent. Q. In pursuance of that order by the directors did you make all the calls? Ans. Made four calls. Q. Between what times, as near as you can tell, did you make them? Ans. Between the first of March and the first of September, 1920. Q. Did you make those calls on each of these defendants who are being sued? Ans. Yes, sir."

The company has become hopelessly insolvent. A judgment had been taken on 5 November, 1923, against the corporation by W. T. Tadlock for $2,705.65, interest and costs. In an action brought by W. B. Gurley against Windsor Redrying Company, M. B. Gillam and J. H. Bonner were appointed temporary receivers on 17 January, 1924, and made permanent receivers on 6 February, 1924, to wind up the affairs of the corporation. In November, 1924, W. T. Tadlock filed petition for permission to be made a party plaintiff, in order to require the suits to be brought against stockholders who had not paid their subscriptions. Suit was ordered to be brought against delinquent stockholders by order of the court on 30 January, 1926. At February Term, 1926, the court appointed H. G. Harrington referee, and giving him instructions to ascer-

tain who the stockholders were and the names and amounts of those who had not paid their subscriptions for stock and make report to the court. In the present action no minute book of the transactions of the corporation was kept. The minutes were kept by the Secretary "on a little piece of paper." The original subscription list was lost by the president, showing the names of the incorporators and amounts subscribed. One hundred dollars reward was offered to any one who "could find it." Mr. Harrington's report was filed 20 June, 1927. Demand on the defendants, stockholders, for their unpaid subscriptions were made shortly after 20 June, 1927, by plaintiffs, receivers. This was the first and only effort made by the receivers to collect the unpaid subscriptions. The order of court was made August Term, 1927, directing the receivers to bring this action. This action was instituted on 3 February, 1928, to obtain necessary funds from the delinquent subscribers to stock to pay the outstanding indebtedness of the insolvent corporation.

It was admitted by all defendants that at the time the receivers were appointed the indebtedness of the corporation to creditors was in excess of its available assets, plus the amount of unpaid subscriptions to stock now being sued for.

The issue submitted to the jury was as follows: "Is plaintiff's cause of action against the defendants, and each of them, barred by the statute of limitations, as alleged in the answer?"

The court charged the jury, "If you believe the evidence and find the facts to be true as sworn to by the witnesses in this case to answer the issue Yes." To the charge plaintiffs excepted and assigned error. In apt time the plaintiffs asked the court to charge the jury, "that if they believe all of the evidence and find the facts to be as testified to by the witnesses to answer the issue No." This the court refused to charge, and to such refusal the plaintiffs excepted and assigned error.

Winston & Mathews for plaintiffs.

J. B. Davenport, J. A. Pritchett and Stephen C. Bragaw for defendants.

CLARKSON, J. The only question we think necessary to consider: Is this action barred by the statute of limitations? We think not.

The defendants plead the three-year statute of limitations, C. S. 441(1): "Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections."

This is a general statute and it must be construed in *pari materia* with the statutes relating to corporations.

Section 1165, C. S., in part, is as follows: "The directors of a corporation may, from time to time, make assessments upon the shares of stock

subscribed for, not exceeding, in the whole, the par value thereof, remaining unpaid; and the sums assessed shall be paid to the treasurer at such times and by such installments as the directors direct," etc., and provides for the sale of the share or shares of delinquent subscribers after notice. This provision is substantially sections 23, 24 and 25, Public Laws 1901, chapter 2, entitled "An act to revise the corporation law of North Carolina." It will be noted that this says the *directors of a corporation.*

C. S., 1160, is as follows: "Where the capital stock of a corporation *has not been paid in* and the *assets are insufficient* to *satisfy its debts and obligations,* each stockholder *is bound to pay* on each share held by him *the sum necessary to complete the amount of such share,* as fixed by the charter, or such proportion of that sum as is required to satisfy such debts and obligations," etc. This is substantially the same as Public Laws 1901, ch. 2, sec. 22.

R. R. v. Avery, 64 N. C., 491, is cited by defendants as authority on the plea of the statute of limitations. The gist of that case is as follows: "Where the charter of a railroad company provided, that upon the failure by subscribers to its stock to pay installments as called for, 'the directors may sell at public auction,' etc., such stock, and, in case enough were not produced thereby to satisfy the subscription, might sue for and recover the balance from such subscriber: *Held,* that upon a failure by a subscriber to pay installments as called for, it was optional with the company to bring suit against him without making sale as above or, to sell, and sue for the balance. Also that the plea of the statute of limitations barred a recovery of so much of such subscription as was included in calls made more than three years before suit was commenced." In that case the Court said, at p. 493: "Of course then, the statute commenced to run when the cause of action accrued, to wit, as to each installment, when it became due by the call of the company. 3 Parsons on Contr., 93. If a bill or note be payable by installments, the statute begins to run from the date of each installment respectively. *Gary v. Pindar,* 2 B. & P., 427."

It will be noted that the charter of the Western Railroad Company in the above case made provisions for calls similar to C. S., 1165, by its directors. That action was brought by the *corporation* against the *subscriber.* Here C. S., 1160, *supra,* makes provision for the *payment of debts* of the corporation by the *subscribers* of unpaid capital stock.

In the case of *Cooper v. Security Co.,* 127 N. C., 219, this Court said at pp. 220-1: "The opinion of the Court in *Hatch v. Dana,* 101 U. S., 205, contains a full discussion of this question, and is a direct decision on the point now before us. The syllabus of the decision, which is supported by the opinion, is in these words: 'Creditors of an incorporated

company who have exhausted their remedy at law can, in order to obtain satisfaction of their judgment, proceed in equity against a stockholder to enforce his liability to the company for the amount remaining due upon his subscription, although no account is taken of the other indebtedness of the company, and the other stockholders are not made parties, although by the terms of their subscription, the stockholders were to pay for their shares 'as called for' by the company, and the latter had not called for more than thirty per cent of the subscriptions. . . . (p. 222). The defendant company is the agent of the defendant stockholder. We will refer to *Hawkins v. Glenn,* 131 U. S., 319, in support of his Honor's view on the statute of limitations, where it is held that the statute does not run, as against subscriptions to stock payable as called for, and the principal cannot object, and say that his agent failed in his duty, and thereby defeat creditors."

It is contended by defendant that *Hawkins v. Glenn* does not bear out the construction given to it by this Court in the *Cooper case* and refers to U. S. Supreme Court Reports Digest, Vol. 6, Limitation of Actions, but under (b) this is said: "The statute of limitations does not commence to run in favor of a stockholder of a company sued for an installment due on his stock, until a *formal call or assessment has been made by the company or by an order of the Court.* (Italics ours.) *Hawkins v. Glenn,* 131 U. S., 319, 9 Sup. Ct. Rep., 739; (Anno.), 33; 184; *Glenn v. Liggett,* 135 U. S., 533, 10 Sup. Ct. Rep., 867, 34, 262; *Glenn v. Marbury,* 145 U. S., 499, 12 Sup. Ct. Rep., 914, 36, 790."

Hereafter we will draw the distinction as to the application of when the statute of limitation commences to run as between the corporation and its stockholders and the creditors and the stockholders for unpaid subscriptions to stock under our statute. The *first* when a formal call or assessment has been made by the corporation or its stockholders; *second,* by the receiver representing the creditors by an order of the court.

In *Glenn v. Marbury, supra,* at p. 507, it is said: "In conformity with *Hawkins v. Glenn,* and *Glenn v. Liggett,* we hold that limitation commenced to run, in favor of the present defendant, only from the order in the Virginia court making the call or assessment on subscribers of stock. *Glenn v. Williams,* 60 Md., 93, 122, 123."

In *Harrigan v. Bergdoll,* 270 U. S., at p. 564, this is said: "The nature, the extent, and the conditions of the liability of a stockholder on account of stock not full paid depend primarily upon the law of the State or county by which the corporation was created. *Glenn v. Liggett,* 135 U. S., 533, 548, 34 L. Ed., 262, 268, 10 Sup. Ct. Rep., 867. Compare *Benedict v. Ratner,* 268 U. S., 353, 359, 69 L. Ed., 991, 997, 45 Sup. Ct. Rep., 566. That law determines whether the liability is to the corporation or is to creditors." *Bronson v. Schneider,* 49 Ohio, 438.

The *Cooper case* was decided 27 November, 1900. In 1901, C. S., 1160, *supra*, was enacted, following the trend in the *Cooper case*, looking towards protecting creditors, and provided that where the capital stock of a corporation had not been paid in and the assets are insufficient to satisfy its debts and obligations, each stockholder *is bound to pay on each share held by him*, etc., up to the amount of their subscription to pay the debts. The directors and stockholders in the present case directed the calls which was done, but did not follow it up and enforce payment by action. If this had been done, assets may have been realized sufficient to pay the creditors in whole or in part.

It is well settled in this jurisdiction and generally in the courts of the States of this Union; that they go very far to protect corporate creditors and it is the settled doctrine that capital stock, and especially unpaid subscriptions to the capital stock constitute a trust fund for the benefit of the creditors of the corporation. Upon the faith of the capital stock, composed of paid and unpaid subscriptions, credit is given to the corporation and the public dealing with the corporation has a right to assume that the capital stock either in money or money's worth will be paid in to pay the corporation creditors. *Marshall Foundry v. Killian*, 99 N. C., 501; *Hill v. Lumber Co.*, 113 N. C., 173; *Bank v. Cotton Mills*, 115 N. C., 507; *Holshouser v. Copper Co.*, 138 N. C., 248; *Silk Co. v. Spinning Co.*, 154 N. C., 421; *Drug Co. v. Drug Co.*, 173 N. C., 502; *Bassett v. Cooperage Co.*, 188 N. C., 511. N. C. Code, 1927, Anno., secs. 1156, 7, 8.

The unpaid stock subscriptions constitute a trust fund for the benefit of creditors. The stockholders select the directors of the corporation, who are their agents and operate for the stockholders the business of the corporation, for which it was organized. A call by the directors of the corporation, duly authorized, upon the stockholders for unpaid subscriptions to stock, so far as the rights of the stockholders in the corporation are concerned, the statute of limitations would begin to run from the time demand was made as to them, but not as to creditors. The stockholders and directors are trustees for the creditors. The demand by the directors of the corporation, an agency of the stockholders, would bind the stockholders so far as their rights were concerned, in regard to the statute of limitations. The directors and stockholders being trustees for the creditors, a demand by the receivers of the insolvent corporation representing the creditors for the unpaid subscriptions, the statute of limitations would begin the run when the order of the court was made. This course is logical and orderly, and, whatever may be the decisions in other courts, which we have examined with care, we think this is consonant with justice and good faith to those who give credit to a corporation relying on the capital stock to be paid. In reaching this conclusion,

we give force to C. S., 1160, passed for the protection of creditors. We think that the statute of limitations begins to run when the receiver appointed to wind up the affairs of an insolvent corporation has been ordered by the court to make a call and has made a demand on the stockholders who had not paid their subscriptions. In the present action this demand was made by order of the court by the receivers shortly after 20 June, 1927, and the suit commenced on 3 February, 1928, and, therefore, this action is not barred by the statute of limitations. For the reasons given, the judgment of the court below is

Reversed.

STATE v. JETHRO VICKERS.

(Filed 10 April, 1929.)

1. Husband and Wife A d—Judgment for support of abandoned wife sufficiently definite.

A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms.

2. Criminal Law L e—Refusal to hear evidence in executing suspended sentence within discretion of court and not reviewable.

The refusal of the judge to hear evidence in executing judgment under a suspended sentence is a matter within his legal discretion and is not reviewable on appeal.

APPEAL by defendant from *Devin, J.*, at December Term, 1928, of DURHAM. Affirmed.

At the trial of this action in the Superior Court of Durham County, May Term, 1928, defendant pleaded guilty to both counts in the indictment. From the judgment on these pleas, defendant appealed to the Supreme Court, contending that the judgment was void for that it was indefinite, with respect to the terms of payments to be made by him for the support of his wife and children.

The appeal was heard at the Fall Term, 1928, of the Supreme Court, 196 N. C., 239, 145 S. E., 175. The action was remanded to the end that the terms of the order, made pursuant to C. S., 4449, be more definitely prescribed and set forth in the judgment.

From judgment, in accordance with the opinion of the Supreme Court, defendant again appealed to the Supreme Court.

STATE *v.* VICKERS.

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

J. W. Barbee and Victor S. Bryant for defendant.

PER CURIAM. The terms of the judgment from which the defendant in this action has again appealed to this Court, are definite. It is adjudged that defendant be confined in the common jail of Durham County, for one year upon each count in the indictment to which he has pleaded guilty, the term under the judgment on the second count to begin at the expiration of the term under the judgment on the first count. During said confinement, defendant is assigned to work on the public roads of Durham County. After such confinement, defendant will be entitled to his discharge. The judgment will then be fully satisfied.

It is provided, however, that the judgment shall be suspended upon the conditions specifically set out therein. These terms are reasonable, and not oppressive. They may be accepted or not by defendant, as he may determine. By the conditions imposed for the suspension of the judgment, defendant is required only to discharge the duty which under the law he owes to his wife and children. If he discharges this duty, the judgment will not be executed; if he fails to discharge this duty, he must abide the judgment.

The amounts to be paid monthly by defendant for the support of his wife and children were agreed to by defendant and counsel for his wife and children. He is required to pay to his wife the sum of $30.00 on the tenth day of each month, for the period of four years, or for such part of said four years as she shall remain his lawful wife. He is further required to pay the sum of $15.00 on the 10th day of each month for the support and maintenance of each of his children, until such child shall arrive at the age of 18. In the event that defendant accepts the conditions of said judgment, and undertakes to pay said sums for the support of his wife and children, he is required to file with the clerk of the court a bond in the penal sum of $1,000, conditioned for the payment of the sums specified. The judgment, in the event he files said bond is suspended; upon default in the conditions of the bond, its penal sum shall be paid to the clerk to be applied by him to the payment of the sums required of defendant for the support of his wife and children, respectively.

There was no error in the refusal of the court to hear evidence tendered by defendant upon the motion of the solicitor for the State for judgment. This was in the discretion of the court, and his action is not reviewable by this Court. The judgment is

Affirmed.

LESS LIPSCOMB v. GEO. H. COX AND H. C. PERKINS, TRADING AS COX & PERKINS.

(Filed 10 April, 1929.)

1. Master and Servant C g—Contributory negligence of servant bars his recovery.

A servant's action against the master for damages for negligently injuring him while engaged in blasting rock in a quarry is barred by an adverse verdict on the issue of contributory negligence.

2. Negligence C d—Burden of proving contributory negligence.

The burden of proof is on the defendant on the issue of contributory negligence in a personal injury action.

3. Appeal and Error J e—Error must be prejudicial to appellant to entitle him to a new trial.

The appellant is not entitled to a new trial for error of law relating to an issue answered by the jury in his favor.

4. Trial E c—Charge sufficient without charging alternate propositions of law.

Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff, under the provisions of C. S., 564, requiring him to charge upon the principles of law arising from the evidence in the case.

APPEAL by plaintiff from *Moore, J.*, at February Term, 1928, of FORSYTH. Affirmed.

This action was begun and tried in the Forsyth County Court, by *Efird, J.*, and a jury. The issues were answered as follows:

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

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover of defendants? Answer: ....."

From judgment of the Forsyth County Court on the foregoing verdict, plaintiff appealed to the Superior Court of Forsyth County, assigning errors at the trial.

From judgment of the Superior Court, overruling each and all of plaintiff's assignments of error on his appeal to said court and affirming the judgment of the Forsyth County Court, plaintiff appealed to the Supreme Court.

Archie Elledge and Parrish & Deal for plaintiff.

Manly, Hendren & Womble for defendants.

PER CURIAM. During the month of August, 1926, plaintiff was an employee of defendants. Defendants were then engaged in the operation of a rock quarry in Forsyth County. This action is for the recovery of damages for personal injuries, resulting from an explosion of dynamite, which plaintiff, as an employee of defendants, was using in blasting rocks, at defendants' quarry.

The jury has found that plaintiff was injured by the negligence of defendants, as alleged in the complaint, but that plaintiff, by his own negligence, contributed to his injuries, as alleged in the answer. Plaintiff's recovery in this action is, therefore, barred by his contributory negligence. He contends, however, that he is entitled to a new trial, because of errors at the trial in the Forsyth County Court, which he duly assigned on his appeal to the Superior Court of Forsyth County.

On his appeal to this Court, plaintiff contends that there was error in the judgment of the Superior Court, overruling his assignments of error, and affirming the judgment of the county court. This contention is not sustained. There was no error in overruling plaintiff's assignments of error based on exceptions at the trial to the exclusion of testimony offered by plaintiff as evidence pertinent to the first issue. The answer of the jury to this issue was favorable to plaintiff. Nor was there error in the instructions of the court to the jury, with respect to the second issue. It is not contended that the instructions as given were erroneous; plaintiff contends that there was error in the failure of the court to instruct the jury in accordance with the requirements of the statute. C. S., 564. The charge of the court to the jury is set out in the case on appeal. It is full, clear and correct. The principle upon which a new trial was ordered by this Court in *Mehaffey v. Appalachian Const. Co.*, 194 N. C., 717, 140 S. E., 716, is not applicable in this case. The court instructed the jury that the burden on the second issue was on defendants; and that only in the event the jury should find from the evidence the facts to be as contended by defendants, and as stated specifically by the court, could the second issue be answered, Yes. The jury could not have failed to understand that if they did not so find the facts, they should answer the issue, No. In this case, the court was not required to instruct the jury that upon their failure to find facts as detailed in the instruction, they should answer the issue, No. A general instruction was sufficient. The judgment of the Superior Court is

Affirmed.

W. P. CONNOR v. FLEMING BROTHERS LUMBER & MANUFACTURING COMPANY, INC., AND GEO. W. FLEMING.

(Filed 10 April, 1929.)

1. Trial G b—Verdict in this case held not inconsistent.

A verdict in an action against a corporation and individually against its president that the defendant corporation was answerable in damages for breach of plaintiff's contract of employment and that the plaintiff's mortgage for moneys loaned by the individual defendant was subject to be foreclosed is not objectionable as inconsistent.

2. Evidence D a—Evidence not related to matters in controversy properly excluded.

Letters that do not relate to the matters in controversy are properly excluded as evidence.

3. Same—Conversation that is evidence of indebtedness competent in foreclosure action.

Where the plaintiff seeks to enjoin the foreclosure of a mortgage, a conversation between himself and defendant that is evidence of the indebtedness that plaintiff denies, is competent.

4. New Trial B g—New trial will not be granted where newly discovered evidence would not tend to change result.

A motion for a new trial will not be granted where the newly discovered evidence is not material to the answer to the issue and its consideration would not tend to vary the result.

APPEAL by plaintiff from *Sinclair, J.*, at June Term, 1928, of NEW HANOVER. No error.

Action to recover of defendant corporation damages for the wrongful discharge of plaintiff from its employment, in breach of the contract of said employment, and to restrain the foreclosure of a mortgage executed by plaintiff to the defendant, Geo. W. Fleming.

Plaintiff alleges that the mortgage is void, for that he was not indebted to the said Geo. W. Fleming, as recited therein, at the date of its execution; and that the execution of said mortgage and of the notes secured thereby were procured by the fraud of the said Geo. W. Fleming.

From judgment on the verdict, plaintiff appealed to the Supreme Court.

Isaac C. Wright for plaintiff.
Butler & Butler for defendants.

PER CURIAM. The jury, by its answer to the first issue, found that the defendant corporation did not enter into the contract with plaintiff, with respect to the terms of his employment, as alleged in the complaint.

It found, however, by its answer to the third issue, that plaintiff was wrongfully discharged by said defendant from its employment and assessed his damages at $200.00. The defendant corporation did not except to or appeal from the judgment that plaintiff recover of it the sum of $200.00. The jury, evidently found that plaintiff was employed by said defendant, by the year and not by the month, at the date of his discharge, as alleged by said defendant. Upon these findings of fact, the verdict is not inconsistent.

Plaintiff was employed by Geo. W. Fleming, acting as president of the defendant corporation. Upon the allegations of the complaint, and the evidence offered at the trial, the effect of the jury's answer to the first issue, was that the jury found that said Geo. W. Fleming did not enter into the contract with plaintiff, as alleged in the complaint, either officially or individually, and that, therefore, the money advanced for the purchase of the house and lot in Wilmington, N. C., for plaintiff was advanced by him, out of his own funds, and not out of the funds of the corporation as a loan to plaintiff. Plaintiff is, therefore, indebted to the defendant, Geo. W. Fleming, as found by the jury, and not to the corporation. This indebtedness was evidenced by plaintiff's notes, payable to the order of Geo. W. Fleming, and secured by mortgage to him. The notes are now past due and unpaid. There is no error in the judgment that defendant, Geo. W. Fleming recover of plaintiff the amount due on the notes, or in the decree for the foreclosure of the mortgage. There was no evidence to sustain the allegation in the complaint that the execution of the notes and mortgage was procured by fraud.

It was not error to exclude the letter written by a representative of the corporation to plaintiff, in 1921, offered in evidence by plaintiff. This letter had no probative value as to the matters in controversy. It tended only to show that plaintiff was then in the employment of the corporation, and that his services were satisfactory. These matters were not in controversy. They were admitted.

Nor was it error to overrule plaintiff's objection to the testimony of Geo. W. Fleming, with respect to a conversation between him and plaintiff. This testimony did not tend to show an offer of compromise. It tended to show plaintiff's willingness to surrender the house and lot to Geo. W. Fleming, the mortgagee. It was competent as evidence of the fact of plaintiff's indebtedness to Geo. W. Fleming, as evidenced by the notes and mortgage, and contradicted the testimony of plaintiff with respect to said notes and mortgage. *In re Clodfelter's Will,* 171 N. C., 528, 88 S. E., 625; *Baynes v. Harris,* 160 N. C., 307, 76 S. E., 230; *Daniel v. Wilkerson,* 35 N. C., 329.

Plaintiff's motion for a new trial, upon the ground of newly discovered evidence, first made in this Court, is denied. It is immaterial whether Geo. W. Fleming advanced the money for the purchase of the house and lot for plaintiff by his individual check or by the check of the corporation of which he is president. The weight of the evidence sustains his contention that the advancement was made by Geo. W. Fleming, individually, and not by him, as president of the corporation, in its behalf. It is doubtful whether, upon a new trial, the newly discovered evidence, would cause a different result from that of which plaintiff now complains. *Alexander v. Richmond Cedar Works,* 177 N. C., 536, 98 S. E., 780. The judgment is affirmed. We find

No error.

THE WAYNE NATIONAL BANK v. THE NATIONAL BANK OF LAGRANGE.

(Filed 17 April, 1929.)

1. Insurance N c—Between mortgagees, one having prior registered mortgage has priority in proceeds under loss payable clause.

Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds to the one having the later registered security. C. S., 6420, 3311.

2. Same—Where there are no priorities proceeds will be divided.

If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims.

APPEAL by plaintiff and defendant from *Grady, J.,* at Chambers, 21 September, 1928. From LENOIR.

Controversy without action upon an agreed statement of facts. (1) The plaintiff is a National Banking Association with its principal office in the city of Goldsboro, and the defendant is a National Banking Association with its principal place of business in the town of LaGrange. (2) At the dates herein set forth J. E. Jones, of LaGrange, was the

owner of three lots of land on which were situated two storage warehouses, which also he owned. (3) On 4 December, 1920, J. E. Jones and his wife executed and delivered to M. T. Dickinson a deed of trust conveying the property above described to secure the payment of a note for $15,000 due 60 days from date, executed by said Jones and made payable to the order of himself and by him negotiated to the plaintiff bank. The deed of trust was recorded 14 December, 1920. (4) On 11 May, 1925, J. E. Jones and wife executed and delivered to the defendant a mortgage on the property above described as security for the payment of a note for $5,000 due 1 October, 1925, executed by said Jones and his wife to said bank. The mortgage, which was duly registered, contains the following clause: "The parties further covenant and agree that they will effectuate and maintain a policy of fire insurance on the buildings situate on said property in the amount of $5,000, for the benefit of the party of the second part, the policy to carry the New York standard loss payable clause duly attached thereto in favor of the party of the second part, with the understanding and agreement that if the party of the first part shall fail to maintain such insurance, then the party of the second part may do so and the premium paid therefor shall be secured by this mortgage, the amount of such premium in that event to be deemed part of the principal indebtedness hereby secured." (5) The plaintiff required said Jones to take out and carry the fire insurance hereinafter mentioned and had in its possession said fire insurance policies. (6) The said J. E. Jones, on 21 December, 1927, effected fire insurance in his name on the storage warehouses on said lands above described in the Globe & Rutgers Fire Insurance Company, to which was attached a New York Standard Mortgage Clause with full contribution, in which, among other things it is provided "loss or damage," if any, under this policy, shall be payable to Wayne National Bank of Goldsboro, N. C., and the National Bank of LaGrange, as mortgagee (or trustee) "as interest may appear." On other dates, but after the execution of said mortgages and prior to the destruction of the buildings by fire as hereinafter set forth, the said J. E. Jones effected fire insurance in his name on the said storage warehouses on said lands above described, in five other fire insurance policies issued by four insurance companies, to each of which was attached the New York standard mortgage clause, payable in the identical manner as in the clause attached to the Globe & Rutgers Fire Insurance policy mentioned hereinbefore in this paragraph, that is, "loss or damage, if any, under this policy, shall be payable to Wayne National Bank of Goldsboro, N. C., and the National Bank of LaGrange, as mortgagee (or trustee) as interest may appear," the aggregate amount of the fire insurance in all six of said policies being $20,000. (7) On 15 January, 1928, the buildings on the

lots above described which were covered by the insurance policies were injured by fire and the loss was adjusted by all the parties claiming an interest therein and there was paid by the insurance companies for the damage to said buildings amounts aggregating $11,250, represented by checks of said company payable to J. E. Jones, the Wayne National Bank, and the National Bank of LaGrange. (8) At the time of the fire there was due the plaintiff the sum of $12,760 with interest from 1 October, 1927, and there was due the defendant the sum of $5,000 with interest from 15 January, 1926.

The plaintiff contends that it is entitled to the entire amount of the moneys paid under said insurance policies, the amount due the plaintiff being in excess of the total amount of the fire insurance collected. It is contended by the defendant that it is entitled to one-half of said moneys if the indebtedness secured to it equals one-half of the said fire insurance fund so collected and now on deposit in the plaintiff bank, but that since the entire indebtedness to the defendant is $5,000 with interest from 15 January, 1926, until paid, which is less than one-half of the fire insurance fund, the defendant is entitled to $5,000 with interest from 15 January, 1926, and that the plaintiff is entitled to the excess of said insurance fund over the amount of $5,000 and interest. It was adjudged at the hearing that the plaintiff pay to the defendants the sum of $5,000 out of the moneys now in hand and that it retain the balance, to be applied by it on the indebtedness due it by said Jones, both sums to be credited on all of his indebtedness which said banks hold against said Jones.

From this judgment the plaintiff appealed, assigning as error the failure to hold that plaintiff is entitled to the whole of the proceeds of said insurance policies, to wit, the sum of $11,250; and the defendant appealed, assigning for error the failure to allow the defendant interest on $5,000 from 15 January, 1926, until paid.

Dickinson & Freeman for plaintiff.
Rouse & Rouse for defendant.

ADAMS, J. The defendant makes the point that it has an equitable claim to the insurance fund, to the extent of the indebtedness due it, by reason of the provision in its mortgage that the mortgagor would insure the buildings for its benefit; and to support this position the defendant cites *Wheeler v. Factors' and Traders' Insurance Co.*, 101 U. S. (11 Otto), 439, 25 L. Ed., 1055.

We understand the principle to be that as a rule a mortgagee has no right to the benefit of a policy taken by the mortgagor, in the absence of an agreement to this effect, unless the policy is assigned to him; but

where the mortgagor is charged with the duty of taking out insurance for the benefit of the mortgagee, as between the parties to the contract the mortgagee is entitled to an equitable lien on the proceeds of the policy obtained by the mortgagor. *Wheeler v. F. & T. Ins. Co., supra; Thomas v. Von Kapff,* 6 Gill & J., 372; *Chipman v. Carroll,* 25 L. R. A., 305, and note; *Fitts v. Grocery Co.,* 144 N. C., 463. In the case last cited it is said that where the mortgagor has covenanted that he will keep the mortgaged premises insured for the benefit of the mortgagee and then effects insurance in his own name, equity will treat the insurance as effected under the agreement and will give the mortgagee his equitable lien. In this connection it may be noted that the case of *Dunlop v. Avery,* 23 Hun., 509, cited in the defendant's brief was reversed by the Court of Appeals of the State of New York. 89 N. Y. (44 Sickels), 592.

But how is the defendant's argument on this point applicable to the facts? The mortgagor agreed to carry insurance for the benefit of the defendant and he was "required" to do the same thing for the benefit of the plaintiff. That the agreement was in writing and the "requirement" in parol does not imply that the duty with which the mortgagor was charged was less solemn or exacting in the one case than in the other. *Swearingen v. Ins. Co.,* 52 S. C., 309. Furthermore, all the policies procured by the mortgagor were intended to provide and did provide for the protection of both parties; they were payable to the plaintiff and to the defendant "as interest may appear." The New York standard mortgage clause was attached to each of the policies and this clause operates as a separate insurance of the mortgagee's interest. *Bank v. Ins. Co.,* 187 N. C., 97; *Everhart v. Ins. Co.,* 194 N. C., 494; *Welch v. Ins. Co.,* 196 N. C., 546.

The defendant insists that it had an insurable interest in the property and that without regard to its right to an equitable lien it was assured as to indemnity by the New York standard mortgage clause. There can be no doubt that the defendant had such insurable interest. Joyce on Insurance (2 ed.), secs. 1036, 1037; *Ins. Co. v. Reid,* 171 N. C., 513. But there is a difference between insurance of the mortgagee's interest and insurance of the mortgagor's interest for the benefit of the mortgagee—a difference, likewise, between the mortgagor's executed and unexecuted covenant to take insurance for the protection of the mortgagee. Joyce on Insurance (2 ed.), sec. 104. In this case the relation of the parties is determinable by the executed contract, the direct question being whether the interest of the parties in the proceeds of the policies is to be adjudicated upon the basis of priority of mortgage liens or upon that of a personal contract without regard to such priority. *Batts v. Sullivan,* 182 N. C., 129, is not authority for the position that liens

upon property should be disregarded, because there the policy taken out by the tenant did not purport to protect the interest of the landlord.

If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies should ordinarily be divided between the mortgagees in proportion to their respective claims; but it is otherwise if there is such priority among the claimants. 26 C. J., 449, sec. 588; *Parker v. Ross,* 11 S. W., 965; in *Lichtstern v. Forehand,* 194 N. W., 421. "The insurance money received by the mortgagee takes the place of the mortgaged property, and the mortgagee would receive it, if the debt was due and unpaid, as he would receive the mortgaged property which it represented to reasonably account for its use." Jones on Mortgages (7 ed.), sec. 410. The plaintiff's mortgage was registered 14 December, 1920; the defendant's was not executed until 11 May, 1925. By virtue of our statute priority is given to the mortgage which was first recorded. C. S., 3311. Our conclusion is that the claim of the Wayne National Bank should first be paid out of the funds derived from the policies of insurance. This conclusion finds support in C. S., 6420, which provides that where by the terms of a fire insurance policy taken out by a mortgagor loss is payable to a mortgagee for his benefit the company shall pay all mortgages in the order of their priority of claim. For this reason it is not necessary to consider the defendant's appeal.

Error.

C. L. ANDERSON, ADMINISTRATOR OF THOMAS G. ANDERSON, DECEASED, v. LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE.

(Filed 17 April, 1929.)

1. Insurance E b—Construction of insurance contract in general.

The rule that a liberal construction of ambiguous language will be given in favor of the insured has no application when the words employed clearly express the terms upon which the policy has been issued.

2. Insurance R a—Construction of policy of accident insurance as to risks covered.

Where a policy of accident insurance indemnifies first against injury to the insured while a pedestrian in connection with being struck down by certain classes of motor-driven vehicles, and second, against accident from a collision while riding in certain classes of motor-driven cars, the qualifying terms of each class will be applied to the risks of its particular class, and will not be construed together so as to make the risks of one class of such vehicles or cars apply to an injury covered by the other.

3. Same—Motorcycles.

A policy insuring a person against accident by collision while riding or driving in any horse-drawn vehicle or motor-driven car by interpretation clearly excludes an accident occurring while the insured was riding on a motorcycle, a car by usual significance being an automobile, affording greater security to the one riding therein than a motorcycle.

4. Same.

A motorcycle is a motor vehicle designed to travel on not more than three wheels in contact with the ground as distinguished from a motor car which has four wheels, and a body within which a person rides, affording greater safety.

APPEAL by plaintiff from *Lyon, Emergency Judge*, at September Term, 1928, of FORSYTH. Affirmed.

On 14 September, 1926, the defendant issued to the plaintiff's intestate a "Travel and Pedestrian Policy." The insuring clauses limit the extent of the insurance as follows:

"Life and Casualty Insurance Company, of Tennessee, hereby insures the person named in said schedule against the result of bodily injuries received during the time this policy is in force, and effected solely by external violent and accidental means strictly in the manner hereafter stated, subject to all the provisions and limitations hereinafter contained, as follows: If the insured be struck or knocked down or run over while walking or standing on a public highway by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air, or liquid power, excluding injuries sustained while on a railroad right of way in violation of any statute or of any regulation of the railroad company, or if the insured shall, by the collision of or by any accident to any railroad passenger car or passenger steamship or steamboat, in or on which such insured is traveling as a fare-paying passenger; or, by the collision of or by any accident to any public omnibus, street railway car, taxicab, or automobile stage, which is being driven or operated, at the time, by a licensed driver plying for public hire, and in which such insured is traveling as a fare-paying passenger; or, by the wrecking of a passenger elevator in which the insured is riding as a passenger; or, by the collision of or by any accident to any private horse-drawn vehicle, or motor-driven car in which insured is riding or driving; or, if the insured shall, by being accidentally thrown from any such vehicle or car, suffer any of the specific losses set forth below, the company will pay the sum set opposite such loss." The case was tried in the Forsyth County Court and judgment of nonsuit was rendered, and on appeal to the Superior Court the judgment of the county court was affirmed.

J. M. Wells, Jr., and John C. Wallace for plaintiff.

Manly, Hendren & Womble for defendant.

ADAMS, J. The insured was a motorcycle officer in the police department of the city of Winston-Salem, and on 11 August, 1927, while riding on his motorcycle he was injured by its collision with a truck. The injuries he received caused his death on 15 August, 1927. The motorcycle was the ordinary two-wheel machine propelled by gasoline. The question for decision is whether a motorcycle is within the clause, "motor-driven car in which insured is riding or driving."

The appellant contends that the words "any such vehicle or car," near the end of the last insuring clause, embrace all the vehicles described in the clause relating to pedestrians. This instruction, we think, is not permissible. There are two classes of persons for whose benefit the policy was intended: pedestrians, or persons "walking or standing on a public highway," and travelers riding or driving in specified vehicles or cars. These two classes are clearly defined. The intestate was insured against the result of bodily injuries caused, while he was walking or standing on a public highway, by being struck or knocked down, or run over by a vehicle propelled by steam, cable, electricity, naphtha, gasoline, horse, compressed air or liquid power. Persons driving or riding in motor-driven cars are not included in this category. The bodily injuries against which they are insured are injuries caused them in the manner described while they are driving or riding a vehicle used in ordinary travel. As the two classes are separate and distinct, the phrase "any such vehicle or car," which clearly refers to vehicles and cars of the latter class, cannot reasonably be said to include the vehicles described in the former class. *Noscitur a sociis*—the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it.

Is a motorcycle a motor-driven car? The question, on which we have no direct decision, has been determined by other courts adversely to the contention of the appellant. The clause under consideration—"motor-driven car in which the insured is riding or driving"—was construed by the Court of Errors and Appeals of New Jersey in *Perry v. North American Acc. Ins. Co.*, 138 At., 894. There it was said: "Our examination of the provision of the policy sued on bearing on the present controversy has led us to the conclusion that the correct interpretation of the terms of the policy excludes a motorcycle from the class of a motor-driven car. There is no ambiguity in the language of the policy. The principle of law that when an ambiguity exists the policy should be liberally construed against the company and in favor of the insured has no application. The ordinary and usual meaning of the words must be sought and given to them. Where the words are used to express the meaning of the party using them, the court will not adopt a strained and improbable construction. *Bew v. Traveler's Insurance Co.*, 95 N. J.

Law, 533, 112 A. 859, 14 A. L. R., 983. The policy uses the phrases "horse-drawn vehicles" and "motor-driven cars." A motorcycle is a vehicle. If motorcycles were intended to be included, the draftsman of the policy would have used the words "motor-driven vehicles." After using the word "vehicle" in the phrase "horse-drawn vehicles," it would seem that the use of the phrase "motor-driven car" immediately afterward is significant and indicates a purpose to exclude such a vehicle as a motorcycle from the provisions of the policy. One riding on a motorcycle is more exposed to accidents than one riding in a motor-driven car. A car stands upright on four wheels whether in operation or stopped. It is protected by bumpers in front and rear. It has a body in which the passengers sit which protects them in some measure from the perils of the highway. One riding on a motorcycle cannot keep it in equilibrium when not in operation. When stopped he must get off or place his feet, or one foot, upon the ground. A motorcycle has no front or rear protection in the form of fenders or bumpers. It has no body for the protection of the rider. A rider is therefore more exposed to the dangers incident to congested traffic. For these reasons, which make the risk of riding on a motorcycle greater than that of riding in a motor-driven car, we think the rider on a motorcycle was intentionally excluded from the provisions of the policy by the use of the language employed. The use of the preposition "in," in the clause of the policy reading "or motor-driven car in which insured is riding or driving" is also significant. One riding on a motorcycle is not referred to as riding "in" a motorcycle, but "on" a motorcycle. A passenger or one driving a car is not usually referred to as riding "on" a car but "in" a car. Where a policy uses the words "or motor-driven car in which the insured is riding or driving," it is for the purpose of limiting the insurer's liability. The reason is the one we have indicated, the greater safety of the insured "in" a car. This distinction has been recognized in a number of cases."

In *Salo v. North American Acc. Ins. Co.*, 153 N. E., 557, the Supreme Judicial Court of Massachusetts observed: "The word 'car' is ordinarily used in speaking of an automobile. It is a common expression describing an automobile. It is a matter of common knowledge that in ordinary conversation a motorcycle is not referred to as a car, but is spoken of as a motorcycle. The difference in the mechanical construction of automobiles and motorcycles does not indicate that a common designation would naturally apply to both. A motorcycle having ordinarily two wheels is a machine more in the nature of a bicycle equipped with motor power."

The same result, based upon similar reasoning, was announced by the Louisiana Supreme Court in *LaPorte v. North American Acc. Ins. Co.*, 161 La., 933, 48 A. L. R., 1096.

Our statute defines motorcycle as a motor vehicle designed to travel on not more than three wheels in contact with the ground except any such vehicle as may be included in the term "tractor," as defined in the same statute. P. L. 1927, ch. 148, sec. 1(c). There is nothing in our law which is inconsistent with the cited authorities, and we see no reason why they should not be regarded as conclusive on the question here presented. The judgment is

Affirmed.

JOE HARRISON AND WIFE, HETTIE HARRISON, v. D. M. SLUDER.

(Filed 17 April, 1929.)

Contracts E a—Action of defendant held not a breach of contract for board during his life.

Where there is a contract to furnish the defendant board and lodging during his life in consideration of his willing all his property to the plaintiffs, the defendant does not breach his contract by merely leaving the plaintiffs' house without objecting to the board and lodging, which the plaintiffs are ready, able, and willing to furnish, and residing elsewhere, and the plaintiffs may not maintain an action for the amount of the board and lodging to the date of his so leaving without showing that the defendant has breached the same by refusing to comply with its terms.

APPEAL by plaintiffs from judgment of Superior Court of GUILFORD, *Moore, J.* Affirmed.

This action was begun and tried in the municipal court of the city of High Point, before Teague, J., and a jury.

From judgment of said court dismissing the action, plaintiffs appealed to the Superior Court of Guilford County. The only assignment of error on said appeal was based on plaintiffs' exception to the judgment which was rendered upon defendant's motion at the close of all the evidence.

From the judgment of the Superior Court, refusing to sustain plaintiffs' assignment of error, and affirming the judgment of the municipal court, plaintiffs appealed to the Supreme Court.

D. C. MacRae and R. T. Pickens for plaintiffs.

Z. I. Walser for defendant.

CONNOR, J. This is an action to recover the value of board and lodging furnished by plaintiffs to defendant, under a special contract, entered into by and between plaintiffs and defendant, on or about 20 March, 1925. The contract is admitted in the pleadings. There is no controversy between the parties as to its essential terms.

Plaintiffs agreed to board and lodge the defendant, in their home in the town of Thomasville, N. C., so long as he should live, and defendant, in consideration of said agreement, agreed to execute his last will and testament and thereby devise and bequeath to plaintiffs all his property, both real and personal, to the end that plaintiffs should have said property at defendant's death.

Pursuant to the terms of said contract, defendant entered the home of plaintiffs on or about 20 March, 1925, and lived in said home continuously, except when absent on occasional visits, from said date to 10 October, 1927. During this time plaintiffs, under the terms of their contract with defendant, furnished to him board and lodging in their home. Defendant accepted said board and lodging without complaint. On 14 March, 1925, defendant signed and duly executed a paper-writing which is in form sufficient to constitute his last will and testament; he thereby devised and bequeathed to plaintiffs all his property, both real and personal. Defendant delivered said paper-writing to the person named therein as executor of said last will and testament; said paper-writing has not been altered, revoked or canceled, but is now in the possession of the person to whom it was delivered by defendant. From the date on which plaintiffs and defendant entered into said contract, to wit, 20 March, 1925, to 10 October, 1927, both parties to said contract complied in all respects with its terms.

On 10 October, 1927, defendant left plaintiffs' home; from said date to the date of the commencement of this action, to wit, 11 February, 1928, defendant boarded and lodged elsewhere than at the home of plaintiffs. When defendant left the home of plaintiffs, and procured board and lodging elsewhere, he made no complaint of the board and lodging furnished to him by plaintiffs in their home. The only reason defendant gave for leaving plaintiffs' home was that he did not like to live in town, and wished to live in the country. Prior to 10 October, 1927, defendant had frequently left plaintiffs' home for visits, after which he returned to said home and resumed his relations with plaintiffs. There was no evidence tending to show that plaintiffs objected to defendant leaving their home, or that they have at any time requested him to return; nor was there evidence tending to show that defendant, since leaving plaintiffs' home on 10 October, 1927, has made any demand or request of plaintiffs with respect to his board and lodging. Defendant has simply left plaintiffs' home, without complaint as to the manner in which plaintiffs had complied or were complying with the terms of their contract; there was no evidence tending to show whether or not defendant intends to return to plaintiffs' home, and to resume his relations to plaintiffs under the contract.

The only question presented for decision is whether there was any evidence from which the jury could have found that defendant had breached or abandoned his contract with plaintiffs, and thereby subjected himself to this action for the recovery of the value of the board and lodging furnished by plaintiffs to him, prior to 10 October, 1927, in part performance by them of their contract with defendant.

We concur with the judge of the Superior Court in his decision that there was no error in the judgment of the municipal court, dismissing the action for that there was no evidence at the trial tending to show that defendant had breached the contract, or that the contract had been abandoned by either party thereto.

Plaintiffs rely upon *Hayman v. Davis,* 182 N. C., 563, 109 S. E., 554, as sustaining their assignment of error. In that case, defendant by his demurrer, admitted that the contract by which he had agreed to give his land to plaintiff, had been abandoned. It was, therefore, held that, upon the allegations of the complaint, plaintiff could recover, before the death of defendant, on a *quantum meruit* for the services she had performed prior to defendant's breach and abandonment of the contract. In the instant case, defendant denies that he has breached the contract, or that the contract has been abandoned by either party thereto; he alleges in his answer that the contract is still subsisting, and is in full force. There was no evidence to sustain the allegation in the complaint that defendant had breached the contract, or that the contract had been abandoned. The failure of defendant to remain in plaintiffs' home continuously, and to accept there the board and lodging which plaintiffs are ready, willing and able to furnish, in accordance with their contract, does not relieve defendant of his obligation, under the contract; so long as plaintiffs are ready, willing and able to comply with the contract on their part, defendant is and will be bound by its terms. It is elementary that plaintiffs cannot maintain an action on the contract, until and unless defendant has in some way breached it. Defendant did not agree to remain continuously in plaintiffs' home, so long as he shall live; if he chooses to leave said home from time to time, of his own accord, and to procure board and lodging elsewhere, he does not thereby breach his contract to execute his last will and testament, devising and bequeathing all his property to plaintiffs, in consideration of board and lodging furnished to him by plaintiffs, or of board and lodging which plaintiffs are ready, willing and able to furnish to him, at his request in their home.

In the absence of evidence showing a breach of the contract by defendant, amounting to an abandonment of the contract, acquiesced in by plaintiffs, plaintiffs cannot recover of defendant, during his lifetime,

on a *quantum meruit,* for board and lodging furnished to him, under the contract. If defendant shall fail to devise and bequeath his property to plaintiffs, by his last will and testament, he will thereby breach his contract, and plaintiffs can then recover damages caused by such breach, upon showing that they have fully performed the contract, on their part, by furnishing board and lodging to defendant so long as he lived; they cannot then be defeated of their recovery by a showing that defendant did not remain continuously in their home, and there accept board and lodging which plaintiffs were at all times ready, willing and able to furnish in performance of their contract. We find no error in the judgment of the Superior Court. It is

Affirmed.

W. F. MORRISON v. W. C. LEWIS AND GROVER THOMPSON.

(Filed 17 April, 1929.)

Abatement and Revival B b—Action is pending from issuance of summons—Pleadings.

An action is pending in the Superior Court from the time the clerk issues the summons for service by the proper process officer, and where the action has not abated by failure to complete service as the law requires, another action later begun, involving the same subject-matter between the same parties, will be dismissed when this is properly made to appear. C. S., 475.

APPEAL by plaintiff from *Shaw, J.,* at November Term, 1928, of GUILFORD.

Civil action to recover damages for an alleged negligent injury resulting from a collision between plaintiff's automobile, driven by himself, and a truck, owned by the defendant, W. C. Lewis, and operated at the time by his employee, Grover Thompson.

On motion of the defendant, W. C. Lewis, there was a judgment dismissing the action as to him for that another suit between the same parties, involving the same subject-matter, was pending in Surry County; and on motion of defendant, Grover Thompson, the action against him was removed to Surry County for trial for the convenience of witnesses and to promote the ends of justice.

Plaintiff appeals, assigning error.

King, Sapp & King for plaintiff.

J. F. Hendren and Wm. M. Allen for defendants.

STACY, C. J. The collision between plaintiff's automobile and defendant's truck occurred on 23 September, 1927. Suit for damages arising out of said collision was instituted in Surry County by W. C. Lewis against W. F. Morrison 14 November, 1927, summons being signed by the clerk on that day, delivered immediately to plaintiff's attorney for delivery to the sheriff who received it 22 November and duly served same 28 November thereafter. The present suit of W. F. Morrison against W. C. Lewis and Grover Thompson for damages arising out of the same collision was instituted in Guilford County 21 November, 1927, summons being delivered to the sheriff 22 November and duly served 25 November thereafter.

The appeal presents the single question as to whether the suit of Lewis *v.* Morrison was pending in Surry County at the time of the institution of the present action in Guilford County. The trial court held that it was, as summons had been "issued" therein 14 November, 1927, and we are disposed to concur in this ruling.

The rationale of our decisions on the subject seems to be that when a summons passes out of the hands of the clerk for service, whether delivered directly to the sheriff or to another for him, and is duly served on or before the day fixed for its return, nothing else appearing, the action is regarded as pending from the time the summons left the clerk's office, under his sanction and authority, for the purpose of being served. *McClure v. Fellows,* 131 N. C., 509, 42 S. E., 951 (overruled on another point in *Grocery Co. v. Bag Co.*, 142 N. C., 174, 55 S. E., 90, and *Jenette v. Hovey,* 182 N. C., 30, 108 S. E., 301); *Houston v. Thornton,* 122 N. C., 365, 29 S. E., 827; *Currie v. Hawkins,* 118 N. C., 593, 24 S. E., 476; *Webster v. Sharpe,* 116 N. C., 466, 21 S. E., 912; *Pettigrew v. McCoin,* 165 N. C., 472, 81 S. E., 701; *Construction Co. v. Ice Co.,* 190 N. C., 580, 130 S. E., 165.

It is provided by C. S., 475, that "civil actions shall be commenced by issuing a summons," and, as a general rule, a summons is said to be "issued" when it passes from the clerk's office, or the office of a justice of the peace, under the sanction and authority of such officer, for the purpose of being served. Of course, if the summons be not served on or before the day fixed for its return, and no alias is sued out or ordered, a discontinuance of the action results therefrom. *Neely v. Minus,* 196 N. C., 345. And if a discontinuance be worked by failure to serve the summons by the return date, and not until that time, it would seem to follow that the action was pending from the time the summons left the clerk's hands for the purpose of being served. *Pettigrew v. McCoin, supra.*

The decision in *Smith v. Lumber Co.,* 142 N. C., 26, 54 S. E., 788, is not at variance with this position, but in support of it, for in that case—

the question of only one day being involved—the summons did not leave the hands of the justice of the peace who signed it until the day following its date.

The motion to dismiss the present action as against the defendant, W. C. Lewis, was properly allowed. *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545.

In *Alexander v. Norwood,* 118 N. C., 381, 24 S. E., 119, it was said: "Where an action is instituted, and it appears to the court by plea, answer or demurrer, that there is another action pending between the same parties and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed."

On authority of the cases cited, the judgment will be upheld.

Affirmed.

C. M. CECIL, TRUSTEE, AND N. C. LOWE v. SNOW LUMBER COMPANY.

(Filed 17 April, 1929.)

Appeal and Error F a—Assignment of errors under Rules of Court.

Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the Superior Court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of discovery through the record, Rule 19, sec. 3, and otherwise the appeal will be dismissed on the appellee's motion.

APPEAL by defendant from *Shaw, J.,* at December Term, 1928, of GUILFORD.

Civil action to recover funds alleged to have been deposited in the Commercial National Bank of High Point by C. M. Cecil, trustee, and seized under execution by the Snow Lumber Company.

The case was tried in the municipal court of the city of High Point, the court of first instance, where findings were made in favor of the plaintiffs and judgment entered thereon. On appeal to the Superior Court of Guilford County, these findings were approved and the judgment of the municipal court affirmed.

The defendant appeals, assigning error as follows:

"The errors heretofore assigned in the Superior Court are hereby assigned in the Supreme Court, and as same were duly grouped in the Superior Court, appellant does not deem it necessary to restate and group same."

The assignments of errors in the Superior Court were as follows:

"On appeal to the Superior Court, the defendant hereunder groups its exceptions and respectfully assigns in error the actions of the court as set out in its respective exceptions and assignments of error, as follows: Exception No. 6 (R., p. 38). Refusal of court to make the finding of facts, to draw the conclusions of law and to sign the judgment as tendered by the defendant, as set out in the record.

"Exception No. 7 (R., p. 38). The signing of the judgment as set out in the record."

Looking back into the record, it appears that the "special verdict, conclusions of law and judgment" tendered by the defendant, the subject of the sixth exception, covers more than eight pages of the record, and the judgment signed, the subject of the seventh exception, covers approximately five pages. The exceptions are not specific.

C. C. Barnhart, Robinson, Haworth & Reese and Z. I. Walser for plaintiffs.

Peacock & Dalton and Austin & Turner for defendant.

STACY, C. J. The municipal court of the city of High Point was created as a "special court for the trial of petit misdemeanors" by chapter 569, Public-Local Laws 1913. It was given civil jurisdiction in certain cases by chapter 699, Public-Local Laws 1927, with the right of either the plaintiff or the defendant in civil actions or the defendant in any criminal action and the State in certain criminal prosecutions to appeal to the Superior Court of Guilford County in term time "for errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court," etc. This means that in hearing cases on appeal from the municipal court of the city of High Point, the Superior Court of Guilford County sits as an appellate court, subject to review by the Supreme Court.

The assignments of error, appearing on the present record, are not sufficiently definite to enable the court to understand what questions are sought to be presented, without a voyage of discovery through the record. *Sturtevant v. Cotton Mills,* 171 N. C., 119, 87 S. E., 992. Hence, the motion of plaintiffs to dismiss the appeal and to affirm the judgment for failure to comply with Rule 19, sec. 3, would seem to be well founded. *Porter v. Lumber Co.,* 164 N. C., 396, 80 S. E., 443.

We have examined the record, however, and find no reversible error. *Thresher Co. v. Thomas,* 170 N. C., 680, 87 S. E., 327.

Appeal dismissed.

W. B. WHITAKER, SR., v. CARPENTER MOTOR CAR COMPANY ET AL.

(Filed 17 April, 1929.)

1. Highways B c—Violation of speed law negligence per se.

The operating of an automobile upon a public highway or street at a speed in excess of the limit fixed by law is negligence *per se*.

2. Same—Negligence must be proximate cause to be actionable.

Negligence in exceeding the legal speed limit on a public highway or street is insufficient for a recovery of damages unless there is a causal connection between the breach of duty imposed by law and the injury complained of.

CIVIL ACTION, before *Sinclair, J.*, at February Term, 1929, of DURHAM.

The plaintiff instituted an action against defendants for damages, alleging that, while he was attempting to cross East Main Street in the city of Durham, on the night of 1 October, 1926, he was negligently struck and injured by an automobile owned by the defendant, Carpenter Motor Car Company, and operated by a young man named Ross, who was the alleged agent of said company.

There was evidence tending to show that the plaintiff was struck at a point in the business section of the city, and there was further evidence tending to show that the automobile was being operated at a speed in excess of the limit prescribed by law.

The usual issues of negligence, contributory negligence and damages were submitted to the jury. The issue of negligence was answered in the negative. Whereupon judgment was entered that the plaintiff take nothing, from which judgment the plaintiff appealed, assigning error.

McLendon & Hedrick and W. Brantley Womble for plaintiff.
Brawley & Gantt for defendant, Ross.
Fuller, Reade & Fuller for Carpenter Motor Car Company.

BROGDEN, J. The trial judge instructed the jury as follows: "Now, gentlemen of the jury, the fact that a man may drive in excess of the legal rate of speed is not in itself negligence. A man may drive in excess of the legal rate of speed, and at the same time may not be guilty of negligence at all. He may be a careful and competent driver, and he may exceed the speed limit and he may not be driving recklessly and carelessly, and that would not constitute negligence in itself. The law says, however, when you have other evidence of negligence, that you may consider that as a circumstance just as you would consider any

other circumstance bearing upon the main question, of whether or not a man was negligent, and consider it in that respect—but that isn't negligence in itself, that fact standing alone. The plaintiff contends you ought to find that the negligence of Ross caused the injury, and contends that there was no other car upon the street, and that was the only way it could have happened."

The foregoing instruction was erroneous. It was clearly and manifestly a legal mishap which inadvertently slipped into the day's work.

The breach of a statute enacted for the protection of the public is negligence *per se;* but notwithstanding, there must be a causal connection between the breach of the statute and the injury complained of. *Ledbetter v. English,* 166 N. C., 125, 81 S. E., 1066; *Davis v. Long,* 189 N. C., 129, 126 S. E., 521; *Gillis v. Transit Corp.,* 193 N. C., 346, 137 S. E., 153; *Peters v. Tea Co.,* 194 N. C., 172, 138 S. E., 595; *Goss v. Williams,* 196 N. C., 213.

New trial.

GUY D. GRIMES v. CHAS. W. FULTON, AND GUY D. GRIMES v. CHAS. W. FULTON AND J. M. FULTON.

(Filed 17 April, 1929.)

Appeal and Error J b—Power of removal for convenience of witness is within discretion of court and not reviewable.

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the Superior Court judge, and is not subject to review in the Supreme Court except upon abuse of this discretion. C. S., 470. As to whether a city court has the right to remove a cause for this reason to a Superior Court of a different county is not presented by the record on this appeal.

APPEAL by defendant, Charles W. Fulton, from *Shaw, J.,* at December Term, 1928, of GUILFORD.

Motion by the defendant, Charles W. Fulton, to remove these actions for slander and slander of title from "the municipal court of the city of High Point," where they were instituted, to the Superior Court of Surry County for trial on the grounds of convenience of witnesses and to promote the ends of justice, which motion was denied in the court of first instance and judgment affirmed on appeal to the Superior Court of Guilford County.

From the order of the Superior Court affirming the judgment of the municipal court the said defendant appeals, assigning errors.

King, Sapp & King, Gold & York and Roberson, Haworth & Reese for plaintiff.

Folger & Folger and Carter & Carter for defendant, C. W. Fulton.

STACY, C. J. It is not conceded that the judge of "the municipal court of the city of High Point" has the power to remove a cause from said municipal court to the Superior Court of a county other than Guilford for trial, but even if it were (which question is not presented and therefore not decided), still the motion to remove, on the grounds stated, "for the convenience of witnesses and to promote the ends of justice," C. S., 470, rests in the sound discretion of the trial court, and is not reviewable on appeal in the absence of abuse of such discretion. *Power Co. v. Klutz*, 196 N. C., 358, and cases cited.

Affirmed.

TOWN OF KENILWORTH ET AL. V. SOLON HYDER, TAX COLLECTOR FOR BUNCOMBE COUNTY.

(Filed 17 April, 1929.)

1. Drainage Districts A a—Statutes creating drainage district construed in pari materia.

Where proceedings for the establishing of a special taxing drainage district are referred to in a later statute and confirmed therein with an additional provision establishing its boundaries, the two being interrelated, are to be construed together by the courts when the constitutionality of the district is questioned.

2. Same—Notice to or consent of those included in district not necessary.

Where an incorporated town having a sewerage system is included in a special drainage district later established by statute giving defined boundaries overlapping those of the town, it is not required that those owning land within the lappage should be notified or give their consent to be also included within the boundaries of the special district.

3. Drainage Districts A b—Boundaries of district need not coincide with political subdivisions.

The General Assembly of North Carolina has the power to create drainage districts without regard to the boundaries of the other political subdivisions of the State, such as county or municipal boundaries and the like.

4. Same—Provision that town owning sewerage system cannot be made a part of district without consent relates to sewerage system and not to boundaries.

Where a statute creating a special drainage district includes in its expressed boundaries an incorporated town already having a drainage

system, a proviso therein that no person, firm or corporation owning any water system shall be compelled to become a part of such sanitary district unless satisfactory, etc.: *Held*, the word "district" used in the proviso means "district system" and not the boundaries of the area, and does not operate to relieve those living in such section from the drainage assessments.

5. Drainage Districts B a—Notice and an opportunity to be heard not necessary to validity of special taxes for district.

A statute which authorizes the laying off of a drainage district with power given the trustees provided therein to lay an *ad valorem* tax for its construction and maintenance is not unconstitutional for failing to provide that notice be given the owners of land situate therein that the lands will be included within the area or of the amount of the taxes to be levied or the specific purpose therefor.

6. Same—Special tax for drainage district does not require submission to voters nor is its creation private act.

A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of the State Constitution, Art. VII, sec. 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by our Constitution, Art II, sec. 29.

7. Same—Assessing special drainage tax not an exercise of Eminent Domain—Due Process Clause.

The creation by statute of a special drainage district with the power to levy an *ad valorem* tax therein for its construction and maintenance is not a taking of property within the purview of our Constitution, Art. I, sec. 17, and does not fall within the intent and meaning of the due process clause, Federal Constitution, Art. XIV, sec. 1. The distinction between taxation of this character and assessments pointed out by ADAMS, J.

8. Same—Double taxation not grounds for attacking drainage assessments.

Where some of the citizens of an incorporated town having a sewerage system therein have their property also included in a special taxing drainage district defined and created by statute, the constitutionality of the later act may not be successfully questioned on the grounds either of double taxation or a taxation without benefit received.

APPEAL by plaintiffs from *Schenck, J.*, at February Term, 1929, of BUNCOMBE. Affirmed.

This is an action to restrain the defendant from collecting an *ad valorem* tax said to have been levied in the Swannanoa Water and Sewer District. At the session of 1923 the General Assembly passed an act to create sanitary districts in Buncombe County and authorized the county commissioners to create such districts upon petition of the voters residing in the proposed districts. Public-Local Laws 1923, ch. 341. This act was ratified 1 March, 1923, and under it the board of com-

missioners established sanitary districts, one of which was the Swannanoa Sanitary Sewer District. In 1927 the General Assembly ratified and approved the incorporation of the last named district and changed its name to the Swannanoa Water and Sewer District. The boundaries of the district are prescribed and the machinery for its operation is fully set forth in the act.

In their complaint the plaintiffs allege that the town of Kenilworth is a municipal corporation and that the other plaintiffs are residents of the town and owners of property therein which is subject to an *ad valorem* tax; that the town has miles of paved streets, modern conveniences including a complete water and sewer system, and property valued at almost four million dollars; that the defendant has demanded of the plaintiffs the payment of a tax of fifty-four cents on property valued at $100; that the system of the Swannanoa Water and Sewer District is not connected with the town system and is of no benefit to the town; that the plaintiffs have never consented to become a part of the Swannanoa District; and that the act of 1927, *supra,* was enacted in breach of the Fourteenth Amendment to the Constitution of the United States and section 17 of the Bill of Rights, and of Article VII, section 7, and Article II, section 29, of the Constitution of North Carolina.

The defendant demurred to the complaint on the following grounds: (a) Said complaint fails to state that the territory of the plaintiff, the town of Kenilworth, and the lands of the other plaintiffs, are situated outside of the boundaries of the Swannanoa Water and Sewer District, as the same is confirmed, created, and delimited by the terms and provisions of the statute pleaded in the 9th and 12th paragraphs of said complaint, namely, chapter 249, Public-Local Laws 1927, aforementioned; (b) because said complaint fails to allege that the tax levy which the plaintiffs resist and seek to invalidate in this action is made for any other purpose than to pay the principal and interest of bonds issued and caused to be issued and sold by said Swannanoa Water and Sewer District and/or by the county commissioners of Buncombe County for the purpose defined by the aforesaid Public-Local Law, or that said levy exceeds the rate and amount necessary for said purpose; and generally (c) because said complaint fails to state any cause of action, either legal or equitable, which would or might entitle the plaintiffs to the relief demanded in said complaint."

The demurrer was sustained and the action dismissed. The plaintiff excepted and appealed for error assigned.

J. W. Pless for plaintiffs.

Frank Carter, Edwin S. Hartshorn, Thos. S. Rollins and S. W. Brown for defendant.

ADAMS, J. The plaintiffs allege that the tax complained of was levied under Public-Local Laws 1927, ch. 249, and upon this allegation they base the contention that in determining the controversy we are restricted to a consideration of this act—a contention, however, in which we do not concur. They assail the whole chapter as unconstitutional, but allege that if it is valid they are not within its purview. Their allegations in effect make the act a part of the complaint and call for an examination of all its relevant provisions.

The first and second sections authorize, ratify, approve, and confirm all the proceedings taken by the board of commissioners of Buncombe County creating the Swannanoa Sanitary Sewer District under chapter 341, Public-Local Laws 1923, declare the district to be a municipal corporation with perpetual existence, and change its name to that of the "Swannanoa Water and Sewer District." If the board of county commissioners derived its power from the act of 1923, we must refer to this act to ascertain whether the board transgressed its delegated powers and whether the proceedings which the act of 1927 purports to have ratified were effective or invalid. The two acts were enacted for a common purpose and are essentially interrelated.

Before going to the demurrer we advert to the grounds on which the plaintiffs criticize the act of 1927. Pursuant to a rule of practice in this Court (R. 27½) the appellants in their brief submit the following as the questions involved in the appeal: (1) Whether the provisos in section 11 of the act of 1927 exclude the plaintiffs from the operation of the act until they consent to become a part of the sanitary district; (2) whether the act of 1927 is in conflict with the Constitution, Article II, section 29, or (3) with Article VII, section 7; (4) whether it violates the seventeenth section of the Declaration of Rights or the due process clause of the Fourteenth Amendment to the Federal Constitution. If these questions, which are the only ones proposed, are resolved against the appellants, the specific grounds of the demurrer will demand only brief consideration.

In view of some recent decisions by this Court it may be expedient first to dispose of the second and third questions. The act of 1923 authorized the county commissioners to create sanitary districts in Buncombe County and to appoint for each district three trustees who were to exercise certain legislative powers: to build a system of sewerage and sewer pipes, to purchase or condemn land, and to issue negotiable coupon bonds of the district. Upon its creation each sanitary district was made a municipal corporation, and the county commissioners were authorized annually to levy a special tax upon all the taxable property within the district sufficient to pay the interest as it accrues and to create a sinking fund for the payment of the principal at maturity.

Section 10 of the act of 1927 authorizes the commissioners annually to levy a special tax of "sufficient rate and amount to pay the principal and interest of any bonds authorized by this act as the same become due, the tax to be levied against all the taxable property within said district"; also to levy a special tax sufficient in rate and amount for the proper maintenance, extension, supervision, and control of the authorized improvements. It may be seen that in their salient features the two acts are strikingly similar—the chief divergence of the latter being a description of the district by metes and bounds which could not be set forth in the former, the provision for taking over any other water or sewerage system with the provisos which the appellants invoke, and a direction that on completion of the work the trustees surrender to the county all property belonging to the district.

The following sections are the basis of the second and third questions: "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 an officer of the same except for the necessary expenses thereof unless by a vote of the majority of the qualified voters therein." Constitution, Art. VII, sec. 7.

"The General Assembly shall not pass any local, private, or special act or resolution . . . relating to health, sanitation, and the abatement of nuisances." Constitution, Art. II, sec. 29.

In *Reed v. Engineering Co.*, 188 N. C., 39, it was held that the act of 1893 is not antagonistic to either of these constitutional inhibitions; that a water and sewerage system involves a necessary expense and that the act is not a local, private, or special act relating to health or sanitation. As already indicated the two legislative acts are correlative; they were enacted to achieve a single result; and the divergence between them is so slight that we see no convincing reason for holding that *Reed's case* is not equally applicable to the later act. See *Kornegay v. Goldsboro,* 180 N. C., 441; *Coble v. Comrs.*, 184 N. C., 342; *Harrington v. Comrs.*, 189 N. C., 572, 576. Compare *Armstrong v. Comrs.*, 185 N. C., 405; *Day v. Comrs.*, 191 N. C., 780; *Sanitary District v. Prudden,* 195 N. C., 722.

We turn now to the fourth question. "No person ought to be . . . disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land." Constitution, Art. I, sec. 17. "Nor shall any state deprive any person of life, liberty, or property, without due process of law." Constitution of United States, Art. XIV, sec. 1.

Does the act of 1927 violate these provisions? The appellants say that they had no notice of the proposed boundaries before the district was formed and that they have not been benefited in any way by its creation.

It may first be noted that this act does not levy special taxes or assessments upon abutting property for special benefits conferred by a public improvement. "Assessments as distinguished from other kinds of taxation are those special and local impositions upon the property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom. Provisions relating to taxation generally are uniformly held not applicable to local assessments or special taxation for improvements." McQuillin on Municipal Corporations (2 ed.), sec. 2565.

Not without significance is the omission from the act of 1927 of a provision in the act of 1923 permitting an election by the trustees between constructing the sewer system at the expense of the district and constructing it by an assessment against the property abutting the system or within a radius of the benefits arising from the improvement, leaving only the first named method operative. Both acts provide for the condemnation of land, but the law authorizing assessments against abutting property for the payment of public improvements has no relation to the exercise of the power of eminent domain. McQuillin, *supra.*

The district in question is a special taxing district. The power of the Legislature to form such districts is fully recognized and is practically unlimited. *Kelly v. Pittsburgh,* 104 U. S., 54, 26 L. Ed., 658; *Myles Salt Co. v. Bd. of Comrs.,* 239 U. S., 478, 60 L. Ed., 392. "Sometimes it is deemed wise to create a tax district for special purposes, generally for public improvements, such as for highway taxes, bridge taxes, drainage taxes, or the like, and to fix the boundaries of such district as including two or more counties or towns or even making the district wholly independent of such political boundaries." . . . "Taxing districts may be as numerous as the purposes for which taxes are levied. Equality and uniformity of taxation does not preclude the power of the state to create separate taxing districts, provided the taxes are equal and uniform within each taxing district." Cooley on Taxation, secs. 319, 321. The same writer says: "It is not essential that the political subdivisions of the state shall be the same as the taxing districts, but special districts may be established for special purposes, wholly ignoring the lines of the political subdivisions of the state. It is compulsory that the boundaries of the political divisions of the state shall be regarded in taxation only where the tax itself is for a purpose specially pertaining to one of them in its political capacity, so that the nature of the tax will determine the district. A school district may be created out of territory taken from two or more townships or counties, and the benefits of a highway, a levee, or a drain may be so peculiar that justice would require the cost to be levied either upon part of a township or county, or upon parts

of several such subdivisions of the state." *Ibid.*, sec. 325. And more specifically as to due process of law: "Property taken in the lawful exercise of the taxing power is not taken without due process of law. In the exercise of the taxing power, due process does not require that property subject to the tax or the amount of tax to be raised should be determined by judicial inquiry, and a notice and hearing as to the amount of the tax and the manner in which it shall be apportioned are generally not necessary to due process of law. A tax does not violate the due process clause because it operates unjustly nor because it constitutes double taxation; and the motives or purpose of the taxing power cannot be inquired into, to invalidate a tax as a violation of the due process clause. If a tax is within the power of the Legislature, there is no violation of the due process clause because of the results which may or will arise from the tax. It seems that a tax does not violate the due process clause, as applied to a particular taxpayer, although the purpose of the tax will result in an injury rather than a benefit to such taxpayer." *Ibid.*, sec. 143.

When land is to be taken and devoted to the public service the owner must be given an opportunity to be heard with respect to the necessity of the taking, and the compensation to be paid; but the creation by the Legislature of a special taxing district is not a taking of property in this sense and does not violate the due process clause, even where no notice is given. Cooley, sec. 143, *supra.; Carson v. Sewer Comrs.*, 182 U. S., 398, 45 L. Ed., 1151; *Mount St. Mary's Cemetery Asso. v. Mullins*, 248 U. S., 501, 63 L. Ed., 383; *Valley Farms Co. v. Westchester*, 261 U. S., 155, 67 L. Ed., 585. Nor were the appellants entitled to notice that the tax would be levied; the due process clause does not require that persons taxed by the law of a state shall have an opportunity to be present or to be heard when the tax is assessed against them. *McMillen v. Anderson*, 95 U. S., 37, 24 L. Ed., 335.

It is argued here that as the town of Kenilworth has a sewer and drainage system of its own, the appellants will derive no benefit from the creation of the system which they assail. It has been held that property which cannot be directly or indirectly benefited by a drainage district may not be included therein merely for the purpose of assessing it for the benefit of other lands in the district. *Myles Salt Co. v. Board Comrs., supra.* In that case the area "included" was an island of high land which could not be a receptacle for stagnant water, and for this reason its inclusion was "palpably arbitrary and a plain abuse of power." *Valley Farms v. Westchester, supra.* But in *Miller & Lux v. Sacramento & S. J. Drainage District*, 256 U. S., 129, 65 L. Ed., 859 it was said: "Since *Houck v. Little River Drainage District*, 239 U. S., 254, 60 L. Ed., 266, the doctrine has been definitely settled that, in the

absence of flagrant abuse or purely arbitrary action, a state may establish drainage districts and tax lands therein for local improvements, and that none of such lands may escape liability solely because they will not receive direct benefits." Moreover, *Carson v. Sewer Comrs., supra,* may be considered, under the facts in the case before us, as authority for the position that the appellants are benefited in being permitted to discharge their sewers into the more serviceable public sewers of the district.

The plaintiffs lay stress on their first proposition—that is, that they are excepted from the act of 1927 by the provisos in the eleventh section. This section authorizes the trustees, upon terms which are just and mutually satisfactory, to take over any sewer or water systems, or any part thereof, and requires them when they take it over by mutual agreement to pay a reasonable compensation. There is one proviso "that no person, firm or corporation owning any water system or sewerage system shall be compelled by the trustees to become a part of such sanitary district as is herein created unless the same is satisfactory to such person, firm, corporation or municipality owning any water system or sewerage system within the boundary of such created sanitary district," and another proviso that such systems may not be taken over or forced by the trustees to become a part of the sanitary district unless satisfactory to the owners. When taken over by mutual consent such system or systems shall be under the control of the trustees.

If the word "district" in the provisos be construed as synonymous with the boundary lines of the district these clauses would imply that the town of Kenilworth is not within the boundaries because it has not consented to become a part of the district. This construction would result in a contradiction of the third section, which, with no exception, describes the district by metes and bounds, it being admitted in the brief of the appellants that the town is within this area. If "district" signifies all the land within the prescribed boundaries, the town is obviously a part of the district by virtue of the third section, though its water system is not connected with that of the district. The provisos in our opinion, were not intended to empower the trustees to change or modify the defined area. Construing the act in its entirety and observing its manifest purpose we reach the conclusion, as contended by the defendant, that the word "district" as used in the provisos means "district system." By this construction the several sections of the act become operative, and effect is given to all. The town of Kenilworth is a part of the district, but it shall not be compelled by the trustees to become a part of the sanitary district system or to be taken over by them for this purpose without its consent. It is insisted that this construction burdens the appellants with double taxation; but the

property of the plaintiffs is not twice taxed for the benefit of the taxing district. The county commissioners levy only one tax for the district and this is uniform and equal. Furthermore, neither the State nor the Federal Constitution affords protection against double taxation by the State. *Baker v. Druesdow*, 263 U. S., 137, 68 L. Ed., 212; *Person v. Watts*, 184 N. C., 499, 508.

In view of the questions proposed we see no reason why the demurrer should not be sustained and the judgment affirmed. The property of the appellants is within the taxing district and there is no allegation in the complaint that the tax was levied for any purpose not authorized by the public-local act, or that the levy exceeds the authorized rate and amount. We omit reference to the bonded indebtedness of the district and to the area embraced in the watershed of the Swannanoa River, and reach our conclusion upon the defendant's demurrer to the allegations in the complaint. Judgment

Affirmed.

HORACE T. KING, TRADING AND DOING BUSINESS AS HANOVER IRON WORKS v. G. C. ELLIOTT AND WIFE, EVA O. ELLIOTT, AND CENTRAL BANK & TRUST COMPANY.

(Filed 17 April, 1929.)

1. Laborers' and Materialmen's Liens A a—Where contract is entire detailed itemization unnecessary.

Where a materialman's lien under the provisions of C. S., 2433, is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor.

2. Same—Sufficiency of itemization.

Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material he has furnished the owner of the building upon which he claims his lien under the provisions of C. S., 2433, showing on several specific dates "money advanced for payroll," "furnace contract," etc., each in stated amounts, it is held a sufficient itemization of his claims as required by the statute.

3. Same—Construction of contract as entire.

An affidavit to a lien filed under the provisions of C. S., 2433, that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract": *Held*, sufficient to show a complete contract for the furnace at the price itemized in the statement.

4. Same—Finding by the court that contract was entire.

Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for

material and labor furnished for a building, C. S., 2433, his finding that the contract was "to do certain work and furnish certain materials for a stated amount" under the evidence in the case is interpreted to mean that the contract referred to was entire.

5. Materialmen's and Laborers' Liens B a—Materialman's lien prior to mortgage registered after time material was begun to be furnished.

The lien for labor and material furnished to the owner of a building under the provisions of C. S., 2433, and notice filed as required by C. S., 2469, 2470, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded.

6. Laborers' and Materialmen's Liens B b—Dates stated in lien presumed correct.

Where a lien filed under the provisions of C. S., 2433, gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct.

STACY, C. J., dissents.

APPEAL by defendant, Central Bank & Trust Company, from *Cranmer, J.*, at September Term, 1928, of NEW HANOVER. Modified and affirmed.

It is admitted that the defendants, G. C. Elliott and wife, Eva O. Elliott, executed to the Central Bank & Trust Company, trustee, a deed of trust, to secure the indebtedness of $6,500 due the Continental Mortgage Company, on the premises described in the complaint. Said deed of trust was in the usual form and was recorded in the office of the register of deeds of New Hanover County, on 1 August, 1927, in Book 186, page 148. It is also admitted that the mortgage executed by the defendants, G. C. Elliott and wife, to the defendant, John Bright Hill, has been duly canceled of record, and that the plaintiff has taken a voluntary nonsuit as to the defendant, John Bright Hill, and also as to the defendant, Indemnity Insurance Company of North America.

The plaintiff introduced in evidence the following alleged lien, filed in the office of the clerk of the Superior Court on 31 December, 1927, and indexed in Lien Book A, p. 108, namely:

"State of North Carolina—County of New Hanover,
Wilmington, N. C.

To W. N. HARRISS, *Clerk of the Superior Court.*

Please take notice that Horace T. King, trading and doing business as Hanover Iron Works, claims a lien on the premises of G. C. Elliott hereafter described for labor done or material furnished for erecting

a building or buildings thereon the labor done, or the amount of the material, the value thereof, and the dates at which the different items in detail were furnished, or labor done, are contained in the bill of particulars hereunto annexed. The amount of the claim is $761.04, and interest as shown by statement attached, marked Exhibit A, and the building or buildings, and premises are situated in the county of New Hanover, North Carolina (describing same by metes and bounds).

HORACE T. KING,
Trading and doing business as Hanover Iron Works.

Sworn to and subscribed before me, this 31 December, 1927.
W. N. HARRISS, *Clerk Superior Court.*"

Dr. G. C. Elliott, Wilmington, N. C.
Bought of Hanover Iron Works.

2 July, 1927, money advanced for payroll	$276.00
15 July, 1927, furnace contract	388.00
1 August, 1927, gutter, conductor and sheet metal	86.74
22 August, 1927, 4 bu. gravel, .50	2.00
200 lbs. asphalt, $3.75	7.50
8 lbs. galv. iron, .10	.80
	$761.04
Interest	20.86
	$782.00

"State of North Carolina—County of Hanover.

Horace T. King, being duly sworn, deposes and says that he is the owner of Hanover Iron Works, that the foregoing statement of account is just, true and owing, and correct copy from claimant's books, showing the goods sold and delivered, installed, and work done by claimants to above debtor. There are no offsets or counterclaims thereto, but the full sum of $761.04 is due and owing with interest from 15 July, 1927.

HORACE T. KING.

Sworn to and subscribed before me, this 31 December, 1927.
W. N. HARRISS, *Clerk Superior Court.*"

The plaintiff testified as follows: "I am the plaintiff in this action, and had a contract with G. C. Elliott to do certain work. The work was completed on the dates set out in the statement attached to the lien. The item for gravel was ordered separate by Dr. Elliott and sent out to the house. We began talking about this job in May. He told me

he was going to build the house and we kept on discussing and figuring and finally some time in June we came to terms. I started to work about 1 June. *The contract was for a lump sum. He had nothing to do with the number of hours I spent or the material that I used.*"

The court below rendered the following judgment, in part:

"A jury trial having been waived by the parties and the court having found that the plaintiff contracted with the defendant, G. C. Elliott, *to do certain work and furnish certain material for stated amount* in connection with the construction of the plaintiff's house on the premises described in the complaint and that plaintiff has secured a consent judgment against G. C. Elliott in the sum of $761.04 and interest and condemning premises for sale described in complaint to satisfy said lien, and that said work was completed on the dates set out in the plaintiff's bill of particulars, attached to a lien filed by the plaintiff in the office of the clerk of Superior Court of New Hanover County, which said lien the court finds is in every respect a valid lien on the premises herein described, and the following issues having been submitted:

1. Is the defendant, G. C. Elliott, indebted to the plaintiff, and if so, in what amount?

2. Has the plaintiff established a valid lien on the property of the defendant G. C. Elliott, described in the complaint?

3. If so, is such lien a prior lien to the deed of trust on said property held by the Central Bank & Trust Company and recorded in the office of the register of deeds of New Hanover County, Book 186, page 148.

And it having been admitted that the defendant, G. C. Elliott, is indebted to the plaintiff in the amount of $761.04, with interest thereon from 15 July, 1927, and it being further admitted that the defendant, G. C. Elliott and wife, executed to the defendant, Central Bank & Trust Company, a deed of trust to secure the indebtedness of $6,500, which said deed of trust is in the usual form and contains the usual covenants and warranties of title and against encumbrances and was recorded in the office of the register of deeds of New Hanover County, on 1 August, 1927, in Book 186, page 148.

The court being of the opinion that the plaintiff's lien is a valid lien and is superior to the deed of trust held by the defendant, Central Bank & Trust Company, answered the first issue: $761.04 with interest from 15 July, 1927; the second issue Yes, and the third issue Yes."

Judgment was accordingly entered in favor of plaintiff and the judgment further set forth that upon payment of the claim by Central Bank & Trust Company, it was subrogated to the rights of the plaintiff.

At the conclusion of the evidence, the defendant, Central Bank & Trust Company, moved for a directed verdict in its favor on the grounds

that the plaintiff had not secured a valid lien superior to the lien of the deed of trust, held by it, which motion the court overruled and the defendant, Central Bank & Trust Company, excepted, assigned error and appealed to the Supreme Court.

John A. Stevens for plaintiff.
K. O. Burgwin for defendant, Central Bank & Trust Company.

CLARKSON, J. The question involved: Is the lien filed by the plaintiff against the property of the defendant, G. C. Elliott, valid and enforceable, and superior to the deed of trust, executed by the defendants, G. C. Elliott and wife, to the defendant, Central Bank & Trust Company, conveying the property in controversy? We think so.

C. S., 2433, is as follows: "Every building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for the payment of all debts contracted for work done on the same, or material furnished."

C. S., 2469, is as follows: "All claims against personal property, of two hundred dollars and under, may be filed in the office of the nearest justice of the peace; if over two hundred dollars or against any real estate or interest therein, in the office of the Superior Court clerk in any county where the labor has been performed or the materials furnished; but all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof. If the parties interested make a special contract for such labor performed, or if such material and labor are specified in writing, in such cases it shall be decided agreeably to the terms of the contract, provided the terms of such contract do not affect the lien for such labor performed or materials furnished."

C. S., 2470: "Notice of lien shall be filed as hereinbefore provided, except in those cases where a shorter time is prescribed, at any time within six months after the completion of the labor or the final furnishing of the materials, or the gathering of the crops."

In *McAdams v. Trust Co.*, 167 N. C., at p. 496, it is said: "Construing our statute on liens of mechanics and laborers, this Court held in *Burr v. Maultsby*, 99 N. C., 263, that the lien relates back to the time the work was commenced or the materials were furnished, and does not impair or affect encumbrances existing prior to that time but only those subsequently created." *Porter v. Case*, 187 N. C., at p. 636. *Harris v. Cheshire*, 189 N. C., 219.

In *Jefferson v. Bryant,* 161 N. C., at p. 406-7, it is said: "This action is to enforce a lien under section 2026 of the Revisal (C. S., 2469), which requires that 'all claims shall be filed in detail, specifying the materials furnished or labor performed, and the time thereof,' and it has been uniformly held, in construing this statute, that there must be a substantial compliance with its terms, and that the statement of time is material. *Wray v. Harris,* 77 N. C., 77; *Cook v. Cobb,* 101 N. C., 68. The headnote to the *Cook case,* which is fully sustained by the opinion, is that 'it is essential to the validity of a laborer's lien that the claim or notice which he is required to file shall set forth in detail the time when the labor was performed, its character, the amount due therefor, and upon what property it was employed; and if it is for materials furnished, the same particularity is required. Defects in these respects will not be cured by alleging the necessary facts in the pleadings in an action brought to enforce the lien.' This rule has been very generally modified when the contract is to complete a building for one sum, and in such case it is not required that the labor performed and the materials furnished shall be itemized, but that the time of the completion of the work shall be stated. The cases are collected in the notes in 27 Cyc., 188."

In the present action it is contended by plaintiff that his claim is founded on a *special contract* under the statute, and it is not necessary that the claim "be filed in detail, specifying the materials furnished or labor performed and the time thereof." That the present lien filed comes within the provisions of the statute and the decision on this aspect in the *Jefferson case, supra,* viz.: "This rule has been very generally modified when the contract is to complete a building for one sum, and in such case it is not required that the labor performed and the materials furnished shall be itemized, but that the time of the completion of the work shall be stated."

"Regardless of the conflict of authority as to the necessity of itemization generally, it is well established that, where the work was done, or the materials furnished under an *entire contract* to do *or furnish the same for gross sum,* it is not necessary that claimant should in his lien statement itemize his account." (*Italics ours*), 40 C. J., p. 242.

"A distinction runs through the authorities in regard to the particularity required in specifying the amount and character of the work done or materials furnished, and the prices charged therefor, where the claim rests upon open account and where the work done or materials furnished were contracted for as an entirety. More particularity of statement is required in the former than in the latter instance." *Francis & Co., Inc., v. Hotel Rueger, Inc.,* 125 Va., 106, 121, 99 S. E., 690.

Speaking to the subject, in 18 R. C. L., at p. 927, it is said: "As to the manner of setting forth or stating the facts to be embodied in the lien notice, however, it need not have the definiteness of a pleading. . . . (p. 935) The statutory requirements, whatever they may be, must be substantially complied with in order to perfect the lien. The affidavit required to verify it may be considered with the claim itself in ascertaining the sufficiency of the latter."

We must construe the whole lien, claim or notice, and affidavit, on this particular attitude together. The notice sets forth: (1) "Dates at which the different items in detail were furnished, or labor done, are contained in the bill of particulars hereunto annexed. The amount of the claim is $761.04." (2) Bill of particulars as follows:

"2 July, 1927, money advanced for payroll	$276.00
15 July, 1927, furnace contract	388.00
1 August, 1927, gutter, conductor and sheet metal	86.74
22 August, 1927, 4 bu. gravel, .50	2.00
200 lbs. asphalt, $3.75	7.50
8 lbs. galv. iron	.80
	$761.04"

(3) The affidavit "that the foregoing statement of account is just, true, and owing, and correct copy from claimant's books, showing the goods sold and delivered, installed, and work done by claimants to above debtor." Unobjected to, plaintiff testified: "The contract was for a lump sum. He had nothing to do with the number of hours I spent or the material that I used."

Webster's Dictionary defines "install": "To set up or fix in position for use or service." To set up or fix in position for use or service the furnace, and the incidentals connected therewith, would take labor and material, and the furnace itself would be a considerable item in the cost. It will be presumed that the day the last item in the bill of particulars was the day the furnace was finally in the position for use and service. The implication from the subjects set forth in the bill of particulars is that the labor and material was used in connection with installing the furnace in plaintiff's dwelling-house.

A jury trial having been waived, the trial judge found that the plaintiff contracted with the defendant "to do certain work and furnish certain material for a stated amount," etc. This means, of course, that the contract was entire. There was sufficient evidence to support this finding.

We think the position taken by defendant too technical, under the facts and circumstances of this case, and the statute has been sub-

stantially complied with. It is admitted by plaintiff that the four bushels of gravel at 50 cents a bushel $2.00, had nothing to do with the lump sum contract and must be deducted from the $761.04.

It was said in *Cameron v. Lumber Co.*, 118 N. C., at p. 268: "No one need misunderstand it who should become interested in the property." The judgment below is

Modified and affirmed.

STACY, C. J., dissents.

O. E. UNDERWOOD v. J. E. DOOLEY.

(Filed 17 April, 1929.)

1. Abatement and Revival B a—Former action abates subsequent action which should have been included in former—Pleadings.

The pendency of a suit involving substantially the same cause of action will prevent the plaintiff from maintaining a subsequent action upon any matters which were, or should have been, properly included within the scope of the former one, and the plaintiff may not maintain two separate actions for different damages resulting from the same negligent act, and a later action will be dismissed when this is properly made to appear.

2. Same—Action by insured for personal injuries not abated by action by insurer for damages to automobile.

Where an insurance company, under a policy covering damage to an automobile alone, has paid the insured for damages to it caused by the negligence of a third person, and has recovered judgment in its action against the *tort-feasor*, the owner may maintain a subsequent action against the *tort-feasor* to recover damages for personal injury arising from the same tort, as such action is not substantially the same as the pending action nor between the same parties.

3. Insurance O b—Insurance company paying insured is subrogated to his rights.

Where a company, under a policy covering damage to an automobile alone, has paid the insured the loss resulting from the act of a *tort-feasor*, it is entitled to maintain an action against the *tort-feasor* by subrogation to the owner's rights.

APPEAL by defendant from order of *Grady, J.*, at September Term, 1928, of SAMPSON. Affirmed.

This action was begun in November, 1927, and is now pending in the Superior Court of Sampson County. It was heard at September Term, 1928, of said court, on defendant's motion that the action be dismissed, (1) for that, at the date of its commencement an action against the defendant, begun by the Maryland Casualty Company, upon the same cause of action as that alleged in the complaint in this action, was pend-

ing in the Superior Court of Mecklenburg County, North Carolina; and, (2) for that, since the commencement of this action, a final judgment has been rendered in said action against this defendant, which he has paid and fully satisfied.

From an order denying his motion defendant appealed to the Supreme Court.

Algernon L. Butler for plaintiff.
C. H. Gover for defendant.

CONNOR, J. On 7 November, 1927, the plaintiff, O. E. Underwood, was driving his automobile on Clinton Street, in the town of Roseboro, Sampson County, North Carolina. A motor truck, owned by defendant, and driven by one of his employees, collided with plaintiff's automobile, on said street. As the result of said collision, plaintiff's automobile was badly injured; plaintiff also sustained serious personal injuries. In his complaint filed in this action, plaintiff alleges that said collision was caused by the negligence of the driver of said motor truck, and that defendant, as owner of said truck, and as employer of said driver, is liable for his damages caused by said collision. This action, which was begun in the Superior Court of Sampson County, is for the recovery, only, of damages for the personal injuries sustained by plaintiff and caused by said collision. Plaintiff does not demand in this action judgment that he recover damages for the injuries to his automobile. He does not allege in his complaint that he has suffered damages by reason of the injuries to his automobile; he alleges that by reason of the injuries to his person he has been damaged in the sum of $10,000. He demands judgment for this sum only.

At the date of said collision plaintiff's automobile was insured against loss or damage resulting from a collision, by a policy of insurance issued by the Maryland Casualty Company. By the terms of said policy the Maryland Casualty Company was subrogated to all the rights, claims and demands which the plaintiff had against the defendant for damages resulting from injuries to said automobile, caused by the negligence of defendant. Within a few days after said collision, and prior to the commencement of this action, the Maryland Casualty Company began an action against the defendant herein in the Superior Court of Mecklenburg County, North Carolina. In said action the Maryland Casualty Company, as plaintiff, demanded judgment that it recover of the defendant the sum for which it would be liable to plaintiff herein, under its policy, as damages to his automobile, resulting from the collision between defendant's truck and said automobile, on 7 November, 1927. It alleged that said sum was $2,500; it did not allege that it had paid

or adjusted the loss prior to the commencement of said action. After the commencement of said action in the Superior Court of Mecklenburg County, and before the commencement of this action in the Superior Court of Sampson County, the Maryland Casualty Company paid to the plaintiff herein the sum of $3,000, in full settlement of the amount for which the said company was liable to plaintiff herein, under its policy, on account of the damage or loss which plaintiff had sustained from the injuries to his automobile. After the commencement of this action, and while the same was pending, at the request of said company, plaintiff executed a formal assignment, in writing, to the said Maryland Casualty Company of any and all claims and demands which he had against the defendant for or on account of the injuries and damage to his automobile, caused by the collision between said automobile and defendant's truck on 7 November, 1927. Thereafter, by consent, a judgment was entered in the action pending in the Superior Court of Mecklenburg County, wherein the Maryland Casualty Company was plaintiff, and the defendant herein was defendant, that the Maryland Casualty Company recover of the defendant the sum of $1,400, in full settlement of any and all claims which the said company had against said defendant by reason of the cause of action alleged in the complaint in said action. This judgment has been paid by defendant, and duly canceled on the record in the office of the clerk of the Superior Court of Mecklenburg County.

Upon the foregoing facts, which were made to appear to the court by an amendment to the answer, which defendant filed, by leave of the court, defendant moved that this action be dismissed (1) for that, at the date of its commencement, an action against the defendant, begun by the Maryland Casualty Company, upon the same cause of action as that alleged in the complaint in this action, was pending in the Superior Court of Mecklenburg County, North Carolina; and (2) for that, since the commencement of this action, a final judgment has been rendered in said action, which defendant has paid and fully satisfied. Defendant's motion was denied; defendant excepted, and appealed to this Court.

In the original answer filed by defendant in this action, the allegations of negligence, which constitute plaintiff's cause of action herein, are denied; defendant also pleads, in bar of plaintiff's recovery, his contributory negligence. The facts on which defendant relies to sustain his motion that this action be dismissed, appear from his amended answer. They do not appear on the face of the complaint. In *Alexander v. Norwood*, 118 N. C., 382, 24 S. E., 119, it is said: "Where an action is instituted, and it appears to the Court by plea, answer or demurrer that there is another action pending between the same parties, and substantially on the same subject-matter, and that all material questions and

rights can be determined therein, such action will be dismissed." In *Emry v. Chappell,* 148 N. C., 327, 62 S. E., 411, it is said: "The general principle of the law is that the pendency of a prior suit for the same thing, or as is commonly said, for the same cause of action between the same parties in a court of competent jurisdiction, will abate a later suit, because the law abhors a multiplicity of suits, and will not permit a debtor or a defendant to be harassed or oppressed by two actions, if even substantially alike, to recover the same demand, when the plaintiff in the second action could have a complete remedy by one of them. The principle is based upon the supposition that, if the first suit is so constituted as to be effective and available, and also to afford an ample remedy to the plaintiff in the second, the latter is unnecessary and should be dismissed." In *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545, it is said that when the pendency of another action between the same parties, upon the same subject-matter, in another county, appears upon the face of the complaint, a demurrer on that ground will be sustained; and that when the pendency of such action is made to appear by answer, a motion that the second action be dismissed, should be allowed. In *Construction Co. v. Ice Co.,* 190 N. C., 580, 130 S. E., 165, a judgment dismissing the action, which was begun in Mecklenburg County, for that another action between the same parties, involving substantially the same subject-matter, was pending in another county, was affirmed, upon the authority of the above-cited cases of *Allen v. Salley, Emry v. Chappell* and *Alexander v. Norwood.*

It is well settled, therefore, by authoritative decisions of this Court that where an action is begun in a court of this State, and it is made to appear to said court, either by demurrer or by answer to the complaint, that at the date of its commencement there was pending in said court or in any court in this State of competent jurisdiction, another action between the same parties, involving the same, or substantially the same subject-matter, or cause of action, wherein all the rights of the parties thereto may be fully and finally determined and adjudicated, the action last begun will be dismissed.

As the result of the collision between plaintiff's automobile and de-defendant's motor truck, upon the allegations of the complaint in this action, plaintiff had a cause of action against the defendant on which he was entitled to recover damages for all the injuries which he had sustained and which were caused by said collision. On this cause of action plaintiff could have recovered, in one action, damages for the injuries, both to his automobile and to his person. He had, however, only one cause of action against the defendant, for defendant's tort, out of which the cause of action arose, was single and entire. He could not have split this cause of action, and maintained two actions against

defendant, one for the recovery of damages resulting from injuries to his automobile, and the other for the recovery of damages resulting from injuries to his person. Had plaintiff undertaken to split his cause of action, and instituted two actions, one for the recovery of damages resulting from injuries to his automobile, and the other for the recovery of damages resulting from injuries to his person, the second action would have been dismissed, for that the first action, involving the same subject-matter or cause of action was pending when the second action was begun. *Allen v. Salley, supra.* The recovery of a judgment in the first action, whether for damages to person or to property, would have barred a recovery in the second action. *Eller v. R. R.*, 140 N. C., 140, 52 S. E., 305. In the last cited case, it is said: "The general rule in the law of damages is that all damage resulting from a single wrong or cause of action must be recovered in one suit. The demand cannot be split, and several actions maintained for the separate items of damage. Plaintiff recovers one compensation for all loss and damage, past and prospective, which were the certain and proximate results of a single wrong or breach of duty." It was accordingly held in that case, that the action which plaintiff had begun in the Superior Court to recover of defendant damages for a personal injury, caused by the wrongful act of defendant, was properly dismissed, when it was made to appear to the court that plaintiff had theretofore, in another action, recovered of defendant a judgment for damages resulting from an injury to her property, caused by the same wrongful act of the defendant. The decision in *Eller v. R. R.* is cited and approved in *Barcliff v. R. R.*, 176 N. C., 39, 96 S. E., 644. It is said in the opinion in the last cited case: "No man should be twice vexed for the same cause. The plaintiff may carve out as much as the law allows him in the first instance, but he will not be permitted to cut more than once." In *Allen v. Salley, supra*, which was an action begun in the Superior Court of Buncombe County to recover damages for injuries caused by a collision between an automobile and a truck, it was held that the action should be dismissed, when it was made to appear to the court, that at the date of its commencement, an action between the same parties, upon the same subject-matter or cause of action was pending in the Superior Court of Polk County. In that case it is said: "The collision was but one transaction, and the whole matter should be tried, and the liabilities of all parties determined in the first action."

It is, therefore, well settled in this jurisdiction that one who has sustained damages, resulting from injuries both to his property, and to his person, caused by the single wrong or tort of another, can maintain only one action for the recovery of his damages, and that he cannot split his cause of action, arising from a single wrong or tort, and

maintain separate actions against the *tort-feasor,* as defendant, and recover therein for separate items of damage resulting from said wrong or tort.

An action to recover damages for injuries either to person or to property, caused by the single wrong or tort of the defendant, will be dismissed when it is made to appear to the court in which such action was begun and is pending, that another action begun by the same plaintiff against the same defendant, upon the same, or substantially the same cause of action, to recover damages for another injury, whether to person or to property, was pending in said court, or in another court in this State of competent jurisdiction to try and determine the issues involved in said action, at the date of the commencement of said action. A judgment recovered in the first action will bar a recovery in the second action, although the damages demanded in the second action are for a different injury from that for which the plaintiff recovered in the first action.

The principles above stated are well settled as the law of this jurisdiction, by authoritative decisions of this Court, and are in accord with decisions of courts in other jurisdictions, which are cited in the brief filed in this Court for the defendant. They are not, however, determinative of the question presented for decision by this appeal.

The action begun in the Superior Court of Mecklenburg County and pending therein at the commencement of this action, was not begun by the plaintiff in this action; said action was begun by the Maryland Casualty Company, to recover judgment against the defendant in its own behalf, and not in behalf of the plaintiff herein. The judgment entered in said action, by consent of the parties thereto, was not recovered by the plaintiff in this action; it was recovered by the Maryland Casualty Company, on the cause of action alleged in its complaint in said action. The facts alleged as constituting said cause of action include the facts which plaintiff in this action alleges as his cause of action against the defendant; other facts, however, are alleged by the Maryland Casualty Company, in its complaint in said action, and were essential to constitute a cause of action on which the said company, as plaintiff in said action, was entitled to recover of defendant therein. It cannot be held that the cause of action alleged in the action pending in the Superior Court of Mecklenburg County, at the date of the commencement of this action, is the same, or even substantially the same as that alleged by the plaintiff in this action. The Maryland Casualty Company could not have recovered of defendant solely upon the facts which constitute the cause of action alleged by the plaintiff in this action. It was required to allege and did allege facts from which it appeared that it was the real party in interest with respect to the sub-

ject-matter of the action, to wit, damages for injuries to the automobile owned by plaintiff in this action, caused by the wrongful act or tort of defendant.

At the date of the commencement of this action, the plaintiff had been fully compensated for the damage which he had sustained by reason of the injuries to his automobile. This damage had been paid by the Maryland Casualty Company, in discharge of its liability to plaintiff under its policy of insurance. No part of said damage had been paid by the defendant, who upon the allegations of the complaint in this action, was liable to plaintiff for such damage, as well as for the damages to plaintiff's person. The Maryland Casualty Company, having paid the damage to plaintiff's automobile, for which it was liable under its policy, had a cause of action against the defendant, upon its allegation that said damage was the result of an injury caused by defendant's wrongful act or tort. The Maryland Casualty Company alone could maintain an action to recover of defendant the sum which it had paid to the plaintiff, the insured under its policy, for it, and not the plaintiff, was the real party in interest. In *Cunningham v. R. R.*, 139 N. C., 427, 51 S. E., 1029, it was held by this Court that when an insurer has paid the loss or damage for which it was liable under its policy to the insured, it is subrogated to the rights of the insured, and can alone, as the real party in interest, maintain an action against the wrongdoer, and that it is immaterial whether the insured makes an actual assignment of his right of action or not. The insurer is subrogated not necessarily by virtue of the provision of the policy, but upon principles of equity to the right of action, if any, of the insured against the wrongdoer, who has caused the damage. In that case the action brought by the insured who had been fully compensated by the insurer, against the wrongdoer, was dismissed, upon the ground that the insured was not the real party in interest and for that reason could not maintain the action to recover of the wrongdoer the damages which he had sustained, but which had been fully paid by the insurer. This decision has been cited and approved in *Insurance Co. v. Lumber Co.*, 186 N. C., 269, 119 S. E., 362, and in *Powell v. Water Co.*, 171 N. C., 290, 88 S. E., 426. In the last cited case the following statement of the law is approved by this Court: "When an insurance company pays to the insured the amount of a loss of the property insured, it is subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or of admiralty, or under the modern

codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed."

We have not overlooked the fact that in the complaint filed by the Maryland Casualty Company in the action begun in the Superior Court of Mecklenburg County, it is not alleged that said company has paid the loss or damage to the automobile. It only alleges that it is liable for such loss as the owner has sustained. For the purposes of this decision, we do not think this fact is material.

The denial of defendant's motion in this action is sustained by authoritative decisions of this Court; it is supported by well settled legal principles; it is in accord with justice, and is both sustained and supported by sound policy.

It cannot be held as law in this State that the owner of an automobile, who as the result of the wrong or tort of another, has sustained damages both to his automobile and to his person, and whose automobile is insured against the loss or damage which he has sustained because of injuries to his automobile, is put to an election whether or not he shall, in order to maintain an action against the wrongdoer to recover damages for injuries to her person, release the insurance company from all liability to him under its policy. He does not lose his right of action to recover for the injuries to his person, by accepting from the insurance company the amount for which it is liable to him, under its policy, because the insurance company thereafter upon the cause of action which has accrued to it, recovers of the wrongdoer the amount which it has paid the owner of the automobile in discharge of its liability under the policy. This is not unjust to the wrongdoer, who is thereby required to pay only the full amount for which he is liable because of his wrong or tort. The order denying defendant's motion is

Affirmed.

C. C. WIMBISH v. A. C. HATTAWAY.

(Filed 17 April, 1929.)

Contracts B d—Time of expiration of option.

An option good "until" a day specified includes that day.

CIVIL ACTION, before *Shaw, J.*, at November Term, 1928, of GUILFORD.

On 16 February, 1927, Glenn M. McCall and the defendant, A. C. Hattaway, entered into a written contract, providing in substance that

McCall should sell to the defendant, Hattaway, a diamond ring for the sum of $962.50. Hattaway agreed to give to McCall an option to repurchase the above-mentioned ring for the sum of $1,000, said option "to hold good until the first day of October, 1927." McCall, the holder of the option, duly transferred it to the plaintiff. On 1 October, 1927, Wimbish tendered to the defendant $1,000 and demanded the ring. The defendant refused to deliver the ring, contending that the option expired at midnight on 30 September, and that, therefore, the tender came too late.

Issues were submitted to the jury and were answered in favor of the plaintiff.

The verdict awarded to plaintiff damages in the sum of $400. From judgment upon verdict the defendant appealed.

A. C. Davis for plaintiff.
King, Sapp & King for defendant.

PER CURIAM. The sole question of law presented is whether the words "until the 1st day of October, 1927," include the first day of October.

The decisions in other jurisdictions are not in accord; but it has been expressly decided in this State that the word "until," when used in reference to an act to be done on a day certain, includes the day specified. *Thomas v. Nichols,* 127 N. C., 319, 37 S. E., 327.

Affirmed.

CLAYTON C. RICHARDSON v. T. W. RITTER.

(Filed 17 April, 1929.)

Negligence C a—Act of defendant held contributory negligence barring recovery.

Where one seeks to recover damages for a negligent personal injury resulting from his diving into the shallow water of a public swimming pool, about twenty feet from the diving board, and hitting his head on the concrete bottom, his own negligence in not ascertaining the depth of the water before diving will bar his recovery.

APPEAL by plaintiff from *Shaw, J.,* at October Term, 1928, of GUILFORD. Affirmed.

This is an action to recover damages for personal injuries, alleged to have been caused by the negligence of defendant, in failing to exercise due care to inform plaintiff, a patron of defendant's swimming pool,

that the water in said swimming pool at the place where plaintiff dived into said pool was too shallow for diving, and that the bottom of said pool, at said place, was constructed of concrete.

Defendant denied the allegations of negligence, and also relied upon his plea that plaintiff is barred of recovery, by his contributory negligence, as alleged in the answer.

From judgment dismissing the action, at the close of plaintiff's evidence, as of nonsuit, plaintiff appealed to the Supreme Court.

D. Newton Farnell, Jr., B. L. Fentress and F. P. Hobgood, Jr., for plaintiff.

King, Sapp & King for defendants.

PER CURIAM. On 9 July, 1926, defendant owned a tract of land in Guilford County, on which he had constructed an artificial lake. This lake was operated by defendant as a public swimming pool. Patrons of said swimming pool were charged for admittance to said pool, and for the privilege of bathing, swimming and diving therein.

Plaintiff, accompanied by his wife and children, went to defendant's swimming pool late in the afternoon of 9 July, 1926. Having paid the sum charged for admittance to said pool, and for the privilege of swimming and diving therein, plaintiff within a short time thereafter dived from the edge of said pool into the same; at said place the water was shallow, and the bottom was constructed of concrete. Plaintiff's head struck the concrete bottom of the pool; he was thereby injured, and by reason of such injuries suffered damages. No notice was given plaintiff by signs or otherwise of the depth of the water at the place where he dived into the pool. There was a spring-board, constructed for diving at a distance of 15 or 20 feet from the place where plaintiff dived. Plaintiff made no inquiries of defendant or of any one else as to the depth of the water at the place where he dived, nor did he make any effort to ascertain whether it was safe to dive into said pool at this place.

Even if it should be held that there was evidence from which the jury could have found that defendant was negligent as alleged in the complaint—which is doubtful—and that such negligence was the cause of plaintiff's injuries, all the evidence tends to show that plaintiff was negligent, and that his negligence contributed, as a proximate cause, to his injuries. He, therefore, cannot recover of defendant in this action, the damages which resulted from his injuries.

The judgment dismissing the action is affirmed upon the authority of *Elder v. R. R.*, 194 N. C., 617, 140 S. E., 298, and of decisions cited in the opinion in that case.

Affirmed.

ALBERT PICK & COMPANY v. MOREHEAD BLUFFS HOTEL COMPANY, INC.

(Filed 24 April, 1929.)

1. **Principal and Agent C a—Implied authority of agent authorized to make purchase to do so on credit of principal—Conditional Sales.**

An agent appointed for the purchase of goods, without being given the money for which to pay for them, has implied authority to purchase them on the credit of his principal, and to do such other things in pursuance of the authority directly given as are reasonably necessary to consummate the transaction, and in this case, involving a large expenditure for the furnishing of a hotel, the execution of a contract wherein the vendor retained title for the security of the purchase price.

2. **Same—Where agent has implied authority to execute conditional sales contract the form of execution immaterial between parties.**

As between the vendor and purchaser it is immaterial in what form the agent authorized to purchase certain merchandise signed the contract, which in case of an incorporated agent is sufficient if signed by its president. C. S., 1139.

3. **Sales I a—Between parties to conditional sales contract registration not necessary.**

Between the parties to a conditional sales contract probate and registration is not required by statute. C. S., 3312.

4. **Contracts B a—Interpretation of contract by parties will be generally adopted.**

An interpretation that the parties to a contract have given it will be generally adopted by the court, and a contract for the purchase of furniture for a hotel subject to an itemization given therein and to such minor adjustments as may take place from time to time as the unit prices set forth, is held to cover additional items amounting to about $11,000, ordered and accepted by the vendee and shipped by the vendor under the contract.

APPEAL by Morehead Bluffs Hotel Company, Inc., from *Nunn, J.*, at November Term, 1928, of CRAVEN. No error.

It is alleged in the complaint that on 12 May, 1926, plaintiff sold to the defendant certain personal property at the agreed price of $48,370.48, which was afterwards increased by the sale of other articles under the contract to $59,370.88; that this sum was credited with $5,000 paid in cash and with an item of $1,133, leaving as the amount due the plaintiff $53,237.88, with interest at 6 per cent on the amount of each shipment from the time the shipment was made.

The defendant denied the material allegations of the complaint and for a further defense alleged that the property, consisting of furniture and other articles, was bought on an open account and not under a con-

tract by which the title was retained by the plaintiff; that it did not authorize such a contract, and that when it learned about a year after the sale that the plaintiff claimed retention of the title, it offered to return the goods and demanded that the alleged contract be canceled and that the furniture be removed from the hotel.

The plaintiff had the property seized under proceedings in claim and delivery and the defendant executed a replevin bond and kept possession of the property. The case came on for trial and the following verdict was rendered:

1. Is defendant indebted to the plaintiff? Answer: Yes.

2. If so, in what amount? Answer: $53,237.88, with interest.

3. Is the plaintiff the owner and entitled to the immediate possession of the personal property described in the complaint and the sheriff's return? Answer: Yes.

4. If so, what was the value at the time of the seizure of the property? Answer: $38,000.

5. What damage, if any, has the property sustained by deterioration since the seizure? Answer: $3,800.

6. What damage has plaintiff sustained by reason of the wrongful detention of the said property? Answer: Six per cent of $38,000.

It was thereupon adjudged that the plaintiff recover of the defendant $53,237.88 with interest from 1 January, 1927; that the property be sold and that the plaintiff recover $3,800 as damages for deterioration, or if possession could not be had that the plaintiff recover the value of the property with interest, etc. The plaintiff excepted and appealed upon error assigned.

Ringer, Wilhartz & Hirsch and Ward & Ward for plaintiff.
Whitehurst & Barden for defendant.

ADAMS, J. On 20 March, 1926, the defendant entered into a written contract with a Delaware corporation known as the William Foor Hotel Operating Corporation, by which the defendant agreed to build a modern hotel and casino at Morehead Bluffs and to furnish the building with first-class modern hotel furniture and equipment. It was agreed that the Foor Corporation, upon receipt of a written request from the defendant, should purchase for the defendant at a price acceptable to the parties all the furniture and equipment for the hotel in consideration of five per cent of the total cost. On 12 May, 1926, a written instrument, called a thirty-day agreement, was signed by the plaintiff and by "William Foor Hotel Operating Corporation for the Morehead Bluffs Hotel Company, by William Foor, Pres." This paper purports to be an offer by the plaintiff to sell the furniture and an acceptance of the offer by

the Foor Corporation for the defendant. It contains this clause: "The title to said merchandise shall remain in the seller until the same shall be fully paid for."

It is contended that this alleged contract is not binding on the defendant because it was not executed by the defendant or any of its officers, but by the Foor Corporation for the defendant. This objection is addressed to the question of the defendant's execution of the instrument and not to the signature of the Foor Corporation. Its name was signed by its president, and it is provided by statute that written contracts for the purchase of personal property by corporations in which title is retained as a security for the purchase price are sufficiently executed if signed in the name of the corporation by the president, secretary, or treasurer in his official capacity. C. S., 1139. The question is whether the execution of the contract by the Foor Corporation for the Morehead Bluffs Hotel Company binds the defendant. By the contract of 25 March, 1926, the defendant appointed the Foor Corporation its agent to purchase furniture; and the instrument of 12 May, 1926, is intended to be a contract between the plaintiff as seller and the defendant as buyer. The parties are the plaintiff and the defendant. It is therefore immaterial whether the contract was signed in the name of the defendant by the Foor Corporation or in the name of the Foor Corporation for the defendant. Either form would be sufficient. *Cadell v. Allen,* 99 N. C., 542; *Ramsey v. Davis,* 193 N. C., 395; 21 R. C. L., 848, sec. 27. The contract as between the parties, if properly executed, is valid without reference to its probate and registration. C. S., 3312; *Kornegay v. Kornegay,* 109 N. C., 188.

Another position of the appellant is this: the appointment of an agent to purchase personal property does not authorize such purchase when the title is retained to secure payment of the agreed price. As no funds were given the agent to pay for the furniture he had the implied power to make the purchase on the credit of the defendant. In *Brittain v. Westall,* 137 N. C., 30, it is said: "It may be taken as a settled principle in the law of agency that if express authority to buy on a credit is not given to an agent, but he is authorized to make the purchase and no funds are advanced to him to enable him to buy for cash, he is, by implication, clearly authorized to purchase on the credit of his principal, because when an agent is authorized to do an act for his principal, all the means necessary for the accomplishment of the act are impliedly included in the authority, unless the agent be in some particular expressly restricted." *Ruffin v. Mebane,* 41 N. C., 507; *Swindell v. Latham,* 145 N. C., 144. In the law of agency this rule also is in force: "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the

nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed the principal is estopped from denying the agent's authority to perform it." 21 R. C. L., 856.

The agent contracted for the purchase of property valued at about $50,000; no money was paid, no security was tendered, and the financial standing of the defendant was uncertain. In these circumstances the plaintiff was justified in assuming that the agent was authorized to purchase though the title was retained; and, having received the furniture, the defendant cannot now repudiate its contract on the ground of the agent's want of power. There is ample evidence that the contract was duly executed.

The price of the goods first shipped was $48,370.48; but afterwards upon the defendant's order other articles were shipped on the same account and under the original contract. This was done pursuant to a stipulation in the thirty-day agreement to this effect: "Subject to the itemization given therein and to such minor adjustments as may take place from time to time at the unit prices set forth." There is evidence that the parties construed this stipulation by changing items amounting to about $11,000 from one of the accounts to the other, leaving the remainder as alleged in the complaint, as admitted in the defendant's evidence, and as shown by the statement from the records of the defendant. Where it appears that the parties themselves have practically interpreted their contract the courts generally will adopt their construction. *Lewis v. Nunn,* 180 N. C., 159; *Wearn v. R. R.,* 191 N. C., 575.

What has been said disposes of the three propositions stated in the appellant's brief. There are forty-nine exceptions in the record, some of which relate to the admission or rejection of evidence. It is not necessary to refer to them in detail; in our examination of them we have found no reason for awarding a new trial.

No error.

STATE v. A. H. RITTER, L. E. VAUGHN, WOLSEY WALL AND ALEX McKENZIE.

(Filed 24 April, 1929.)

1. Criminal Conspiracy A a—Definition of the crime.

A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and does not require the accomplishing of the purpose in contemplation or any overt act in furtherance thereof.

2. Criminal Conspiracy B a—Competency of evidence of coconspirator.

The acts and declarations of each conspirator, while done in furtherance of the unlawful purpose or the testimony of one of them in regard to the conspiracy, is competent evidence against them all, but testimony given by one of the conspirators of his acts done in the absence of the others and in derogation of the purpose of the conspiracy is incompetent against the others, and as to them its admission constitutes reversible error.

APPEAL by defendants, A. H. Ritter and L. E. Vaughn, from *Sink, Special Judge,* at October Term, 1928, of RICHMOND.

Criminal prosecution tried upon an indictment charging A. H. Ritter, L. E. Vaughn, Wolsey Wall and Alex McKenzie with conspiring, confederating and agreeing among themselves to kill and murder one Cleveland Cagle; and in carrying out said conspiracy, it is alleged that they offered to pay one Charlie Patterson the sum of $200 to aid them in their unlawful scheme, etc.

The evidence on behalf of the State tends to show that on Sunday, 3 July, 1927, A. H. Ritter, L. E. Vaughn and Alex McKenzie went to the home of a colored man by the name of Charlie Patterson and told him they would give him $200, and see that he was protected, if he would induce Cleveland Cagle, on the following day, to come where they could get hold of him; that they would drive their car below Cagle's house, feign a breakdown, send Patterson to ask his help, and when he came out to the road they would strike him with a club, run over him with the car, and make it appear that his death was an accident, and that they would have the sheriff with them so Patterson would have nothing to fear. Ritter said Cagle had been tearing up their distilleries and that he ought to be killed.

As the alleged conspirators were drinking, Patterson testified that he paid very little attention to what they said.

But on the following day Alex McKenzie returned, and said to Patterson—none of the others being present: "Those fellows that came here yesterday won't do to fool with. I know them. I am white and you are black. It won't do to do anything like that. They will break our necks." The defendants Ritter and Vaughn, who alone were being tried, duly objected to the introduction of this evidence. Overruled and exception.

Patterson, at the instance of McKenzie, called the sheriff and told him of the proposition that had been made to him.

Ritter and Wall, but not Vaughn, came to Patterson's house about 10 o'clock on Monday, 4 July, as they had suggested the day before, but left before the sheriff arrived.

Here the conspiracy seems to have ended.

Verdict: Guilty as to A. H. Ritter and L. E. Vaughn, the only defendants on trial.

Judgment: Imprisonment as to both in the State's prison at hard labor for a term of not less than four nor more than ten years.

The defendants appeal, assigning errors.

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

F. W. Bynum, Smith & Smith, L. B. Clegg and W. R. Clegg for defendants.

STACY, C. J., after stating the case: The gist of a criminal conspiracy is the unlawful concurrence of two or more persons in a wicked scheme—the agreement to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means—and it is said that the crime is complete without any overt act having been done to carry out the agreement. *S. v. Van Pelt,* 136 N. C., 633, 49 S. E., 177; *S. v. Dalton,* 168 N. C., 204; 83 S. E., 693; *S. v. Trammell,* 24 N. C., 379. "If two or more persons conspire to do a wrong, this conspiracy is an act 'rendering the transaction a crime,' without any step taken in pursuance of the conspiracy." *S. v. Brady,* 107 N. C., 822, 12 S. E., 325. The crime of conspiracy consists of the *conspiracy,* and not of its execution. *S. v. Younger,* 12 N. C., 357.

One who enters into a criminal conspiracy, like one who participates in a lynching, or joins a mob to accomplish some unlawful purpose, forfeits his independence and jeopardizes his liberty, for, by agreeing with another or others to do an unlawful thing, he thereby places his safety and security in the hands of every member of the conspiracy. The acts and declarations of each conspirator, done or uttered in furtherance of the common, illegal design, are admissible in evidence against all. "Every one who enters into a common purpose or design is equally deemed in law a party to every act which had before been done by the others, and a party to every act which may afterwards be done by any of the others, in furtherance of such common design." *S. v. Jackson,* 82 N. C., 565.

But to make the acts and declarations of one person those of another, or to allow them to operate against another or others, it must appear that there was a common interest or purpose between them and that said acts were done, or said declarations uttered, in furtherance of the common design, or in execution of the conspiracy. *S. v. George,* 29 N. C., 321.

Proof of the acts done in pursuance of the common design by one of the conspirators, even though not on trial, and of his declarations made after the entry of the defendants into the combination, and up to the

time when the offense was committed, is competent against all. *S. v. Turner,* 119 N. C., 841, 25 S. E., 810; *S. v. Anderson,* 92 N. C., 732. But declarations of one of the conspirators, made after the offense has been committed and in the absence of the others, are not competent against the others, because not uttered in furtherance of the common design. *S. v. Dean,* 35 N. C., 63.

The declarations of Alex McKenzie, made after he had abandoned the conspiracy, and not in furtherance of the common design, but in derogation of it, and in the absence of the other conspirators, while competent against him, yet, we think, are inadmissible as evidence against the defendants Ritter and Vaughn. *S. v. Dean, supra; S. v. George, supra.* Nor can the admission of this evidence be held for harmless error. It undoubtedly weighed heavily against the defendants.

There are other exceptions appearing on the record worthy of consideration, but as they are not likely to arise on another hearing, we shall not consider them now.

For error in the admission of incompetent evidence, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

COUNTY OF ROCKINGHAM v. NORFOLK & WESTERN RAILWAY COMPANY.

(Filed 24 April, 1929.)

Highways A a—Where Highway Commission has closed grade crossing, county may not reopen it upon reincorporating abandoned highway.

The State Highway Commission is given exclusive authority by statute to eliminate and close grade crossings of railroad tracks on the highway, and when it has so closed a grade crossing and substituted an underpass in the interest of public safety, 3 C. S., 3846(j), 3846(y), the commissioners of a county are without power to order the grade crossing abandoned by the Commission reopened to the public, and this power is not given the county by C. S., 3846 (e 5), authorizing the county commissioners to reincorporate into the county systems any portion of highway abandoned by the State Highway Commission. See, also, the declaratory statute ratified 18 March, 1929.

CIVIL ACTION, before *MacRae, Special Judge,* at February Term, 1929, of ROCKINGHAM.

The plaintiff alleged that the State Highway Commission took over and incorporated into the State system of highways a public road between Stoneville, North Carolina, and the Virginia line, and thereafter

hardsurfaced the road to a point known as Price Station. When the Highway Commission first assumed control of the road there was a grade crossing just beyond Price Station. The trial judge found as a fact that in the latter part of 1926, or early part of 1927, the State Highway Commission "abandoned that part of the road just beyond Price Station and followed another county road for a distance of about 400 yards and eliminated said crossing . . . after the said Highway Commission had constructed a concrete overhead bridge over the railroad track and had built and extended the new hard-surface road along the west boundary of the church property, bringing the new hard-surface highway back into the old road as it formerly ran . . . closing the old road, and required the Norfolk & Western Railway Company to pay one-half of the expense of the said overhead bridge." Soon after completing the hard-surface road and the building of said overhead bridge, the defendant planted posts across the old public road on the south side of the crossing and on its right of way and tore up and destroyed the said crossing "after obtaining authority from the State Highway Commission to do so." Thereafter, on 11 September, the plaintiff brought this suit against the defendant to compel it to remove said obstruction and restore said grade crossing upon the ground that the portion of the old road abandoned by the State Highway Commission had been duly reincorporated into the county public road system of plaintiff in accordance with C. S., 3846 (c 5).

The trial judge issued a writ of mandamus to compel the defendant to restore said grade crossing, and the defendant appealed.

Sharp & Sharp, W. R. McCargo and H. L. Fagge for plaintiff.

F. M. Rivinus, Burton Craige, Scott & Brewer and Murray Allen for defendant.

BROGDEN, J. The determinative questions of law presented are:

1. Did the State Highway Commission have power to eliminate said grade crossing?

2. If so, was such power modified or destroyed by Public Laws of 1927, ch. 46, sec. 5, C. S., 3846 (c 5)?

C. S., 3846(k) expressly delegates to the State Highway Commission power "to regulate, abandon and close to use all grade crossings on any road designated as part of the State highway system . . . and whenever an underpass or overhead bridge is substituted for a grade crossing, the commission shall have power to close to use and abandon such grade crossing and any other crossing adjacent thereto." Power is also given the State Highway Commission to eliminate grade crossings by compelling the railroads to pay one-half the expense thereof.

C. S., 3846(y). Exclusive jurisdiction over and control of grade crossings is expressly conferred upon the State Highway Commission by C. S., 3846(z).

The overhead bridge near Price Station was substituted for the grade crossing theretofore existing and was constructed by the defendant and the State Highway Commission in compliance with the provisions of the statute and for the express purpose of eliminating this particular grade crossing in the interest of public safety. Under the law as written the State Highway Commission had exclusive control of the crossing, and therefore had exclusive power to "close to use such grade crossing."

Public Laws of 1927, ch. 46, sec. 5, C. S., 3846 (c 5), authorizes a county to reincorporate into the county system any portion of a road duly abandoned by the State Highway Commission. This statute, however, neither by express terms nor by implication, undertakes to disturb or affect the exclusive jurisdiction of the State Highway Commission over grade crossings which it is authorized to eliminate. Moreover, the grade crossing in controversy was duly "closed to use" before the abandonment of the small portion of the road leading to the crossing. While the county has the right to reincorporate such abandoned portions of a road, it must necessarily follow that they must be reincorporated in the condition in which the Highway Commission left them. The Highway Commission left or abandoned this road with the grade crossing "closed to use." The county, therefore, has no power under the law to require the Highway Commission or the defendant to restore a grade crossing which has been duly abolished in compliance with the statute. This view of the law received declaratory sanction by the General Assembly by an act ratified 18 March, 1929, which provides in substance that county road-governing authorities are not authorized to reopen any railroad grade crossing closed by order of the State Highway Commission "in connection with the building of an overhead bridge or underpass to take the place of such grade crossing."

Reversed.

E. B. ATKINSON, ON BEHALF OF HIMSELF AND OTHERS, v. E. C. GREENE ET AL., AND THE CITY OF ASHEVILLE AND THE FRENCH BROAD CEMETERY.

(Filed 24 April, 1929.)

1. Actions D a—Action is commenced from issuance of summons.

The commencement of a civil action is at the time of the issuance of the summons, from which time the action is pending.

2. Municipal Corporations J a—Allegation of demand upon and refusal of city to bring action not necessary in this case.

In an action by a taxpayer, in behalf of himself and others, to vacate and set aside a deed to the city by a cemetery association on the ground of collusion and fraud between the association and the two commissioners who since have been succeeded by others, but were in office at the time of the issuance of the summons: *Held*, as the city officials were in office when the action was commenced the service was proper, and an allegation of demand upon and refusal of the city to bring suit was not required.

3. Same—Plea in Bar.

Held, upon the facts of this case, the defendant's plea in bar was properly overruled with leave to file answer.

APPEAL by defendants from *Sink, Special Judge,* at April Special Term, 1928, of BUNCOMBE. Affirmed.

Marcus Erwin and Alfred S. Barnard for plaintiff.
George Pennell, Mark W. Brown and Carter & Carter for defendants.

ADAMS, J. The original summons was issued 16 May, 1927, and served on all the defendants therein named on 20 May, 1927. Among these defendants were John H. Cathey and Frank L. Conder, officers of the city, who constituted a majority of the city board of commissioners. Neither the City of Asheville nor the French Broad Cemetery Company was a party, but each of them was afterwards made a party defendant by an order of court. The summons against these two defendants was issued 23 May, 1927, and served the day following. The date of its issuance was the day before Cathey and Conder retired from office—the day before they were succeeded respectively by Roberts and Rogers.

The plaintiff, suing on behalf of himself and other taxpayers, filed a complaint setting up two causes of action. His object was to vacate and set aside a deed conveying land to be used as a cemetery, executed on 4 March, 1927, to the City of Asheville by the French Broad Cemetery Company. The gravamen of the action is fraud and collusion in effecting the sale between Cathey and Conder as officers of the city and the officers and stockholders of the Cemetery Company. For the purpose of barring the prosecution of the action the defendants alleged that the summons was served on the city within the space of a few minutes after the oath had been administered to the officers succeeding Cathey and Conder, and that it was not served on the city while Cathey and Conder were in office. Upon these facts the defendants submit the legal proposition that the action cannot be maintained in the absence of an allegation in the complaint that the plaintiff had requested the governing

body of the city to take such action as was necessary to vacate and cancel the deed and that such action had not been taken. Whether such request was necessary is the question for decision. The controlling principle is enunciated in the authorities cited in *Murphy v. Greensboro,* 190 N. C., 268, 275. An allegation that the city refused to bring suit is not necessary if the request to bring it was not required. Such request was not required if at the time the suit was brought the corporate management was in control of the officers who are said to have connived with the officers and stockholders of the Cemetery Company. *Murphy v. Greensboro, supra,* 276, and citations. That they were in control when the summons was issued is admitted.

A civil action is commenced when the summons is issued and, as the statute fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served. C. S., 475; *Pettigrew v. McCoin,* 165 N. C., 472; *Morrison v. Lewis, ante,* 79. As the city officials who are charged with the alleged wrong were in office when the action was commenced an allegation of a demand upon the city and the city's refusal to bring suit was not required. The cases of *Harrison v. New Bern,* 193 N. C., 555, and *White v. Hickory,* 195 N. C., 42, cited by the appellants, were decided upon facts which differ in material respects from those appearing in the present appeal.

Judge Sink overruled the plea in bar and gave leave to the city to file an answer. In our opinion his judgment is free from error and should be

Affirmed.

CHAS. R. BRIGGS AND WIFE, CLARA SILVIS BRIGGS, v. THE INDUSTRIAL BANK OF RICHMOND, JOHN D. BROWN AND G. C. HAMPTON, JR., TRUSTEE.

(Filed 24 April, 1929.)

Quieting Title A a—Usurious charge on notes secured by mortgage not ground for suit to remove cloud on title to extent of interest.

An usurious charge of interest on notes does not affect the validity of the mortgage or deed of trust securing them, C. S., 2306, and a suit brought to remove a cloud upon title to the lands under the provisions of C. S., 1743, to the extent of the usurious charge of interest on the notes cannot be maintained.

CIVIL ACTION, before *Moore, Special Judge,* at October Term, 1928, of GUILFORD.

Plaintiffs allege that on 15 August, 1927, they borrowed from the defendant bank the sum of $1,700, but that said defendant required

them to execute sixty notes in the sum of $42.50 each, payable on the first day of each month until the entire sum had been discharged; that in order to secure the payment of said notes plaintiffs executed and delivered to the individual defendants a deed of trust upon certain land in Guilford County. Plaintiffs further allege that they had paid twelve monthly installments of $42.50 each, and that the transaction was usurious in that the sum of $658.18 represented money in excess of the legal rate and the penalty allowed by law. Plaintiffs demand judgment "that the sum of $658.18 of the aforesaid deed of trust and notes be adjudged to be usurious and void; that the same be declared a cloud upon the title of plaintiffs and be canceled and removed; that the amount which is due upon said notes and deed of trust be adjudged to be $1,190, payable monthly at the rate of $42.50 per month, without interest," etc.

The defendants demurred to the complaint upon several grounds, and in particular that the complaint did not state a cause of action for removing the cloud upon the title of plaintiffs.

The trial judge sustained the demurrer, and the plaintiffs appealed.

Thomas J. Hill for plaintiffs.
Shuping & Hampton for defendants.

BROGDEN, J. If a note secured by a mortgage or deed of trust is tainted with usury, can the makers thereof have the usurious element adjudged a cloud upon the title and removed under the provisions of C. S., 1743?

The remedy prescribed by law for usurious transactions is thus stated in *Ripple v. Mortgage Corp.*, 193 N. C., 422, 137 S. E., 156. "In North Carolina the penalty, as prescribed by statute, for taking, receiving, reserving, or charging for the use of money a sum in excess of interest at the legal rate is forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid. The forfeiture will be enforced against the usurer, when he seeks to recover upon the usurious contract or transaction. His debt will be stripped of all its interest-bearing quality, and he will be permitted to recover only the principal sum loaned. If a sum in excess of interest at the legal rate has not only been charged by the lender, but has also been paid by the borrower for the use of money, then the person, or his legal representative, or the corporation by whom the same has been paid, may recover twice the amount paid in an action in the nature of action for debt." C. S., 2306.

It is manifest that the note is not a cloud upon title. The cloud, if any, is formed by the mortgage or deed of trust. It was formerly held in *Glisson v. Newton*, 2 N. C., 336, that a bond tainted with usury was

utterly void "as is also every security or assurance founded upon it." But the statute in force in 1796 when the decision was rendered, contained express provision to that effect. *Shober v. Hauser*, 20 N. C., 222.

In construing the present statute upon the subject of usury it has been held that the usury complained of did not affect or impair the obligation and validity of the mortgage or deed of trust securing the note. Thus, in *Spivey v. Grant*, 96 N. C., 214, 2 S. E., 45, the Court declared: "Nor can the change in the rate of interest, assented to by him, made in the deed, impair its force as to him. Had it remained, it would have only affected the obligation to the extent of the interest, not the conveyance as a valid act." To the same effect is the utterance in *Rogers v. Booker*, 184 N. C., 183, 113 S. E., 671. "The usury did not impair the validity of the mortgage, and only forfeits the interest."

Plaintiffs do not contend that the deed of trust is entirely invalid, but that it is partially so. C. S., 1743, does not apply to such a fact situation. The statute was intended to remove clouds not merely to determine their size.

Affirmed.

MRS. M. W. GANT v. THE PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY OF CHATTANOOGA, TENNESSEE.

(Filed 24 April, 1929.)

1. Insurance E b—Construction of insurance contract in general.

The rule that a liberal construction of ambiguous language will be given in favor of the insured has no application when the words employed clearly express the terms upon which the policy has been issued.

2. Insurance R a—Construction of policy of accident insurance as to the risks covered.

When a policy of accident insurance limits the liability of the company to injuries caused the insured by being struck by a moving automobile, its plain and unambiguous meaning will not be extended in favor of the insured to cover an injury caused by being struck with a plank hurled against her by a revolving wheel of an automobile.

3. Trial D c—Nonsuit properly granted when evidence does not establish liability of defendant.

Where the only evidence in an action upon an accident insurance policy tends to show that the defendant was not responsible under the terms of the policy, the defendant's motion as of nonsuit is properly granted.

APPEAL by defendant from *Shaw, J.*, at August Term, 1928, of GUILFORD. Reversed.

This is an action to recover on an automobile accident policy of insurance issued by defendant to plaintiff on 6 February, 1923, and in force on 10 January, 1927. The policy provides for the payment by defendant to plaintiff of a stipulated sum of money, as indemnity, for the loss of life or limb, of sight or time, by accidental means; the liability of defendant, however, is expressly limited by the language of the insuring clause in said policy.

By said policy defendant insured plaintiff "against the effects resulting exclusively of all other causes from bodily injury sustained by the insured during the life of this policy solely through external, violent and accidental means (excluding suicide while sane or insane, or any attempt thereat while sane or insane) and which bodily injury is sustained by the insured as the result of operating, driving, riding in or on, adjusting or cranking an automobile, or of being struck, run down or run over by a moving automobile, or caused by the burning or explosion of an automobile."

The evidence at the trial tended to show that on 10 January, 1927, plaintiff was struck by a plank which was thrown against her by the revolving wheel of an automobile; the plank struck the plaintiff on her leg, thereby causing her a serious bodily injury. At the time she was struck by the plank plaintiff was standing in the yard of her home in Greensboro, N. C., at a distance of 12 or 15 feet in the rear of the automobile. No part of the automobile struck, or came in contact with the person of plaintiff.

Plaintiff's husband had undertaken to drive the automobile from his garage to the street, in front of his home; the driveway, running from the garage to the street, was covered with snow, 15 to 17 inches deep. After the automobile had been driven from the garage, and while it was on the driveway, the rear wheels began to spin, because of the snow on the driveway. This caused the automobile to skid. To prevent the wheels from spinning and the automobile from skidding, plaintiff's husband directed a servant to place a plank under each of the rear wheels. When this had been done, the wheels passed over the planks underneath them. As the left rear wheel passed over the plank, which had been placed under it, the plank was hurled by the revolving wheel, with great force, toward the plaintiff, who at the time was standing in the rear of the automobile. This plank struck the plaintiff and caused the injury to her leg. Because of the injury, plaintiff was taken at once to a hospital, where she remained for thirty-five days, under the care of physicians and surgeons. Since her return to her home from the hospital plaintiff has been unable, because of her injury, to resume the performance of her household duties.

Issues were submitted to the jury, and answered as follows:

"1. Was the plaintiff struck by a moving automobile, within the terms of the policy of insurance, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff on said occasion expose herself to unnecessary danger? Answer: No.

3. What amount, if any, is plaintiff entitled to recover of defendant? Answer: $635, with interest from 15 July, 1927."

From judgment on the verdict defendant appealed to the Supreme Court.

Shuping & Hampton for plaintiff.

Brooks, Parker, Smith & Wharton for defendant.

CONNOR, J. Only one question is presented for decision by defendant's several assignments of error on this appeal: Was the bodily injury, which all the evidence shows was sustained by her on 10 January, 1927, the result of plaintiff "being struck . . . by a moving automobile"? Unless this question can be answered in the affirmative, it must be conceded that plaintiff cannot recover in this action. Defendant is liable to plaintiff only under the terms of the policy; if the injury which she sustained is not included within the terms of the policy, plaintiff cannot recover.

There was no evidence at the trial tending to show that plaintiff in fact was struck by a moving automobile, and thereby injured; all the evidence tended to show that she was struck by a plank. Can the language of the policy be so construed by the court that it may be held, upon all the evidence, as a matter of law, that plaintiff was struck by a moving automobile, because the evidence shows that she was struck by a plank which was thrown against her by the revolving wheel of an automobile?

If the language of the policy is uncertain or ambiguous, and is susceptible to more than one construction, the court will adopt and apply that construction which is most favorable to the insured. If, however, there is no uncertainty or ambiguity in the language of the policy, there is no occasion for judicial construction; the rights and liabilities of the parties must be determined in accordance with the plain, ordinary, and popular sense of the language which they have used in their contract. *Penn v. Insurance Co.*, 158 N. C., 29, 73 S. E., 99.

In the instant case the liability of the defendant under the policy which plaintiff accepted, is expressly limited by language which is free from uncertainty or ambiguity. This language, therefore, cannot be so construed as to enlarge defendant's liability, in order that plaintiff may recover upon the facts shown by the evidence. As there was no evidence

from which the jury could find that plaintiff was injured by "being struck by a moving automobile," we must hold that there was error in the refusal of the court to allow defendant's motion, at the close of the evidence, that the action be dismissed as upon nonsuit. To the end that the action may be dismissed, in accordance with this opinion, the judgment is

Reversed.

STATE v. GEORGE DALTON.

(Filed 24 April, 1929.)

Criminal Law G c—Right to impeach credibility of defendant's testimony.

Where a defendant in a criminal action testifies in his own behalf the credibility of his testimony is subject to impeachment, and it is competent for the State to ask him on cross-examination whether there was then a warrant out for him from the Federal Court, when relating only to his credibility as a witness.

APPEAL by defendant from *Shaw, J.*, and a jury, at Fall Term, 1928, of STOKES. No error.

The bill of indictment charged the defendant with (1) the manufacture of intoxicating liquors; (2) having intoxicating liquors in his possession; (3) having intoxicating liquors in his possession for the purpose of sale. The jury rendered a verdict of guilty "in manner and form as charged in the bill of indictment."

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

W. Reade Johnson for defendant.

CLARKSON, J. The defendant, George Dalton, was a witness in his own behalf. On cross-examination the following question was asked him: "Q. There is a warrant out for you now from the Federal Court against you?" The defendant objected; the objection was overruled and the defendant excepted and assigned error. The defendant answered "Yes, I guess there is." This is the sole assignment of error in the record.

This matter was thoroughly discussed in *S. v. Maslin,* 195 N. C., at p. 540. In that case, on cross-examination, for the purpose of impeachment, the defendant was asked whether he was then under indictment for abstracting and embezzling funds belonging to the Merchants Bank and Trust Company, for the embezzlement of trust funds deposited in the same bank by the Snipes estate, and for receiving into the bank cer-

tain moneys for deposit when he knew the bank was insolvent. His objection to each question was overruled and to each, reserving his exceptions, he gave an affirmative answer. In that case it was held that the questions were competent.

In the case of *S. v. Wiggins*, 171 N. C., 813, the question asked, "If he had not been accused of stealing a certain person's hogs," was properly excluded. Note the question was not whether he had been convicted.

A warrant is issued from a court and has to be sworn to. We think the evidence competent. *S. v. Jeffreys*, 192 N. C., 318.

No error.

MARY SCHWARBERG, ELIZABETH SCHWARBERG AND ELIZABETH M. PETTES v. E. M. HOWARD, V. L. COLE AND UNITED STATES LAND COMPANY.

(Filed 24 April, 1929.)

Appeal and Error E a—Complaint is necessary part of record proper.

Under Rule 19, section 1, the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed.

APPEAL by defendants from *Stack, J.*, at September Term, 1928, of MOORE.

Johnson & Johnson for plaintiffs.
J. A. D. Parrish and L. B. Clegg for defendants.

STACY, C. J. It appears from the statement of case on appeal, which constitutes the entire record sent to this Court, that summons in an action entitled as above, was issued out of the Superior Court of Moore County 29 March, 1928, and that thereafter, 25 July, 1928, two of the defendants, E. M. Howard and United States Land Company, through their counsel, entered a special appearance and move, first, that the action be dismissed for want of proper service as to them; and, second, that the action be moved to Carteret County for trial, if not dismissed. Both motions were overruled and the defendants appeal. The complaint is not sent up as a part of the record as required in all cases, and we are not able to determine the nature and character of the action.

It is provided by Rule 19, sec. 1, of the Rules of Practice in the Supreme Court that "the pleadings on which the case is tried, the issues and the judgment appealed from shall be a part of the transcript in all cases." 192 N. C., p. 847. The appeal, therefore, must be dismissed for

failure to comply with the rules, or to send up the necessary parts of the record proper. *S. v. McDraughon,* 168 N. C., 131, 83 S. E., 181; *Cressler v. Asheville,* 138 N. C., 482, 51 S. E., 53; *Sigman v. R. R.,* 135 N. C., 181, 47 S. E., 420; *Jones v. Hoggard,* 107 N. C., 349, 12 S. E., 286.

As to whether the defendants did not waive their special appearance and enter a general appearance by moving for change of venue as a matter of right, see *Motor Co. v. Reaves,* 184 N. C., 260, 114 S. E., 175.

Appeal dismissed.

MRS. T. D. JONES, SOUTHGATE JONES, J. L. MOREHEAD, W. L. FOUSHEE, A. D. MATTHEWS, MRS. J. N. GORMAN, EDITH MATTHEWS, AND B. B. MATTHEWS v. CITY OF DURHAM.

(Filed 24 April, 1929.)

1. Municipal Corporations G b—Railroad right of way properly included in lineal feet necessary in petition for street improvements.

The right of way of a railroad company abutting on a street proposed to be improved by a city is properly included in the lineal feet in the petition for improvement under the provisions of C. S., 2707, requiring that a petition for local improvements shall be signed by at least a majority of the owners representing at least a majority of all the lineal feet of frontage upon the street, etc., proposed to be improved.

2. Municipal Corporations G d—Procedure of owners objecting to assessments.

The remedy of owners of property abutting upon a street proposed by petition to be improved, assessing the land of such owners, is given by statute, C. S., 2714, providing them an opportunity to be heard, and the right of appeal to the Superior Court by giving notice of appeal within ten days after confirmation by the municipal authorities, and when this has not been done, and the work has been completed, injunctive relief against the collection of the assessments by the city will not lie.

3. Same—Findings of municipal authorities that petition is signed by proper number of owners is final.

Where the municipal authorities have approved the petition of owners of land abutting upon a street proposed to be improved in accordance with the provisions of statute, their approval and order for the improvements to be made is final, except where it appears from the face of the petition, as a matter of law, that the signers do not represent a majority of the owners or of the lineal feet required by statute.

4. Municipal Corporations G a—Power of City to Aid or Contract for paying street assessments.

Where a railroad company by proceedings in mandamus has been compelled to construct an underpass for a street crossing, the city has the power to sign an agreement in the proceedings obligating itself to pay for

street improvements along the underpass, and where this has been done the city may accept the signature of the railroad company to a petition to improve the street as an owner of lineal feet abutting thereon and to pay the part assessed against such right of way for the improvements, and where the relevant provisions of the statutes in regard to street improvements have been complied with this furnishes no evidence of fraud. C. S., 2705, 2706, 2708, 2709, 2710, 2711, 2712, 2713, 2714.

APPEAL by plaintiffs from *Devin, J.*, at Chambers, in Durham, N. C., in September, 1928. Affirmed.

This is an injunctive proceeding brought by plaintiffs against defendant to restrain it from collecting certain street assessments. The court below found the facts and rendered judgment in favor of defendant. The findings of facts are carefully set forth at some length and unnecessary to repeat here in full.

Briefly: (1) A writ of mandamus was brought by the city of Durham *v.* Southern Railway Company and other railroads to compel them to construct an underpass with proper approaches thereto in the city of Durham, to eliminate and abolish a dangerous grade crossing at Chapel Hill Street. The judgment rendered in the lower court was sustained by this Court—185 N. C., 240, and sustained by the U. S. Supreme Court, 69 L. Ed., 231 (266 U. S., p. 178).

(2) The judgment in the writ of mandamus set forth: *"The city of Durham agrees to do all underground work such as the relaying and replacing of water, gas and sewerage mains, street paving including curbs and gutters and also sidewalks."*

(3) The railroads, in accordance with the terms of the judgment, built the underpass and approaches at the cost of some $254,000.

(4) After the underpass and approaches were built, W. P. Budd, who was interested in a lot on the east approach of the said Chapel Hill Street underpass, circulated a petition for the street improvement area under the provisions of chapter 56, Laws 1915, and amendments. The total lineal feet within the local improvement area was 2893.30 feet. Budd obtained a total of 1334.80 feet. Later the Southern Railway Company signed, making a total of 2051.20 feet (the addition in the record is incorrect, but immaterial), leaving unsigned 842.10 feet, which made a majority of the lineal feet with the signature of the Southern Railway Company which was 716.40 feet. There were seventeen property owners, all except five signed the petition. Thus the petition had a majority of lineal feet and owners in the street area to be paved.

(5) The clerk's report showing the frontage signed and unsigned by the property owners, with the original petition, was submitted to the mayor and city council. A resolution setting forth in detail the whole matter was by a unanimous vote adopted by the mayor and city council

on 16 August, 1926, and a resolution made at the same meeting ordering the paving and making the assessments. These resolutions were published as required by law in the *Morning Herald,* a newspaper published in the city of Durham.

(6) The city council, the governing body of the city of Durham, did not cause to be placed upon the minute books of the city council of the city of Durham any record, by resolution or otherwise, of the contract or agreement between the city of Durham and the Southern Railway Company, by the terms of which the city of Durham was to assume and pay the assessment to be charged against the Southern Railway Company and the North Carolina Railroad Company, the lessor of the Southern Railway Company. The city council of the city of Durham did not cause to be made any record on the minute books of the city of Durham, of the payment, or the authority to pay, the assessment of the city of Durham, against the Southern Railway Company and the North Carolina Railroad Company. The only record of the agreement between the city of Durham and the Southern Railway Company with respect to the signing of a petition by the Southern Railway Company and with respect to the assumption and payment of the amount assessed against the Southern Railway Company is contained in the file of R. W. Rigsby, city manager, the files of S. C. Chambers, city attorney, which the plaintiffs did not see or know of prior to the beginning of this action, and the words "assumed by city" after the name of the Southern Railway Company in the assessment roll. Upon the completion of the improvements under said petition due notice was given of a public hearing on the adoption of the assessment roll, which hearing was set for and held on 28 February, 1927, in the city hall of the city of Durham, when and where interested persons were given an opportunity to be heard relative to said assessments. There was no objection to the assessment roll and it was adopted at 7:40 p.m., on 28 February, 1927, which is in words and figures as follows: "Street Assessment Roll: Chapel Hill Street from Main Street to Duke Street and Great Jones Street from Main Street to Chapel Hill Street. Total yardage 6,619.2. Total cost $25,784.98; property owners assessment $16,298.06."

Then is set forth the frontage of each property owner and the amount due by each for the improvement. The charges against the frontage in the rate set forth in the assessment roll represents a charge of two-thirds against the property owners and one-third against the city of Durham. In the case of the Southern Railway Company, the city assumed the assessment. On 22 March, 1927, the city of Durham paid to the city tax collector by warrant the assessments against the Southern Railway Company and the North Carolina Railroad Company in the sum of $4,062.70. None of the plaintiffs knew of the provisions of the judgment

in the case of the city of Durham *v.* Southern Railway Company, Norfolk and Western Railway Company and the Seaboard Air Line Railway Company, until after the said assessment roll was completed and adopted, and until a short time prior to the beginning of this action. None of the plaintiffs knew of the agreement between the city of Durham and the Southern Railway Company, in which the city of Durham assumed the payment of the said assessments against the Southern Railway Company and the North Carolina Railroad Company until after the said assessment roll was completed and adopted, and until a short time prior to the beginning of this action. The plaintiffs did not object to the proceedings of the city of Durham in respect to these assessments, because they relied upon the good faith of the officials of the city of Durham and upon the truthfulness of the published proceedings of the city of Durham, in respect to the said local improvements under the provisions of chapter 56, Public Laws 1915. The plaintiffs allege in their affidavits that had they known of the provisions of the said judgment or of the agreement between the city of Durham and the Southern Railway Company, concerning the manner in which the said petition was signed by the Southern Railway Company, they would have objected to the filing of the said petition, the adoption of the assessment roll and all other proceedings incident thereto and appealed from any action by the city of Durham tending to charge these plaintiffs with the costs of the said improvements.

This injunctive proceeding was instituted 9 August, 1928, after the plaintiffs had notice under the statute and the work was completed.

The court rendered the following judgment: "Upon the foregoing findings of fact; it is ordered, considered and adjudged, that the city of Durham was acting in the public interest in providing safe and convenient public streets under authority conferred by chapter 56, Public Laws 1915, as amended, and that the petition praying for such improvement is proper and regular on its face and all notices required by law were duly given and that the plaintiffs had full opportunity to appear and protest when the assessments were subsequently made, which they failed to do. Further, that by and under the terms of the judgment entered in the case of city of Durham *v.* Southern Railway Company, Seaboard Air Line Railway Company and Norfolk and Western Railway Company, in which the city agreed to do the paving, the city of Durham had a right to require said Southern Railway Company to sign such petition for the frontage occupied by its right of way, and when so signed, the governing body of the city had a right to consider such signatures in determining the sufficiency of said petition, and in so acting and in the doing of the work thereunder and in confirming the assessments in connection with such work, such assessments are not void

by reason of fraud or other cause, and such assessments as have not been paid are valid and subsisting liens against the several parcels of land; it is further, ordered, considered and adjudged, that the restraining order heretofore made in this cause be, and the same is hereby dissolved, provided that the dissolution shall not take effect pending any appeal to the Supreme Court."

The plaintiffs duly excepted, assigned errors and appealed to the Supreme Court upon the following grounds: (1) To the refusal of the court to grant the restraining order prayed for, and to the dissolution of the injunction as set out in the judgment; (2) to the action of the court in signing the judgment set out in the record.

McLendon & Hedrick, J. L. Morehead, Brawley & Gantt and W. L. Foushee for plaintiffs.

S. C. Chambers and P. C. Graham for defendants.

CLARKSON, J. *Question involved:* (1) Will a local improvement petition, required by C. S., 2707, signed by the Southern Railway Company, an abutting owner, which made a majority of all the lineal feet frontage (no question as to their being a majority in number of the owners), the assessment against said railway the city of Durham assumed to pay in a mandamus proceeding to force said railway and others to build an underpass, render an assessment thereunder void as to other abutting property owners in the area who did not sign but had notice of the proceeding, under C. S., 2705, 2712? We think not. See Public Laws 1915, chap. 56, sec. 5; C. S., 2703 *et seq.*

C. S., 2707, is as follows: "The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets or part of a street or streets proposed to be improved. The petition shall cite this article and shall designate by a general description the local improvement to be undertaken and the street or streets or part thereof whereon the work is to be effected. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. The determination of the governing body upon the sufficiency of the petition shall be final and conclusive."

In construing this section, this Court said in *Gallimore v. Thomasville,* 191 N. C., at p. 650: "The statute, C. S., 2707, provides that the determination of the governing body 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. . . . *(Gallimore case.)* 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 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 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."

In *City of Charlotte v. Brown,* 165 N. C., 435, it is held: "Where a municipality levies a special tax for street improvements upon the land of an abutting owner in excess of that allowed by a statute applicable, the excess is a nullity and may be enjoined; and where the limitation prescribed is a certain per cent of the taxable value of the property, that valuation must control, whether the property lies upon one or several streets." *Winston-Salem v. Coble,* 192 N. C., 776; *Winston-Salem v. Ashby,* 194 N. C., 388; *Flowers v. Charlotte,* 195 N. C., 599. In the above cases the matter was jurisdictional and the proceeding void and the remedy by injunction permissible.

C. S., 2714, is as follows: "If a person assessed is dissatisfied with the amount of the charge, he may give notice within ten days after such confirmation that he takes an appeal to the next term of the Superior Court of the county in which the municipality is located, and shall within five days thereafter serve a statement of facts upon which he

bases his appeal, but the appeal shall not delay or stop the improvements. The appeal shall be tried at the term of court as other actions at law."

Under this section if the plaintiffs desired to attack the assessment when levied against their property, the statute gives the remedy. *Brown v. Hillsboro,* 185 N. C., 368; *Gunter v. Sanford,* 186 N. C., 452; *Leak v. Wadesboro,* 186 N. C., 683; *Mfg. Co. v. Commissioners of Pender,* 196 N. C., 744.

C. S., 2705, provides publication of resolution or notice. C. S., 2706, when petition required; 2708, what resolution shall contain; 2709, character of work and material; 2710, assessments levied; 2711, amount of assessments ascertained; 2712, assessment roll filed, notice of hearing; 2713, hearing and confirmation, assessment lien.

Everything was done by defendant as required by the statute. The court below found as a fact that "the plaintiffs had full opportunity to appear and protest when the assessments were subsequently made, which they failed to do." The work was done after plaintiffs had notice as required by the statute. The whole matter, on the face, was regular and in compliance with the statute. Plaintiffs' remedy, if they had any, was under C. S., 2714. They cannot now complain. The proceeding was not void.

In *Charlotte v. Alexander,* 173 N. C., 515, it is held: "Abutting property owners who have contracted with a municipality that the latter exceed its statutory authority in assessing their lands beyond a certain per cent of their value for street improvements, and to give it a written waiver of such rights, are estopped to deny the validity of the contract by accepting its benefits, and the 'waivers,' when obtained, are enforcible by the municipality." *In re Assessment v. R. R.,* 196 N. C., 756.

Question two: Did the Southern Railway Company, an abutting owner in the area, have the right to sign the petition and rely on the city of Durham to perform its agreement with said railway to pay for same in the mandamus proceeding against said railway requiring it and others to build an underpass? We think so.

The Municipal Finance Act, C. S., 2942(r), implies not only that a city may bear a part of the expense incident to the elimination of grade crossings, but may issue bonds therefor, this section providing that bonds may be issued by a city as follows, for that purpose: "The elimination of any grade crossing or crossings and improvements incident thereto, thirty years." *R. R. v. Goldsboro,* 155 N. C., at p. 362; *Durham v. R. R.,* 185 N. C., at p. 245. The agreement was legal and binding on the city of Durham.

In the mandamus proceeding the judgment contained the following: "The city of Durham agrees to do all underground work, such as the

relaying and replacing of water, gas and sewerage mains, *street paving* including curbs and gutters and also sidewalks." This agreement was binding on the city of Durham. It had the power to make it. This agreement was part of the judgment in the mandamus proceeding which required the underpass to be built by the railroads. See *Argentine v. Atchison, etc., R. R.*, 30 L. R. A., p. 255; *Woodruff v. Catlin*, 54 Conn., 277; *Westbrook's App.*, 57 Conn., 95; *Fairfield's App.*, 57 Conn., 167; *N. Y. & N. E. R. Co.'s App.*, 58 Conn., 532; and cases cited in the notes to the case of *Kelly v. Minneapolis*, 26 L. R. A., 92.

Third question: Was there any fraud practiced by the municipality? We think not.

The court below found "the city of Durham had a right to require said Southern Railway Company to sign such petition for the frontage occupied by its right of way, and when so signed, the governing body of the city had a right to consider such signatures in determining the sufficiency of said petition, and in so acting and in the doing of the work thereunder and in confirming the assessments in connection with such work, such assessments are not void by reason of fraud or other cause, and such assessments as have not been paid are valid and subsisting liens against the several parcels of land."

44 C. J., sec. 3297(7), is as follows: "In accordance with general principles it has been held that an assessment may be vacated or set aside, or its enforcement enjoined, by reason of fraud on the part of the municipal authorities making the assessments." *Gallimore, supra.*

We can see no evidence of fraud in the matter. The mandamus proceeding required the railroads to build the underpass, the city of Durham to pay the street paving. As heretofore stated, the city of Durham had the legal right to make this agreement. This judgment was affirmed on appeal to this Court and the U. S. Supreme Court. The railroad was an abutting owner and signed the petition at the request of the authorities of the city of Durham, knowing the city was liable under the judgment to pay for the street paving. Plaintiffs cannot complain, they are paying for exactly what they get—the street paved which abuts on their property. The Southern Railway gets what the city agreed to do after the underpass was built—the street paved which abuts on its property. The only complaint that plaintiffs might have was the fact that the city of Durham must increase its general tax a little by the city paying for paving the street abutting on the Southern Railway Company's property. It had a right, in its discretion, to make this agreement. In fact the enormous cost in building the underpass justified this minimum sum compared to the cost to the railroads. We can see no legal or equitable grounds for plaintiffs' not paying for their street assessments. The judgment below is

Affirmed.

STATE v. J. I. PALMER.

(Filed 24 April, 1929.)

1. **Homicide C a—one killing another through reckless driving of automobile is guilty of manslaughter.**

One driving an automobile on a public highway while drunk, recklessly and in disregard of statutes for the regulation of automobiles thereon, resulting in death to another, is guilty at least of manslaughter without reference to whether he intended to inflict injury or not.

2. **Same—Negligence of deceased does not excuse of guilt unless it was sole proximate cause.**

One may not be convicted for driving an automobile upon a public highway in violation of safety statutes when the negligence of the injured person is the sole proximate cause of the injury, but it is otherwise if the concurring negligence of both combined was the proximate cause.

3. **Same—If defendant's negligence causes death his later acts to avoid injury do not relieve him of guilt.**

Where the injury to another would not have occurred except for the criminal negligence of the defendant in violating the safety statutes regulating the operation of automobiles upon the public highway, he is not relieved of guilt by the fact that he did all that he reasonably could to avoid the injury at the time of the occurrence under the existing conditions, provided his inability to stop was due to his prior recklessness.

4. **Homicide C c—Evidence of reckless driving.**

Evidence that the defendant while driving on a public highway stopped at a filling station and came out with a bottle of whiskey, from which he took two or three drinks, and that later one of the passengers got out of the automobile because of fear of the defendant's reckless driving, is admissible as substantive evidence and also as corroborative of other evidence of his reckless driving in a prosecution for manslaughter.

APPEAL by defendant from *Shaw, J.*, at November Term, 1928, of DAVIDSON. No error.

The defendant was indicted with Otis Cross and Will Hargrave for the unlawful killing of one C. A. Misenheimer on 13 October, 1928. Pending the trial a *nol. pros.* was entered as to the defendant Hargrave and a verdict of not guilty as to the defendant Cross.

According to the evidence for the State the defendant on the night of 13 October, 1928, was driving a Dodge sedan about a mile south of Thomasville going in the direction of Lexington and the deceased was driving a Chrysler going towards Thomasville. The two cars met about 10 o'clock on a "rainbow curve." When the collision occurred the left front wheel of the Dodge sedan struck the left side of the Chrysler, knocked off the front wheel and left front door, and shattered the glass

on that side of the car. Misenheimer, who was driving the Chrysler, was killed and two other men who occupied the front seat with him were injured. The Chrysler was on the right-hand side of the black mark in the middle of the road; and after the collision it was seen that the left front wheel was about 12 inches over the pavement, the remainder of the car being off the pavement and on the shoulder of the highway. The left front wheel of the Dodge was down and the hub was in contact with the surface of the road. The Dodge car ran 23 feet after striking the Chrysler, turned over on the left side with the "top back towards Thomasville." Part of it was on the hard surface, the rear being off on the shoulder which was 5 or 6 feet wide. The defendant who was driving the Dodge car was under the influence of intoxicating liquor at the time of the collision and was running his car in disregard of certain statutory requirements.

There was evidence for the defendant tending to contradict the material circumstances on which the State relied for conviction. It is unnecessary to state more minutely the specific circumstances developed by the evidence. The defendant was found guilty of manslaughter, and from the judgment pronounced he appealed upon error assigned.

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

Phillips & Bower and Raper & Raper for defendant.

ADAMS, J. The act regulating the operation of vehicles on the highways of this State provides among other things that it shall be unlawful for any person who is under the influence of intoxicating liquor or narcotic drugs to drive any vehicle upon a highway; that any person driving a vehicle on a highway shall drive it at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and to any other conditions then existing; that no person shall drive any vehicle upon a highway at such a rate of speed as to endanger the life, limb or property of any person. It is provided that no person shall drive a vehicle on a highway at a rate of speed in excess of 15 miles an hour in traversing or going around curves or traversing a grade upon a highway when the driver's view is obstructed within a distance of 200 feet along the highway in the direction in which he is proceeding; also that the driver of a vehicle shall not drive to the left side of the center line of a highway upon the crest of a grade or upon a curve in the highway, when such center line has been placed upon the highway by the State Highway Commission, and is visible. Public Laws 1927, ch. 148, art. 2, sec. 2, sec. 4(a), sec. 4(b), subsec. 4; sec. 13(d).

There was evidence for the State tending to show that the defendant had violated each of these provisions. In *S. v. Gray,* 180 N. C., 697, 700, it is said: "The principle is generally stated in the textbooks that "if one person causes the death of another by an act which is in violation of law, it will be manslaughter, although not shown to be wilful or intentional" (McClain Cr. L., Vol. 1, sec. 347), or that when life has been taken in the perpetration of any wrongful or unlawful act, the slayer will be deemed guilty of one of the grades of culpable homicide, notwithstanding the fact that death was unintentional and collateral to the act done (13 R. C. L., 843); but on closer examination of the authority, it will be seen that the responsibility for a death is sometimes made to depend on whether the unlawful act is *malum in se* or *malum prohibitum,* a distinction noted and discussed in *S. v. Horton,* 139 N. C., 588. It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous, and death ensues, the person violating the statute is guilty of manslaughter at least, and, under some circumstances, of murder. The principle is recognized in *S. v. Horton, supra,* and in *S. v. Turnage,* 138 N. C., 569; *S. v. Limerick,* 146 N. C., 650, and *S. v. Trollinger,* 162 N. C., 620, and has been directly applied to deaths caused by running automobiles at an unlawful speed. In 2 R. C. L., 1212, the author cites several authorities in support of the text that one who wilfully or negligently drives an automobile on a public street at a prohibited rate of speed, or in a manner expressly forbidden by statute, and thereby causes the death of another, may be guilty of homicide; and this is true, although the person who is recklessly driving the machine uses, as soon as he sees a pedestrian in danger, every effort to avoid injuring him, provided that the operator's prior recklessness was responsible for his inability to control the car and prevent the accident which resulted in the death of the pedestrian." This principle is maintained in *S. v. McIver,* 175 N. C., 761; *S. v. Gash,* 177 N. C., 595; *S. v. Rountree,* 181 N. C., 535; *S. v. Jessup,* 183 N. C., 771; *S. v. Sudderth,* 184 N. C., 753; *S. v. Crutchfield,* 187 N. C., 607; *S. v. Lutterloh,* 188 N. C., 412; *S. v. Trott,* 190 N. C., 674. It is perfectly manifest that under these conditions no error was committed in his honor's denial of the defendant's motion to dismiss the action.

On the afternoon preceding the collision the defendant in company with others left Caswell County and went in his car to Reidsville. They left Reidsville at 8 p.m. and after traveling two or three miles stopped at a filling station. There was evidence tending to show that the defendant and another went into the filling station and upon their return to the car the defendant's companion had a pint of whiskey,

and that the defendant took two or three drinks. A witness testified that when the car arrived at Monticello he got out of it because he was frightened assigning as a reason therefor "a little too reckless, and a little too fast driving." The defendant excepted to the admission of this testimony; but it was competent as a circumstance which was both substantive and, as the record shows, corroborative of the testimony of other witnesses who said that the defendant was drunk.

The remarks of the solicitor in addressing the jury were his deduction from the evidence and the defendant's exception thereto is without merit.

The defendant excepted to the following instruction to the jury: "If you are satisfied beyond a reasonable doubt from the evidence that the defendant, Palmer, was guilty of culpable negligence as heretofore explained to you by the court, or criminal negligence, and that said criminal negligence was the proximate cause of the death of Misenheimer, why it will be your duty to convict the defendant. If you are satisfied beyond a reasonable doubt from the testimony that the defendant, Palmer, is guilty of criminal or culpable negligence as heretofore explained to you, and that Misenheimer was also guilty of negligence and that the negligence of Palmer and Misenheimer both concurred proximately in producing the death of Misenheimer, then it would be your duty to convict the defendant, Palmer." His Honor further instructed the jury as follows: "But, if you find from the evidence, gentlemen of the jury, that the defendant was guilty of culpable negligence and that Misenheimer was also guilty of negligence, and that Misenheimer's negligence was the proximate cause, sole proximate cause of his death, it will be your duty to acquit the defendant. If you have a reasonable doubt as to whether the defendant was guilty of culpable negligence as heretofore explained to you, it will be your duty to acquit him. Or if you are satisfied beyond a reasonable doubt that the defendant was guilty of culpable negligence, or criminal negligence, as heretofore explained to you, but have a reasonable doubt that such negligence was the proximate cause of the death of Misenheimer, it will be your duty to acquit the defendant. If you are satisfied beyond a reasonable doubt that the defendant is guilty of culpable negligence, and that the deceased, Misenheimer, was also guilty of negligence, and if you find that Misenheimer's negligence was the proximate cause, sole proximate cause of the death of Misenheimer, why then it will be your duty to acquit the defendant." These instructions were strictly in accord with the authorities. In 2 R. C. L., 1213, the principle is thus stated: "The rules of law concerning contributory negligence as a defense in civil actions for damages for personal injuries have no application to homicide cases for criminal negligence in operating an automobile. The decedent's behavior is admissible in

evidence, and may have a material bearing upon the question of the defendant's guilt, but if the culpable negligence of the latter is found to be the cause of the death, he is criminally responsible whether the decedent's failure to use due care contributed to the injury or not." This statement of the law has been followed by this Court in *S. v. Gray, supra,* and in *S. v. Oakley,* 176 N. C., 755.

In the trial of this case the defendant was given the advantage of every phase of the law to which he was entitled. We find

No error.

JAMES B. MIDKIFF AND C. L. BRANNOCK v. NORTH CAROLINA HOME INSURANCE COMPANY.

(Filed 24 April, 1929.)

1. Insurance E b—Conditions in statutory policy of fire insurance are valid and binding.

The terms and conditions of the standard form of a fire insurance policy, C. S., 6436, 6437, and the stipulations as to a valid waiver thereof are valid and binding on the parties.

2. Insurance K a—Knowledge of agent of violation of condition of policy at its inception is imputed to his principal.

Where a policy of fire insurance stipulates that it would not be binding until countersigned by its local agent, the policy is made by the local agent on behalf of the company, and knowledge of the agent of existing conditions contrary to the express provisions of the policy at the inception of the contract is imputed to the company.

3. Insurance K b—Imputed knowledge of insurer of violation of condition of policy at its inception is a waiver thereof.

Where the local agent of a fire insurance company, before issuing the policy on a stock of merchandise, knows that included therein are explosives that under the terms of the policy will render it void unless waived in writing attached to its face, and nevertheless the agent issues the policy upon payment of the premium, the knowledge of the local agent is imputed to the company, and the contract being completed the insurer is estopped to deny its liability for a fire loss covered by the policy so issued. It is otherwise if such knowledge is acquired after the policy has been delivered and the contract of insurance completed.

APPEAL by defendant from *Clement, J.,* at August Term, 1928, of SURRY. No error.

This is an action on a policy of fire insurance issued by defendant company to plaintiffs on 6 December, 1926.

The plaintiffs, in consideration of the premium paid by them, were insured by said policy for the term of one year against loss or damage,

to an amount not exceeding fifteen hundred dollars, to the property described therein, to wit, store and office furniture and fixtures, and stock of merchandise, consisting principally of hardware, while contained in a building, situate on lot No. 114, on the east side of Main Street, in the town of Mount Airy, North Carolina. The said property was destroyed by fire on 18 December, 1926.

The policy is in the form prescribed by statute (C. S., 6437) and is known as the Standard Fire Insurance Policy of North Carolina. It is provided on the face of the policy that it shall not be valid, unless countersigned by the duly authorized agents of the company, at Mount Airy, N. C. The policy is signed by the president and attested by the secretary of the company. It is countersigned by Sydnor & Sparger, agents of the company, at Mount Airy, N. C.

It is stipulated in the policy, as one of the conditions of defendant's liability thereunder, that "unless otherwise provided by agreement in writing added thereto, this company shall not be liable for loss or damage (d) while there is kept, used or allowed on the described premises, . . . explosives." No agreement in writing was added to said policy with respect to the keeping of explosives on the premises where the property insured by the policy was located.

It is further stipulated in the policy that "No one shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement added thereto, nor shall any such provision or condition be held to be waived unless such waiver shall be in writing added hereto."

It is admitted in the pleadings that at the date of the fire which destroyed the property insured by the policy, dynamite and dynamite caps were kept by plaintiffs on the described premises, as a part of the stock of merchandise described in the policy and insured thereby. There was evidence tending to show that said dynamite and dynamite caps were on said premises, as a part of plaintiffs' stock of merchandise, at the date of the issuance of the policy; that defendant's agents, who solicited plaintiffs to take the policy and who countersigned and issued it, knew at the time the policy became effective that said dynamite and dynamite caps were then kept on the described premises by plaintiffs as part of the stock of merchandise which they proposed to insure; and that with this knowledge said agents issued the policy, and collected from the plaintiffs the premium for the same.

Issues were submitted to the jury and answered as follows:

1. Did the defendant, the North Carolina Home Insurance Company, execute and deliver to the plaintiffs the policy of insurance, as alleged in the complaint? Answer: Yes.

2. Did the plaintiffs carry dynamite and dynamite caps in their stock at the time of the fire? Answer: Yes.

3. If so, did the defendant by its knowledge and conduct waive the printed portions of the policy forbidding the keeping of dynamite and dynamite caps in stock? Answer: Yes.

4. What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: $1,500, with interest from 18 February, 1927."

From judgment on the verdict, defendant appealed to the Supreme Court.

E. C. Bivens for plaintiffs.
Brooks, Parker, Smith & Wharton for defendant.

CONNOR, J. When a policy of insurance, in the form prescribed by statute (C. S., 6437), and known and designated as the Standard Fire Insurance Policy of North Carolina (C. S., 6436), has been issued by an insurance company and accepted by the insured, and has thereby become effective for all purposes as their contract, the rights and liabilities of both the insurer and the insured, under the policy, must be ascertained and determined in accordance with its terms and provisions. These terms and provisions have been prescribed by statute, and are valid in all respects; they are just both to the insurer and to the insured. Each is presumed to know all the terms, provisions and conditions which are included in the policy. Both are ordinarily bound by them. *Lancaster v. Ins. Co.,* 153 N. C., 285, 69 S. E., 214.

It has, therefore, been held by this Court, that after the policy has been issued by the company and accepted by the insured, and thereby become effective for all purposes as their contract, the provision in the statutory form of the policy that "no one has the power to waive any provision or condition of the policy except such as by the terms of the policy is the subject of agreement added thereto, nor shall any such provision or condition be waived, unless the waiver is in writing added thereto" is valid and will be enforced by the courts of this State. The company will not ordinarily be held to have waived the breach or violation by the insured of a provision or condition of the policy, after the same has become effective as the contract of the parties, where by its terms such breach or violation releases the company from liability under the policy, unless there is a waiver in writing added or attached to the policy. The knowledge of an agent of the company, after the policy has become effective, of the breach or violation by the insured of a provision or condition of the policy will not be imputed to the company, as the basis of a waiver. This principle was applied in *Greene v. Ins.*

Co., 196 N. C., 335, 145 S. E., 616, and in accordance therewith the judgment rendered in the Superior Court on the verdict was reversed. In the opinion in that case it is said: "After a policy has been issued, and has become a valid and binding contract between the parties, knowledge by the agent who issued it, of the breach of a stipulation or condition, which by the express terms of the policy, renders it void, will not be imputed to the company. In such case, forfeiture of the policy, for such breach, can be waived only in accordance with the provisions of the policy. *Smith v. Ins. Co.*, 193 N. C., 446, 137 S. E., 310."

However, it has also been held by this Court that the provision in the statutory fire insurance policy, restricting the power of an agent of an insurance company to waive provisions or conditions, the breach or violation of which renders the policy void or releases the company from liability under the policy, and requiring a waiver in cases where a waiver is permitted by the terms of the policy, to be in writing and added to the policy, does not as a general rule refer to or include conditions existing at the inception of the contract; the provision is applicable only to conditions which arise after the policy has become effective as the contract of the parties. Thus it is said in *Greene v. Ins. Co., supra:* "Conditions with respect to the property insured by a policy of fire insurance existing at the time the policy was issued, and known by the agent of the company, who issued the policy, cannot be relied upon to defeat the liability of the company under the policy, for notwithstanding the provisions of the policy, the knowledge of the agent is imputed to the company. When the policy is issued with such knowledge, it will be held that the company has waived the breach of the stipulation and provisions contained therein, which would otherwise render the policy void, at its inception. In such cases, the doctrine of waiver is applied by the courts upon well settled principles of equity." In *Aldridge v. Ins. Co.*, 194 N. C., 683, 140 S. E., 706, it is said: "It is true that under certain conditions the terms set out in a policy of insurance can be waived only in the manner prescribed by the contract (*Black v. Ins. Co.*, 148 N. C., 169, 61 S. E., 672, 21 L. R. A. (N. S.), 578); but the provisions which usually restrict the agent's power of waiver do not as a rule apply to an agent who has knowledge of conditions existing at the inception of the contract. These conditions may be waived by the agent although embraced in the policy when it is delivered, for in these circumstances the agent's knowledge is the knowledge of the principal. *Smith v. Ins. Co.*, 193 N. C., 446, 137 S. E., 310; *Bullard v. Ins. Co.*, 189 N. C., 34, 126 S. E., 179; *Ins. Co. v. Lumber Co.*, 186 N. C., 269, 119 S. E., 362; *Johnson v. Ins. Co.*, 172 N. C., 142, 90 S. E., 124. Applying this principle to the evidence, neither in the

admission of the testimony nor in the instructions to which the exceptions relate have we discovered any sufficient or satisfactory cause for awarding a new trial."

It should be noted that the policy in the instant case, although signed by the president and attested by the secretary of the company, when delivered to the local agent, by its express terms does not become valid, until countersigned by the local agent. The contract with the insured is, therefore, made on behalf of the company by the local agent. As a matter of public policy, and of justice to the insured, it has been uniformly held in this State that knowledge of the local agent with respect to conditions affecting the subject-matter of the policy, existing at the date of its issuance, is imputed to the company. There is no principle of law upon which a court is required to hold that an insurance company, after it has received a premium from the insured for a valid policy, may declare the policy void, and escape liability under its terms, after a loss has occurred, on the ground that the policy was void at the time it was issued because of conditions then existing of which it had full and ample knowledge. In such case, the company is and should be estopped from making a contention to this effect; it is and should be held that the company has, by issuing the policy, with such knowledge, relinquished the right, which it would otherwise have under the terms of the policy, to declare the policy void, and thereby be relieved of liability.

In the instant case, there was evidence tending to show that the local agents of the defendant company, at the time they countersigned and issued to the plaintiffs the policy of insurance, insuring their stock of merchandise, knew that plaintiffs had and kept dynamite and dynamite caps on the described premises, as part of said stock of merchandise, and that with this knowledge they issued the policy. There was no evidence tending to show that the dynamite and dynamite caps on said premises, kept by plaintiffs as part of said stock of merchandise, at the date of the fire, had been added to said stock of merchandise since the issuance of the policy. The knowledge of the local agents, in this instance, was the knowledge of the defendant. It must be held, therefore, that defendant having issued the policy, with knowledge of the presence of the dynamite and dynamite caps on the premises described in the policy, waived this condition, and is estopped to rely upon the presence of the dynamite and dynamite caps, on said premises, at the date of the fire, as releasing the defendant from liability under the policy.

There was no error on the trial of this action in the Superior Court. The testimony of witnesses tending to show that defendant's local agents issued the policy with knowledge that plaintiffs kept dynamite and

dynamite caps on their premises, as part of their stock of merchandise at the time the policy was issued, was, upon the facts of this case, competent as evidence. Parol evidence tending to sustain an affirmative answer to the third issue was properly submitted to the jury, under instructions which are in accord with authoritative decisions of this Court. The judgment is affirmed. There is

No error.

J. B. MIDKIFF AND C. L. BRANNOCK, TRADING AS MIDKIFF & BRANNOCK, v. DIXIE FIRE INSURANCE COMPANY AND PALMETTO FIRE INSURANCE COMPANY.

(Filed 24 April, 1929.)

1. Insurance K a—Knowledge of agent of violation of condition of policy after contract completed not imputed to insurer.

Knowledge of the local agent of a fire insurance company that the insured kept explosives in his stock of merchandise covered by the policy contract, will not be imputed to the principal, when such knowledge is acquired after the policy has been issued, and where a waiver has not been obtained according to specific provisions of the policy or otherwise sufficient in law, the forfeiture provision of the policy relating thereto will be enforced.

2. Same—Evidence of knowledge of violation of condition at inception of policy.

Evidence that merchandise of the class insured usually contained explosives is incompetent to show a waiver of the policy provisions making the policy void in such instances.

APPEAL by plaintiffs from *Clement, J.*, at August Term, 1928, of SURRY. Affirmed.

Two actions by the above named plaintiffs, one against the Dixie Fire Insurance Company, as defendant, and the other against the Palmetto Fire Insurance Company, as defendant, both pending in the Superior Court of Surry County, were, by consent, consolidated for trial.

From judgment of nonsuit in each action, plaintiffs appealed to the Supreme Court.

E. C. Bivens for plaintiffs.

Brooks, Parker, Smith & Wharton for defendants.

CONNOR, J. These actions were begun by plaintiffs to recover on Standard Fire Insurance Policies of North Carolina, issued by defend-

ants to plaintiffs. The policy issued by defendant, Palmetto Fire Insurance Company, is dated 26 August, 1926; the policy issued by defendant, Dixie Fire Insurance Company, is dated 13 September, 1926. Both policies of insurance cover a stock of merchandise, consisting principally of hardware, agricultural implements and machinery, cutlery, guns and pistols, trimmings, wooden ware, tin ware, belting, harness and leather goods, iron, nails, bicycles, furniture, house-furnishing goods, carpets, rugs, pictures, "and all other merchandise not enumerated, not more hazardous, usual to hardware and furniture trade or stores," while contained in a building located on lot No. 114, on the east side of Main Street, in the town of Mount Airy, North Carolina. The property insured by the said policies against loss or damage was destroyed by fire on 18 December, 1926.

At the date of said fire, in violation of a provision or condition contained in each of said policies, plaintiffs had and kept on the premises described in said policies, as part of the stock of merchandise insured thereby, dynamite and dynamite caps. There was no evidence at the trial tending to show that defendants or either of them had waived such violation in accordance with the terms of its policy or otherwise. Neither of the defendants had knowledge at the date of the issuance of its policy that plaintiffs at said date had or kept dynamite as a part of their stock of merchandise. There was no evidence tending to show that the local agent of either of the defendants, who countersigned and issued its policy had such knowledge, at the date of the issuance of the policy. Knowledge of such agents acquired after the policy became effective as the contract of the parties, and while such agents were not acting in behalf of their respective principals, cannot be imputed to defendants.

Knowledge of such agents, at the date of the issuance of the policies, that hardware merchants of Surry County, generally carry dynamite and dynamite caps in stock, even if it should be held that such knowledge should be imputed to defendants, would not be sufficient to sustain plaintiff's contention that each of the defendants, because of such knowledge, had waived the violation by plaintiffs of the condition in the policies with respect to the keeping of explosives. There would be no presumption of law or fact that hardware merchants of Surry County, who carry fire insurance on their stocks of merchandise generally violate a condition of their policies. The presumption would be rather that they procure agreements by the companies in writing added to the policies, by which the condition with respect to explosives is waived. Evidence tending to show that hardware merchants of Surry County generally carry dynamite and dynamite caps in stock was properly excluded upon defendants' objections.

This appeal involves the same question of law as that presented for decision in *Midkiff v. Insurance Co., ante,* 139. In that case there was evidence tending to show a waiver by defendant of the condition in the policy with respect to explosives. The judgment on the verdict was affirmed. In the instant case, there was no evidence tending to show that either of the defendants had waived this condition, in accordance with the provisions of the policies, or otherwise. Therefore the judgment dismissing each action as of nonsuit, must be

Affirmed.

STATE v. ROY RHYNE.

(Filed 24 April, 1929.)

Intoxicating Liquor B a—Evidence of possession of intoxicating liquor in this case held competent.

With evidence tending to show that at night the defendant on trial for violating the prohibition law for possession and transporting of intoxicating liquor, left his automobile on the highway and went into a wood and returned with a half-gallon jar of whiskey under each arm, which he broke and sought to escape arrest, testimony is competent that the officers returned the next morning and found five gallon cans "in the same spot where they went" as a competent circumstance with the other evidence.

CRIMINAL ACTION before *Stack, J.*, at September Term, 1928, of ANSON.

The defendant was indicted for violation of the prohibition law and was convicted of unlawful possession of intoxicating liquors and of transporting the same. He was sentenced to serve a term of six months on the roads and fined $250.00 and costs.

From judgment pronounced the defendant appealed.

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

McLendon & Covington for defendant.

PER CURIAM. The evidence tended to show that the defendant and another drove a truck into the woods about seventy-five or one hundred yards from the public road, got out and walked back into the woods. When they returned the defendant Rhyne had a half-gallon jar of whiskey under each arm. The officers were lying in wait at the truck and the defendant broke the jars and escaped. These events took place about nine o'clock at night. The trial judge permitted an officer to

testify that early next morning he went back into the woods "in the same spot where they went" and found three five-gallon cans which were empty.

The defendant objected to this testimony and assigns the admission thereof as error.

There was ample evidence to support the conviction, irrespective of the evidence objected to. However, the finding of the empty cans at the identical spot where the defendant went the night before was a competent circumstance.

No error.

MARY B. FORD v. WILLYS-OVERLAND, INC.

(Filed 1 May, 1929.)

1. Principal and Agent A b—Agreement determines whether relationship is that of agency or independent dealer.

The form of a written contract for the local sale of automobiles will not control the question of whether the local representative is a purchaser thereof or an agent therefor, but the correct interpretation of the writing itself as to its effect will fix the status of the local representative in this respect.

2. Same—Agreement with partnership for representation, taken over after its incorporation by the corporation, controls.

Where a partnership has a written agreement for the local sales of automobiles and thereafter the partnership is incorporated and continues to act under the agreement with the implied acquiescence of the company distributing the automobiles to local dealers, the unmodified or original agreement will govern the relationship as to whether the corporation was an independent local dealer purchasing the machines or a sales agent.

3. Same—Agreement held to create relationship of independent dealer—Automobiles—Warranties.

Where a contract creating a local representative for the sale of automobiles, by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited.

APPEAL by defendant from *Harding, J.*, at January Term, 1929, of RICHMOND. Reversed.

Action to recover damages for breach of warranty alleged to have been made by the Rockingham Sales Company, as agent of defendant, in the sale of an automobile.

Defendant denied that the Rockingham Sales Company was its agent; it alleged that said company was its local dealer in the town of Rockingham, N. C., and that as such dealer the said company had no authority, express or implied, to warrant said automobile, as agent of defendant.

From judgment on an adverse verdict, defendant appealed to the Supreme Court.

J. C. Sedberry for plaintiff.
Ozmer L. Henry for defendant.

CONNOR, J. On 27 August, 1926, plaintiff purchased a Whippet sedan automobile from the Rockingham Sales Company, paying therefor the sum of $840.00. The Rockingham Sales Company was a corporation, organized under the laws of the State of North Carolina. During the month of August, 1926, the said company was engaged in the business of selling automobiles, as a local dealer, in the town of Rockingham, N. C. It purchased the automobile which it sold to plaintiff from defendant. The defendant is a corporation organized under the laws of the State of Virginia. It is engaged in the business of selling and distributing to its local dealers automobiles manufactured by the Willys-Overland Company, a corporation organized under the laws of the State of Ohio.

The defendant sold the automobile which was purchased by plaintiff to the Rockingham Sales Company, as the successor of the Knight-Overland Company, a partnership, pursuant to and under the terms of an agreement in writing, by which the Knight-Overland Company became the local dealer of defendant, at Rockingham, N. C., in Whippet and Willys-Knight automobiles. The said agreement was signed by the individuals who composed the said partnership, and who were thereafter the incorporators of the Rockingham Sales Company. The corporation was organized to take over the business of the partnership, as a dealer in automobiles. Defendant recognized the corporation as the successor of the partnership, and continued to do business with it as such successor, under the terms of the written agreement. The relationship between the defendant and the corporation, as successor of the partnership, was determined by the said written agreement. This relationship, at least as between the parties, was that of vendor and vendee, and not that of principal and agent. One of the express stipulations of said written agreement was that the Knight-Overland Company, called therein the "Dealer," was in no way the legal representative or agent of the defendant, called therein the "Seller," for any purpose

whatsoever, and that the dealer had no right to assume or create any obligations of any kind, expressed or implied, on behalf of the seller, or to bind the seller in any respect whatever.

This stipulation, however, is not conclusive, on the plaintiff, who purchased the automobile from the dealer, for, notwithstanding its provisions, the plaintiff may show, if she can, by evidence, that the dealer was in fact and in law the agent of the defendant, with authority, by reason of such relationship to act for and in behalf of defendant, within the scope of the agency. If under the provisions of the written agreement, the relationship between the parties is that of principal and agent, it is immaterial that they are called therein "Seller" and "Dealer." This principle was applied in *McNeill v. Electric Storage Battery Co.*, 109 S. C., 326, 96 S. E., 134. It was held in that case that notwithstanding a provision in the contract to the contrary, the parties thereto were principal and agent. It is said in the opinion: "It is true the contract provided that the relation of principal and agent should not exist, but when the provisions of the contract make a contract of agency, then it is a contract of agency, and it makes no difference by what names the parties call themselves." In the instant case, however, there are no provisions in the written agreement inconsistent with or contradictory of the express provision that the dealer is not the agent of the seller. Nor was there any evidence tending to show a course of dealing between the defendant and the Rockingham Sales Company, by which the latter was recognized or held out by the defendant as its agent in the sale of automobiles.

In *Huselton v. Motor Car Co.*, 81 Pa. Super. Ct., 526, it was held that "where an authorized distributor of motor cars enters into a contract with a local dealer for a given territory, agreeing to furnish the dealer a certain quantity and variety of cars, the relationship thereby established is not one of agency." The contract between the parties in that case is substantially the same as the contract in the instant case.

The defendant as seller of Whippet and Willys-Knight automobiles made no warranty to its local dealer, the Rockingham Sales Company, or to purchasers of said automobiles from its said local dealer, with respect to said automobiles. It is expressly provided in the agreement under which said automobiles were sold that the only warranty with respect to Whippet and Willys-Knight automobiles is that of the manufacturer, which is set out in said agreement. There was evidence tending to show that under the terms of this warranty, the manufacturer sent a mechanic to Rockingham to remedy the defect in plaintiff's automobile. Plaintiff in her letter addressed to defendant, dated 14 March, 1927, said that in response to her letter dated 8 March, 1927,

"your Mr. Nichols arrived and completely overhauled my car. He found and rectified the trouble, and no doubt his report to you completely covers all the details." In this letter plaintiff requested the defendant to pay her $30.00, "actual money which my husband and I have spent for work directly necessary by this fault in the assembling of my car." Under the terms of the warranty made by the manufacturer of plaintiff's automobile, neither said manufacturer nor the defendant were liable to plaintiff for said sum of $30.00, or any other sum. *Ward v. Liddell Co.*, 182 N. C., 223, 108 S. E., 634.

In the absence of any evidence at the trial of this action in the Superior Court, tending to sustain an affirmative answer to the first issue submitted to the jury there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. C. S., 567. The motion should have been allowed and the action dismissed.

The Rockingham Sales Company did not make or purport to make any warranty of the automobile purchased by the plaintiff in behalf of defendant or upon which defendant should be liable. The warranty, if any, was made by the said company on its own behalf, and it alone is liable for any breach of said warranty. The judgment that plaintiff recover of defendant the damages assessed by the jury for breach of the warranty alleged in the complaint is

Reversed.

W. J. SHUFORD, RECEIVER OF THE "Y. & B. CORPORATION," v. J. A. YARBOROUGH AND EAGLE INDEMNITY CO.

(Filed 1 May, 1929.)

1. Pleadings D b—Joinder of unnecessary parties not demurrable.

A demurrer for defect of parties and causes of action will not be sustained where the defect alleged relates to parties not necessary to the proper determination of the action.

2. Same—Joinder of defaulting officer and surety on his bond is proper under facts of this case.

A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. *Clark v. Bonsal*, 157 N. C., 270, in which the indemnity was against "loss actually paid" cited and distinguished.

APPEAL by defendants from *Stack, J.,* at March Term, 1929, of MECKLENBURG.

Civil action by plaintiff, receiver, to recover of J. A. Yarborough $60,625.84, moneys alleged to have been unlawfully abstracted and misappropriated by him while acting as president and treasurer of the Y. & B. Corporation, and to hold the Eagle Indemnity Company liable for said defalcations to the extent of $10,000 on its written guaranty of the fidelity of said officer.

A demurrer was interposed chiefly upon the grounds (1) of an alleged defect of parties, and (2) of an alleged misjoinder, both of parties and of causes of action.

From a judgment overruling the demurrer, the defendants appeal, assigning errors.

Preston & Ross and E. B. Cline for plaintiff.

Wade H. Williams and Fred B. Helms for defendants.

STACY, C. J. The demurrer was properly overruled on both grounds. C. S., 507 and annotations.

A "defect of parties" applies to necessary parties, and not to unnecessary ones. *Winders v. Hill,* 141 N. C., 694, 54 S. E., 440.

It is not a misjoinder of parties and causes for the receiver of a corporation to sue its president and treasurer for wrongfully abstracting and misappropriating funds of the corporation and at the same time join as party defendant his surety or the guarantor of his honesty and fidelity. *Carswell v. Talley,* 192 N. C., 37, 133 S. E., 181; *Robinson v. Williams,* 189 N. C., 256, 126 S. E., 621; *Chemical Co. v. Floyd,* 158 N. C., 455, 74 S. E., 465; *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

The case of *Clark v. Bonsal,* 157 N. C., 270, 72 S. E., 954, is not in point, for there the contract between the defendants was one of strict indemnity against "loss actually paid." The allegations of the present complaint are to the effect that the defendant, Eagle Indemnity Company, "guarantees the fidelity of the president and treasurer of the Y. & B. Corporation in the sum of $10,000, . . . and agrees to make good any loss sustained by reason of his dishonesty, theft or wrongful abstraction," etc., and that loss has already been sustained within the terms of the contract of guaranty.

Affirmed.

AMERICAN BLOWER COMPANY, A CORPORATION, ET AL., V. B. MACKENZIE.

(Filed 1 May, 1929.)

1. Dower B a—Definition of Inchoate Dower.

Inchoate dower is not an estate in land but is a subsisting, substantial right of the wife in the lands of her husband during his life, possessing some of the incidents of property, and which has a present cash value capable of computation, and becomes a right of dower upon the husband's death if she survive him.

2. Dower B b—Right of wife to cash value of inchoate dower as against creditors.

Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's right of inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband.

3. Dower B b—Computation of present value of inchoate dower.

The rule by which the present value of the wife's inchoate right of dower in her husband's lands is obtained is to ascertain the present value of an annuity for her life equal to the interest on one-third of the value of his lands to which her contingent right of dower attaches, and then deduct from the present value of the annuity for life the value of the annuity during the joint lives of herself and husband, the difference being the present value of her contingent right.

4. Same—Mortgage encumbrances not deductible from value of inchoate dower—Mortuary Tables.

The value of the wife's inchoate dower in the proceeds of sale of her living husband's lands upon which there are unpaid mortgages is calculated upon the value of the entire proceeds of sale of the lands without deduction of the mortgage indebtedness assumed by the purchaser, and as the individual and joint life expectancies according to the mortuary tables are dependent in part upon health and habits, the question of the present value of the inchoate right of dower must be submitted to a jury under proper instruction from the court unless otherwise agreed to by the parties interested.

5. Dower A b—Lands or interests to which dower attaches.

Where a wife joins in the mortgage conveyance of her husband to exclude her claim for inchoate dower therein, her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower.

6. Mortgages H a—Sale of mortgaged property by receiver of mortgagor is not foreclosure.

Where the receiver of the insolvent husband, under order of court, sells and conveys the husband's lands, and the husband and wife join in his deed under agreement that her right of inchoate dower should attach to the proceeds, and the land sold is subject to prior mortgage liens which the purchaser at the sale assumes, the effect of the transaction is not a foreclosure of the mortgaged property either technically or substantially.

APPEAL by Ethel T. McKenzie, wife of defendant, from *Stack, J.*, at May Term, 1928, of GUILFORD. Error.

Sidney J. Stern for appellant.

King, Sapp & King, Shuping & Hampton and J. S. Duncan for creditors.

Broadhurst & Robinson for receiver.

ADAMS, J. This action was instituted by the American Blower Company to recover the sum of $5,422.10 with interest from 31 August, 1926, alleged to be due for appliances and equipment sold to the defendant. It was alleged in the complaint that the defendant was indebted in large amounts to sundry other creditors; that he was insolvent, and that the administration of his estate demanded the appointment of a receiver. Other creditors were given leave to join in the suit. Upon admission of all the allegations in the complaint Judge Oglesby, finding as a fact that the defendant was insolvent, appointed a receiver of his property. At this time the defendant was the owner in fee of two lots in the city of Greensboro. On the first lot was a deed of trust executed on 31 March, 1920, by the defendant and his wife to Julian Price, as trustee for the Jefferson Standard Life Insurance Company; on the second, a deed of trust executed by the defendant to the Atlantic Bank & Trust Company, as trustee for G. S. Boren and C. H. Andrews, on 18 March, 1925; and on both lots, a deed of trust dated 14 July, 1925, executed by the defendant and his wife to R. D. Douglas, as trustee for the Greensboro Bank & Trust Company. The deed held by Price was executed to secure an indebtedness of $20,000 evidenced by notes signed by the defendant and his wife, to whom the surplus in case of sale was to be paid—the remainder due on these notes and assumed by the purchaser being $17,451.61. The deed held by the Atlantic Bank & Trust Company was made to secure a debt of $71,500 as the purchase price of land, evidenced by notes signed by the defendant, to whom upon sale the surplus was to be paid—the remainder due and assumed by the purchaser being $45,750. The deed held by R. D. Douglas was

intended to secure notes signed by the defendant, to whom any surplus was to be paid, the remainder due and assumed by the purchaser being $30,304.61.

By an order of court the receiver was authorized to sell the defendant's assets by public auction or at private sale. He reported that he had received from C. C. Hudson an offer to pay $126,000 for the two lots on these terms: Hudson was to get a deed in fee with full covenants and was to assume payment of the deeds of trust; and all taxes and assessments against the property were to be paid by the receiver or credited on the amount offered. The defendant and his wife consented to join the receiver in conveying the property to Hudson for the purpose of releasing such right of homestead or inchoate right of dower as they were entitled to, with the understanding that the funds derived from the sale of the property should be impressed with such right of homestead or inchoate right of dower. The offer was accepted, and on 18 June, 1927, they and the receiver executed and delivered to Hudson, Incorporated, a deed in fee, in which is recited the purchaser's agreement to pay the amounts secured by the respective deeds of trust.

The receiver advertised for claims and among those presented was that of the defendant's wife, Ethel T. MacKenzie. She contended that as the funds were to be impressed with her inchoate right of dower she was entitled to $25,568.18 on this theory: her expectancy was 31.1 years and that of her husband 14.7 years; one-third of the income from the purchase price of the property was $2,530; the cash annuity of one dollar for 16.4 years (her expectancy beyond that of her husband) according to the annuity tables (C. S., 1791) is $10.106, and the cash value of an annuity of $2,530 for the same period is $25,568.18.

The receiver rejected this claim on the ground that during the life of the husband the wife had no vested interest or estate in his property which would entitle her to participate in the fund either as a preferred or as an unsecured creditor. Upon exceptions filed Judge Stack gave judgment as follows: that two-thirds of the amount available to creditors ($29,521.45) be paid ratably to the creditors whose claims had been allowed and that the remaining one-third be turned over to the clerk to be loaned on good security; that the income therefrom during the joint lives of the defendant and his wife, after payment of all taxes, be distributed from time to time ratably on the allowed claims; that if the claimant die before her husband the principal and undistributed interest be paid on such claim; that if she survive her husband the income be paid to her during her natural life or at her election the present cash value; and that after her death the fund be distributed

ratably among the creditors whose claims had been allowed. The claimant excepted and appealed.

In rendering judgment his Honor probably had in mind the principle stated in *Vartie v. Underwood,* 18 Barb. (N. Y.), 561, as it is given in *Gore v. Townsend,* 105 N. C., 228: "The wife's inchoate right in the husband's land follows the surplus moneys raised by a sale in virtue of the power of sale in a mortgage executed by her with her husband, and will be protected against the claims of the husband's creditors by directing one-third of such surplus moneys to be invested, and the interest only to be paid to the creditors during the joint lives of husband and wife." But the present appeal rests upon the wife's demand that the cash value of her inchoate right of dower be determined; it presents for review the questions whether the present pecuniary value of such right may be determined, and if it may whether the value of the land without deducting the debts secured by the deeds of trust shall form the basis of computation.

Inchoate dower or the inchoate right of dower is the interest which the wife has in the lands of her husband during his life and which may become a right of dower upon his death. Black's Law Dictionary. In *Gwathmey v. Pearce,* 74 N. C., 398, it is defined as a vested right to dower; in *S. v. Wincroft,* 76 N. C., 38, as a mere right which may never exist, not an estate in her husband's land; in *Gatewood v. Tomlinson,* 113 N. C., 312, as an inchoate right or estate in land, the enjoyment of which is postponed until the death of the husband; in *Rodman v. Robinson,* 134 N. C., 503, as a right which the wife has in her husband's land, contingent upon her surviving him; and in *Trust Co. v. Benbow,* 135 N. C., 303, as a valuable interest in land. In *Bethell v. McKinney,* 164 N. C., 71, it is said to be an existing encumbrance on land within the meaning of a covenant against encumbrances, and in *Corporation Commission v. Dunn,* 174 N. C., 679, quoting from 14 Cyc., 925, to be neither an estate nor an interest in land. Referring to the nature and incidents of this right, the Court said in *Gore v. Townsend, supra:* "It is true that the inchoate right of dower was never considered an estate of interest in a court of law, which did not even concede the power of the widow to convey her unassigned dower after the right had become consummate by the husband's death, but she might make a contract for the sale that would be enforced in a court of equity. *Potter v. Everett,* 42 N. C., 152; *Boyles v. Commissioners,* 40 Pa. St., 37. It must be remembered, however, that the discussion of the nature of the wife's interest in her husband's land has assumed a new phase since the enactment of the law restoring the common-law right of dower in North Carolina." And further: "2 Scribner Dower, 8, says: 'Although, therefore, an inchoate right of dower cannot be properly denominated an

estate in lands, nor, indeed, a vested interest therein, and, notwithstanding the difficulty of defining with accuracy the precise legal qualities of the interest, it may, nevertheless, be fairly deduced from the authorities that it is a substantial right, possessing in contemplation of law, the attributes of property, and to be estimated and valued as such.' It has many of the incidents of property. It has a present value that can be computed."

The inchoate right of dower is not an estate in land; it confers no control of the land or right of possession; but it is a subsisting, substantial right, possessing some of the incidents of property and having a present cash value which, as said by Scribner, is capable of computation. *Gore v. Townsend, supra;* 19 C. J., 493.

The last statement is at variance with the position that there is no scale or standard for ascertaining the present worth of the widow's inchoate right *(Reiff v. Horst,* 55 Md., 42), but it is in accord with the reasoning and conclusion of several courts which declare the law to be that such a standard does exist. These courts say that the present value of the wife's contingent right of dower during the life of the husband can be computed and that the correct rule of computation is to ascertain the present value of an annuity for her life, equal to the interest in the third of the proceeds of the estate to which her contingent right of dower attaches, and then to deduct from the present value of the annuity for her life, the value of a similar annuity depending upon the joint lives of herself and her husband. The difference between these two sums will be the present value of her contingent right of dower. *Jackson v. Edwards,* 7 Paige 386, 408; *Brown v. Brown,* 94 S. C., 492; *Strayer v. Long,* 86 Va., 557, 563; *Gordon v. Tweedy,* 74 Ala., 232, 49 A. R., 813. It is obvious that there is a difference between this rule and that for ascertaining the present worth of dower to which the wife is entitled after the death of her husband. One of its commendable features is the means by which the rights of the parties are presently determinable and by which the title to property is released from encumbrance or doubt.

This is the most feasible rule; but what is the basis upon which the computation shall be made? Is it the full value of the real estate ($126,000), or the full value less the amount due on the purchase price, or the full value less the amount remaining due on the two deeds of trust signed by the wife, or the surplus or net amount remaining after payment of the encumbrance? The receiver and the creditors say the basis last named is the correct one for the reason that the receiver's sale, in which the defendant and his wife took part, was in legal effect a foreclosure of the deeds of trust and that the claimant, if her husband were dead, would be dowable only in the surplus remaining after paying

the debts secured by the deeds of trust. Jones on Mortgages (6 ed.), sec. 666; Pingrey on Mortgages, sec. 2013; 2 Scribner on Dower, 607; Annotation to *Commercial B. & T. Co. v. Dudley,* 12 A. L. R., 1358; *Bailey v. Bailey,* 172 N. C., 671. The position implies that the deeds of trust have been foreclosed; but this implication the claimant protests and asserts that no foreclosure has taken place.

Foreclosure of a mortgage or deed of trust may be effected by a decree in equity by which the mortgagor's right to redeem the estate is defeated or by the execution of a power of sale contained in the mortgage or deed of trust without recourse to the courts. Whether in the case before us there was a foreclosure depends upon the legal effect of the transaction between the purchaser and the grantors in the receiver's deed. The purchaser's offer was to "assume" payment of the secured indebtedness; Judge Oglesby's order authorized conveyance of the mortgaged property to the purchaser, subject to the encumbrances; both the receiver's report and the receiver's deed refer to the deeds of trust as having been "assumed" by the purchaser. The record does not show whether these assumed debts have been paid; they may be yet outstanding. Nor does it appear that the trustees or the beneficiaries of the trusts were parties to the agreement between the grantors and the purchaser. For aught that appears in the record neither the trustees nor the beneficiaries have released the defendant and his wife from liability on their notes. The receiver conveyed subject to the encumbrances; the defendant and his wife by signing the receiver's deed conveyed their equity of redemption. C. S., 4100. We do not perceive how in these circumstances the conveyance to the purchaser constitutes a foreclosure of the trusts either technically or substantially. By consenting to join in the conveyance on condition that the funds derived from the sale should be impressed with such right of homestead or inchoate right of dower as they might be entitled to, the defendant and his wife intended merely to substitute their interest in the funds for their interest in the conveyed property. If the conveyance to Hudson had not been made what would have been the wife's interest in her husband's estate? Of course, an inchoate right of dower. To determine the present value of this right under the rule given above it is essential to ascertain the property of which she would have been dowable if at the date of the conveyance she had been the survivor of her husband. She would then have been entitled to an estate for her life in one-third in value of all lands and of all legal rights of redemption and equities of redemption whereof her husband was seized at any time during the coverture, subject to all valid encumbrances made during coverture with her free consent. C. S., 4100. She would have lost her right to dower as against the trustees in the deeds of trust or those claiming under them

to the extent necessary to protect the security and no further; but as against other persons her dower rights would have been paramount. 19 C. J., 485, sec. 85(2). This is so for two reasons: (1) the dower or right of dower may not be subjected during the widow's life to the payment of debts due from the estate of her husband (C. S., 4098); (2) if a wife joins her husband in the conveyance of her separate real estate to secure his debt or in the conveyance of his land, in which she has a right of dower, to secure his debt, the relation which she sustains to the transaction is that of surety; and if she survives him and the land is sold to satisfy the debt she becomes a creditor of his estate in an amount equal to the value of her dower. *Purvis v. Carstaphan,* 73 N. C., 575; *Gwathmey v. Pearce, supra; Gore v. Townsend, supra.* In such case upon what basis should the value of her dower be computed?

In *Chemical Co. v. Walston,* 187 N. C., 817, 824, it is said: "Prior to the execution of any mortgage the wife's inchoate right of dower was in the whole land. The fact that she executes the mortgage does not reduce her dower right to the excess over and above the mortgage encumbrance, but her dower in the whole tract is conveyed as security for the payment of the debt. The husband's 'legal rights of redemption and equities of redemption' (C. S., 4100) were in the whole tract, and hence the widow's claim for dower extends to the whole tract." As was observed in that case, in determining the widow's dower, the value of the land, without deducting the mortgage debt, should form the basis of computation. This is true not only as to the land described in the two deeds of trust which the claimant signed, but as to the land described in the deed to the Atlantic Bank & Trust Company as security for the purchase price. In *Overton v. Hinton,* 123 N. C., 1, it was held that a widow was entitled to dower in land purchased by her deceased husband who had executed notes for the purchase and had secured them by a deed of trust on the land. If the claimant were entitled to dower, the value of the land, without deducting the secured debts, would be the basis of computation; and this must be considered in computing the present value of her inchoate right of dower in the property of which she would be dowable as the survivor of her husband. The claimant is therefore entitled to the present cash value of her inchoate right of dower in the value of the land ($126,000) without deduction of the secured debts, to be determined according to the rule heretofore stated; and as the individual and joint life expectancies are dependent in part upon age, health, and habits (*Gore v. Townsend, supra*), the question of the present value of the inchoate right of dower must be submitted to a jury upon correct instructions, unless an agreement as to the amount can be reached by the interested parties.

Error.

A. E. TATE, W. C. IDOL, W. F. CLAYTON, J. L. SPRUILL, J. W. SLATE, GEORGE F. WILSON, E. C. CRIDDLEBAUGH, AND A. T. MOFFITT, TRUSTEES OF FIRST BAPTIST CHURCH OF HIGH POINT, v. R. T. AMOS AND J. E. AMOS.

(Filed 1 May, 1929.)

1. Wills E a—General rules for construction of wills.

A will and codicils thereto will be considered together as one instrument and construed in their entirety to effectuate the intent of the testator as gathered from the language used.

2. Same—Presumption against intestacy.

A will will be construed so as to avoid intestacy when this can be reasonably done, and the word "or" will not be construed as "and" when the latter word would defeat the testator's intent under a proper interpretation of the instrument.

3. Wills E b—Estates created by will.

In a devise of a certain city lot to a designated beneficiary "or to her children," the devisee having a child, to whom a devise is made under a different item of the will, the word "or" will not be construed to mean "and" when the latter interpretation would defeat the intent of the testator or have the legal effect of rendering the devise void, but will be construed to vest the fee-simple title in the mother should she survive the testator, otherwise to her child or children.

APPEAL by defendants from *Moore, J.*, at March Term, 1929, of GUILFORD. Affirmed.

The agreed statement of facts is as follows:

"1. That for sometime prior to her death, S. M. Farabee was the owner in fee simple of a tract or parcel of land, in High Point, North Carolina, more particularly described as follows:

" 'Fronting 100 feet on west side of North Main Street in the city of High Point, lying between the lines of N. W. Beeson and W. P. Pickett; thence westwardly 200 feet deep and 100 feet in the rear, being 100 feet by 200 feet and containing 20,000 square feet, more or less.'

"2. That said S. M. Farabee died on or about 20 May, 1908, leaving a last will and testament, which is set out in Exhibit 'A' and made a part of this paragraph.

"3. The said will was duly witnessed and properly executed to devise land, and is recorded in Will Book H, page 316, office of the clerk of the Superior Court of Guilford County.

"4. That at the time of the execution and probate of the will, the said Grace Darling Winend Hendrick had one living child and he is still living and has obtained his majority within the last three years; that the said child is Charley Thomas Hendrick, Jr., to whom the brick

storehouse and lot on North Main Street, No. 301½ known as the China Laundry, was devised; that the said Charley Thomas Hendrick, Jr., has not joined in any conveyance of the land described in fact 1 of this agreement.

"5. That the lot on North Main Street, known as No. 527, occupied by said Grace Darling Winend Hendrick at the time the will aforesaid was executed and devised to said Grace Darling Winend Hendrick by last will and testament of the said S. M. Farabee aforesaid, is the same land described in fact 1 of this agreement.

"6. That on 14 May, 1912, said Grace Darling Winend Hendrick, unmarried, conveyed by deed, fee simple in form, the property described in fact 1, to Roy Skiff by deed recorded in Book 238, page 590, in the office of the register of deeds of Guilford County, North Carolina, and that the aforesaid land, by various *mesne* conveyances, fee simple in form, thereafter has come into the possession of plaintiffs in this action and is now held by them.

"7. That A. E. Tate, and others, trustees of the First Baptist Church of High Point, North Carolina, contracted to sell said lands and other property to the defendants at and for the sum of $50,025.00, and defendants agreed to purchase said land at said sum.

"8. That defendants, after making aforesaid agreements, declined to accept deed to said land and pay the purchase price thereof because, as they alleged, the title to the tract of land hereinbefore described is defective, for that said Grace Darling Winend Hendrick was not the owner in fee simple of the said property.

"9. That Grace Darling Winend Hendrick had been reared by the testator, S. M. Farabee, and at the time of said Farabee's death, was living at her home and while not an adopted child, the relations between said Farabee and said Hendrick were very close and intimate."

Mrs. S. M. Farabee, after providing for the payment of her funeral expenses and debts, the will reads in part as follows: "Then I give to my beloved sister, Martha Ann English, or to her heirs, the lot and house on North Elm Street, No. 16, that was my mother's property. To my two nephews, Alva C. and Carson N. English, I give this lot and house No. 304 North M. St., and the storehouse No. 302, to be equally divided between them, two brothers, or their heirs. And to Charley Thomas Hendrick, Jr., I give the brick storehouse and lot on North Main Street, No. 300½, known as the China Laundry, for his mother to keep for him. *To Grace Darling Winend Hendrick, I give the lot and house on North Main Street, No. 527, that she now occupies, or to her children, and all my wearing clothes and bed clothes if she wishes them.* To Daisy L. Hiatt Wall I leave one single feather bed, two pillows, two quilts, and one blanket, and two sheets."

The judgment of the court below, was as follows: "This cause coming on to be heard before his Honor, Walter E. Moore, upon facts agreed; and the court being of opinion that the plaintiffs are seized in fee of the lands described in paragraph 2 of the complaint and can convey a fee-simple title thereto to the defendants: Now, therefore, it is ordered and adjudged that the plaintiffs recover of the defendants the sum of $50,025.00 upon their delivery to the defendants of a deed for said land, fee simple in form."

G. H. Jones, Holye & Harrison for plaintiffs.
Roberson, Haworth & Reese for defendants.

CLARKSON, J. The question of law involved in this case is whether or not Grace Darling Winend Hendrick acquired a fee-simple title to the lot in controversy, under the will of S. M. Farabee, in words as follows: *"To Grace Darling Winend Hendrick I give the lot and house on North Main Street, No. 527, that she now occupies, or to her children, and all my wearing clothes and bed clothes if she wishes them."* We think so.

In *Ellington v. Trust Co.*, 196 N. C., p. 755, the law is thus stated: "The guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some rule of law or public policy, is the intent of the testator, and this is to be ascertained from the four corners of the will, considering for the purpose the will and any codicil or codicils as constituting but one instrument. 28 R. C. L., 211, *et seq.*" This principle is well settled in this jurisdiction.

Appellants, defendants, contend (first) that in the construction of the will "or" means "and" and the lot in controversy would vest in Grace Darling Winend Hendrick and Charley Thomas Hendrick, Jr., as tenants in common.

This Court has uniformly held that a devise to "A." and her children, "A." having children, vests the estate to them as tenants in common. *Hunt v. Satterwhite,* 85 N. C., 73; *Silliman v. Whitaker,* 119 N. C., 89; *Lewis v. Stancil,* 154 N. C., 326; *Cullens v. Cullens,* 161 N. C., 344; *Snowden v. Snowden,* 187 N. C., 539; *Cunningham v. Worthington,* 196 N. C., 778.

The substitution of word "or" used as "and" is fully discussed in *Wood v. Wood,* 132 S. C., 120, 128 S. E., 837. See *Neal v. Nelson,* 117 N. C., 393; *Silliman v. Whitaker, supra; Christopher v. Wilson,* 188 N. C., 757; *Robertson v. Robertson,* 190 N. C., 558. In *Harrison v. Bowe,* 56 N. C., at p. 481, this observation is made: "But, say the counsel, the word 'or' must be construed 'and.' Such a change of words is admissible, certainly, when the intent of the testator will be defeated

without it; but it is never admissible unless it is necessary to carry out the manifest design of the will."

Appellants contend (second) that Grace Darling Winend Hendrick and Charley Thomas Hendrick, Jr., are both living and the devise is void for uncertainty. In *Gordon v. Ehringhaus,* 190 N. C., at p. 150, it is said: "When a person, who is capable of doing so, undertakes to make a will, the law presumes that he did not intend to die intestate as to any part of his property." *Faison v. Middleton,* 171 N. C., 170; *McCullen v. Daughtry,* 190 N. C., 215.

We do not think that either of the contentions of appellants, defendants, can be sustained.

The testatrix gave Charley Thomas Hendrick, Jr., a brick storehouse. He was the son of Grace Darling Winend Hendrick. After providing for the son, she devises the lot in controversy to Mrs. Hendrick *or to her children.* We think the principle applicable here is well stated in 1 Jarman on Wills, p. 612, as follows: "The strong tendency of the modern cases certainly is to consider the word 'or' as introducing a substituted gift in the event of the first legatee dying in the testator's lifetime; in other words, as inserted, in prospect of, and with a view to guard against, the failure of the gift by lapse."

A similar case to the present which sustains plaintiffs' contention is *Bender v. Bender,* 226 Pa. St. 607, 75 Atl., 859, 134 A. S. R., 1088.

We think the intention of Mrs. S. M. Farabee, the testatrix, gathered from the entire will, was to devise to Grace Darling Winend Hendrick a fee-simple title to the lot in controversy if she survived the testatrix. If Grace Darling Winend Hendrick died before the testatrix, then the lot in controversy would vest in her child or children in fee simple. She survived the testatrix. This being our interpretation; plaintiffs, who claim under Mrs. Hendrick, acquired a fee-simple title to the lot in controversy. The judgment of the court below is

Affirmed.

C. I. T. CORPORATION v. T. B. DRAKE AND C. A. BURGESS.

(Filed 1 May, 1929.)

Pleadings D b—Where only one defendant is served with summons and the action is against him solely, demurrer for misjoinder properly overruled.

Where an action is instituted against two defendants and only one of them is served with summons and the action is solely against the one served and this appears from the face of the complaint, a demurrer for misjoinder of parties and causes of action is properly overruled.

APPEAL by C. A. Burgess from a judgment of *Harding, J.*, overruling a demurrer to the complaint. From MECKLENBURG. Affirmed.

Lewis & Lewis for appellant.
Pharr & Currie for appellee.

PER CURIAM. This is an action to recover possession of a motor car. The plaintiff alleges that on 9 June, 1928, the Asheville Overland-Knight, Incorporated, sold and delivered a Whippet coupe to T. B. Drake upon a conditional sales contract which was duly recorded in Buncombe County; that on 29 June, 1928, the plaintiff for value bought the note which Drake had executed to secure a part of the purchase price, before its maturity and without notice of any equities against the collection of the note; that after Drake's conviction for a breach of the prohibition laws the car was sold by the sheriff of Iredell County to the defendant Burgess. It is alleged further that the sale was illegal and that the only interest Burgess acquired, if any, was the interest of Drake. Drake has never been served with summons and is not a party to the action. The defendant demurred to the complaint on the ground of an improper joinder of parties and causes of action. The demurrer was overruled and Burgess excepted and appealed.

There is really only one defendant; and since the demurrer admits the allegations in the complaint it is obvious that there is no error in the judgment.

Affirmed.

J. G. RUTLEDGE, JR. v. JOHN W. FITZGERALD.

(Filed 1 May, 1929.)

Appeal and Error J a—Findings of fact presumed correct on appeal.

Where a judgment of nonsuit has been granted, and thereafter the trial judge has restored the cause to the docket upon the ground of excusable neglect and a meritorious defense, the appellant must aptly request the trial court to find the facts upon which the judgment is based, and when this has not been done, and they do not appear of record, it will be presumed that they support the judgment rendered and it will be affirmed on appeal.

APPEAL by defendant from *Oglesby, J.*, at September Term, 1928, of MECKLENBURG. Affirmed.

The following judgment was rendered in the court below: "This cause coming on before his Honor, John M. Oglesby, presiding at the September Term, 1928, Superior Court of Mecklenburg County, on a

motion to set aside the judgment obtained on 19 June, 1928, by John W. Fitzgerald, against J. G. Rutledge, Jr., and W. R. Rutledge, and the same being heard: It is hereby ordered, decreed and adjudged, that the said judgment be, and the same is hereby set aside in the discretion of the court on the ground of excusable neglect and surprise, and also for meritorious cause shown to the court, and that the judgment of nonsuit rendered therein also be set aside on account of excusable neglect and surprise, and that the said judgment herein is ordered to be canceled and stricken from the docket, that the said original cause be restored to the trial docket for trial."

The defendant excepted and assigned error to the judgment rendered and appealed to the Supreme Court.

John G. Carpenter for plaintiff.
Jimison & Abernathy for defendant.

PER CURIAM. The defendant did not request the court below to find the facts upon which the rulings of the court below were based. In the absence of such finding, it is presumed that the court below, upon proper evidence, found facts sufficient to support the judgment. The whole matter is fully discussed and decisions cited in *Holcomb v. Holcomb,* 192 N. C., 504; *Helderman v. Mills Co.,* 192 N. C., 626. See *Lumber Co. v. Anderson,* 196 N. C., 474; *Realty Corp. v. Fisher,* 196 N. C., 503; *Coach Co. v. Griffin,* 196 N. C., 559. The judgment of the court below is

Affirmed.

MINNIE D. GANT v. MASON W. GANT.

(Filed 8 May, 1929.)

Negligence A d—In this case held: injury from act could not be foreseen and nonsuit was proper.

Evidence tending to show that the defendant while endeavoring to get his family automobile from the garage on ground covered with ice and snow, had planks placed under the wheels of the machine which were thrown, by the spinning of the wheels, against the plaintiff, his wife, as she stood watching him about fifteen feet from the rear of the car, causing her serious injury: *Held,* injury from the act could not have been foreseen by the defendant as an ordinarily prudent man, but would have required omniscience, and the defendant is not liable in damages, and a judgment as of nonsuit should have been granted on his motion.

CLARKSON, J., dissenting.

GANT *v.* GANT.

CIVIL ACTION, before *Clement, J.*, at February Term, 1929, of GUILFORD.

Plaintiff and defendant are husband and wife, and were at the time of the injury complained of and are now living together in the city of Greensboro.

The evidence tended to show that the defendant owned a Chrysler automobile for the use of himself and family, and that said automobile was placed in a garage at night at the home of plaintiff and defendant. On the morning of 10 January, 1927, a heavy snow was upon the ground. Plaintiff went to the garage and attempted to get the automobile out to the street in order to take the children to school. She was unable to do so, and thereupon the defendant got into the car and attempted to get it out to the street.

Plaintiff's narrative of the occurrence is as follows: "The snow was deep. He tried to back it out and couldn't back it, and he kept running the motor until the car just kept starting and slipping until it turned around, and then he tried to pull it out and the wheels kept sliding. I was out in the yard seeing how it was going to be done. Our cook was out there and she placed a little plank under one wheel. That seemed to help some. Then he told her to get some long planks and put under the wheels, and when she did the car ran over those two long pieces. . . . And when the wheels ran over those planks, instead of going right on off, they spun to the left and the left rear wheel threw the plank back and struck me on the right leg. . . . The plank that struck my right leg was at least four feet long and about seven or eight inches in width and possibly an inch or three-quarters of an inch thick. . . . The car was on the driveway at the time the boards were placed under it. I was standing, I suppose, from the car, ten or fifteen feet. . . . The motor of the automobile was running, and when it ran off the plank it began spinning, and when it struck the snow it consequently threw the plank. The motor of the car was running, it seemed, with all force from the sound of it. I was standing to the left rear of the car."

The plaintiff sustained painful and permanent injury.

The defendant offered no evidence, and the foregoing evidence of the plaintiff is substantially all of the evidence in the case except the testimony of physicians as to the extent of the injury sustained.

Issues of negligence, contributory negligence, and damages were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $2,030.00 The defendant duly lodged motions of nonsuit, and also requested the court to give certain instructions to the jury.

From judgment upon the verdict the defendant appealed.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

BROGDEN, J. The facts are brief and simple. The ground was covered with a heavy snow, and therefore soft and slick. The defendant was not endeavoring to operate the automobile under dangerous conditions, but merely to get his own automobile out of a garage on his own premises. It was suggested upon the oral argument that the defendant should have placed chains upon the automobile before attempting to get it out of the garage, or to have given notice to his wife, the plaintiff, that the wheels were likely to spin. It was also suggested that the defendant was racing the motor. It does not appear that racing the motor caused the wheels to spin. Ostensibly the spinning resulted from contact with a soft, slick surface. These suggestions all lie in the field of speculation. Under the circumstances disclosed by the record the liability of defendant depended upon whether, by the exercise of ordinary care and prudence, he could have reasonably foreseen that some injury would result from attempting to get the automobile out of the garage. The principle of law is thus expressed in *Fore v. Geary,* 191 N. C., 90, 131 S. E., 387: "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."

The plaintiff testified that the first plank used by the defendant "seemed to help some." Thereupon the defendant directed a servant to place two longer planks between the front and rear wheels. The automobile moved over these planks and as it rolled off upon the slick surface the wheel suddenly began to spin, thus kicking one of the planks backward and inflicting the unfortunate injury upon the plaintiff.

In our opinion the evidence does not disclose any negligence upon the part of the defendant. Under the circumstances of the case to require the defendant to foresee that the plank would be kicked backward and injure his wife would practically stretch foresight into omniscience. The law does not require omniscience. The motion for nonsuit should have been allowed.

Error.

CLARKSON, J., dissenting: The following rule in *Hall v. Rinehart,* 192 N. C., at p. 708, has often been approved by this Court: "In *Hud-*

son v. R. R., 176 N. C., 492, *Allen, J.*, says: 'In support of the first two propositions the defendant relies on the definition of proximate cause, in *Ramsbottom v. R. R.*, 138 N. C., 41, approved in *Bowers v. R. R.*, 144 N. C., 686, and in *Chancey v. R. R.*, 174 N. C., 351, as "A cause that produces the result in continuous sequence, and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed," to which we adhere, with the modification contained in *Drum v. Miller*, 135 N. C., 204, and many other cases, that it is not required that the particular injury should be foreseen, and is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act.'"

Defendant undertook to get his automobile out of the garage. He got it out in the snow. Plaintiff was in the yard, seeing how it was going to be done. Snow was on the ground 10 or 12 inches deep and the wheels would not catch, but kept spinning. It is a matter of common knowledge that frequently in snow or soft dirt the wheels of an automobile without chains do not move forward but spin, and when the power is put on the wheels when spinning throw dirt and debris in the air and in the rear of the car. This was known to defendant, or in the use of due or ordinary care ought to have been known. Defendant, to try to get the rear wheels to catch on something and stop the spinning, put two boards in front of the two rear wheels. Frequently chains and brush are used. After putting the boards or plank on the slick ground for the wheels to catch on, defendant put on "all power," the rear wheels caught on the planks, one about 4 feet long, 8 inches wide and ¾-inch thick, was thrown backward on plaintiff. When the rear wheel ran over the plank, the plaintiff was some 10 or 15 feet distant, standing to the left side of the car, the plank struck her on the right leg and breaking it about 8 or 9 inches up. Anybody who has been in such a plight and had experience in running an automobile could reasonably anticipate that wrong and harm might follow if any one was in the rear or near the rear from such a situation and when the driver of the automobile put on "all power," as the evidence disclosed in the present case. When the "all power" was put on by the driver of the car he gave no warning to the plaintiff standing at the left side of the car in the rear.

The questions of negligence and contributory negligence were questions of due care or the care that a prudent man would exercise under all the circumstances, and this is for the jury to determine. The judge below left it to the jury, they decided that the defendant was negligent and the plaintiff was not guilty of contributory negligence. No doubt the jury had experience in such matters and I think it was for them to decide and not the court.

Negligence has been defined in numerous ways: The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man.

J. D. CORNELL MILLINERY CO. v. LITTLE-LONG CO., ET AL.

(Filed 8 May, 1929.)

Landlord and Tenant D b—Subleasing for shorter term than original lease does not breach condition not to sell or assign.

A condition in the lease of a store that the lessee should not sell or assign the lease without the consent of the lessor is not violated by the lessee's subletting for a shorter period than the unexpired term specified in the original lease without the lessor's consent, the words "sell or assign" not excluding a sublease, the status between the lessor and the original lessee remaining unchanged by the sublease made by the latter.

APPEAL by plaintiff from *Townsend, Special Judge,* at November Special Term, 1928, of MECKLENBURG.

Civil action to recover damages (1) for an alleged unlawful conspiracy among the defendants to destroy plaintiff's business; and (2) for an alleged wrongful eviction from premises leased by the plaintiff.

The evidence tends to show that in April, 1924, the Little-Long Company leased to Cornell Millinery Company (Ohio corporation) a space 50 by 25 feet across the rear of the second story of its store building, located in the city of Charlotte, for a period of five years, beginning 1 August, 1924, and ending 31 July, 1929. The lease, among other things, contained the following covenant: "Also lessee is not to sell or assign this lease or any part thereof without the consent of the lessor."

On 7 April, 1926, Cornell Millinery Company sublet the premises to the plaintiff, J. D. Cornell Millinery Company (New York corporation), for a term ending 30 June, 1929, that is to say, for a term shorter by one month than the original lease. S. Lipinsky Sons & Company succeeded to the rights of the Little-Long Company, and it is contended that neither the Little-Long Company nor S. Lipinsky Sons & Company ever assented to the subleasing or assignment of the premises.

On this phase of the case, the court instructed the jury as follows: "The instrument, gentlemen, offered in evidence as the sublease between the Cornell Millinery Company and the J. D. Cornell Millinery Company would constitute an assignment of a part of the lease or would come within the meaning of the provisions which I have read to you and unless it was either expressly or impliedly assented to and acquiesced in by the Little-Long Company and S. Lipinsky Sons Company or some one authorized to act in their behalf, such a sublease would not be effective to transfer the premises or any interest therein; and the burden is on the plaintiff to satisfy you by the greater weight of the evidence, first, as to the fact of the assignment, and second, as to the fact of the assent of the Little-Long Company, either expressed or implied. If the plaintiff has failed to so satisfy you, it would be your duty to answer the issue 'No.'" Exception by plaintiff.

It was in evidence that Cornell Millinery Company, the Ohio corporation, discontinued its corporate existence some time in March or April, 1926, prior to the incorporation of J. D. Cornell Millinery Company, the New York corporation, on 25 May, 1926. From this evidence, it was contended that no valid assignment or under-lease was or could have been made to the plaintiff by the original lessee.

On the alleged cause of action for conspiracy, judgment as in case of nonsuit was entered at the close of the evidence; and on the alleged cause of action for wrongful eviction on the part of Little-Long Company and S. Lipinsky Sons & Company, the jury returned a verdict in favor of the defendants.

Plaintiff appeals, assigning errors.

W. T. Shore, Chase Brenizer, John Paul Trotter and Biggs & Broughton for plaintiff.

Merrimon, Adams & Adams and Thomas C. Guthrie for defendants other than W. T. Grant Co.

John Newitt for defendant, W. T. Grant Co.

STACY, C. J., after stating the case: Is a covenant in a 5-year lease "not to sell or assign this lease or any part thereof without consent of lessor" violated by a subletting of the premises, without the consent of the lessor, for a period shorter by one month than the unexpired portion of the original term? We think not. 16 R. C. L., 832.

A covenant in a lease against sale or assignment is *stricti juris*, and it is the general holding that a subletting of the demised premises by the lessee is not a breach of such restriction, because the relation of landlord and tenant between the original lessor and lessee still exists and remains unchanged. *Hargrave v. King*, 40 N. C., 430; *Copeland v. Parker*, 4 Mich., 660; note, 14 L. R. A. (N. S.), 1200; 35 C. J., 982.

"The distinction between an assignment and a lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years demises *part* of the house to another for the *whole* of his term, this is not an under-lease, but an assignment *pro tanto.*"—*Daniel, J.*, in *Lunsford v. Alexander,* 20 N. C., 166.

An assignment creates no new estate, while a sublease does. *Collins v. Hasbrouck,* 56 N. Y., 157, 15 Am. Rep., 407. If a lessee convey or transfer his entire interest in the demised premises, without retaining any reversionary interest therein, a sale or assignment takes place; but if he reserve to himself a reversion of some portion of the term, a sublease and not a sale or assignment is made. *Murdock v. Fishel,* 121 N. Y. Sup., 626; *Banking Co. v. Tobin,* 104 Minn., 333, 116 N. W., 838. "An assignment of a lease passes the whole estate of the lessee; a lease, a less estate than the lessor had." *Waters v. Roberts,* 89 N. C., 145. The reservation by the lessee, therefore, of some portion of the term would seem to be the chief distinction between a sublease and a sale or assignment. *Collins v. Hasbrouck, supra.*

The difference is well illustrated by the decision in *Jackson v. Harrison,* 17 Johns, 66, where it was held that a covenant prohibiting the sale or assignment of a leasehold estate was not violated by an act of the lessee which fell short of divesting his whole legal estate. As stated in the head-note: "Where a lease for the term of seven years, contains a condition that the lessee should not 'assign over, or otherwise part with, the indenture, or the premises thereby leased, or any part thereof, to any person,' etc., and a clause of reëntry, and of forfeiture, for a breach of the condition, no forfeiture is incurred by an underletting for two years, or a period short of the whole term; as the words of the condition are to be construed to mean an assignment of the premises, or a part of them, for the whole term."

Again in *Jackson v. Silvernail,* 15 Johns., 278, it was held (as stated in the head note): "Where a lessee for lives covenanted not 'to sell, dispose of, or assign his estate in the demised premises,' without the permission of the lessor, etc., and the lease contained a clause of forfeiture for the nonperformance of covenants, it was held, that a lease of part of the premises by the lessee for 20 years, was not such a breach of the covenant as would work a forfeiture; and that nothing short of an assignment of his whole estate by the lessee would produce a forfeiture of the lease."

In the leading English case of *Crusoe v. Bugby,* 3 Wilson, 234, 2 Bl. Rep., 766, a tenant for twenty-one years covenanted "not to assign, transfer or set-over, or otherwise do or put away the premises or any part thereof" without permission of the landlord. Afterwards the lessee

sublet the premises for fourteen years. It was held that there was no breach of the covenant, on the ground that the demise for fourteen years was an underlease, and not an assignment. And it was observed that the landlord, if he so desired, might have provided against a change of possession, as well as against an assignment, but that he had not done so in language admitting of no other meaning, and that "assign, transfer and set-over," were mere words of assignment, and "otherwise do or put away," as there used, meant any other mode of getting rid of the whole interest and would not be held to prohibit the making of an under-lease.

Applying these principles to the instant case, we think the trial court erred in its peremptory instruction to the jury that a sublease of the premises for less than the full term constituted an assignment of a part of the lease. The words "sell or assign" do not include an underlease, and "any part thereof," as used in the restriction, would seem to refer only to a sale or assignment of some part of the lease. This entitles the plaintiff to a new trial as against the Little-Long Company and S. Lipinsky Sons & Company, but as against the other defendants, the judgment of nonsuit would seem to be correct.

It is not conceded by the defendants that the plaintiff ever had a valid subsisting lease for the premises in question, even though the covenant in the original lease may not restrain the lessee from renting to an under-tenant. The plaintiff, on the other hand, contends that, even if there had been a breach of the covenant, or an invalid lease executed by the lessee, the defendants have duly recognized the sublease and are now estopped to deny its validity. But these are matters to be tried out on another hearing.

New trial.

CARL OATES v. L. L. HERRIN.

(Filed 8 May, 1929.)

1. Trial E c—Charge should explain all principles of law arising from evidence.

Where the issues of negligence, contributory negligence, assumption of risks, and damages are submitted to the jury, it is required that a trial court charge the jury as to the effect of a finding of negligence and contributory negligence on the issues of damages, and his failure to do so is reversible error. The correct form of these issues is given.

2. Trial E e—Requests for instruction not necessary where error in charge is upon substantial feature of case.

Where there is error in the charge upon a substantial feature of the case the appellant is entitled to a new trial upon error assigned without having made a special prayer for instructions in regard thereto.

3. Trial F a—Court has power to give additional instructions and have jury again retire.

The trial court has the power, if he is under the impression created by inconsistent answers to separate issues, that the jury had not understood his charge, to give additional instructions and have the jury again retire for further consideration.

APPEAL by defendant from *Stack, J.*, at March Term, 1929, of MECKLENBURG.

Action for personal injury alleged to have been caused by the negligence of the defendant, a contractor, in failing to furnish the plaintiff, his employee, suitable timbers for the construction of a scaffold, from which the plaintiff fell to the ground. The record discloses these facts:

"The jury, after having deliberated for some time, came in and announced that they had reached a verdict, and returned the following verdict:

1. Was the defendant guilty of negligence as alleged in the complaint? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence 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 of the defendant? Answer: Lost time and expenses.

The court refused to accept the verdict and sent the jury back for further deliberation. To this ruling of the court, which was made in the absence of counsel for both parties, the defendant excepts, which is defendant's exception No. 10. Thereupon the court further charged the jury as follows, counsel for neither party being present in court: 'I told you if you answered the first issue Yes and the second issue No, and the third issue No, then you would go to the fourth issue, and if you should reach that issue, that you must specify in dollars and say how much. You will have to retire and reconsider, then bring in your verdict.' To the foregoing portion of his Honor's charge the defendant excepts, which is defendant's exception No. 11. The jury went out, and after further deliberation returned a second verdict as follows:

1. Was the defendant guilty of negligence as alleged in the complaint? Answer: Yes.

2. Was the plaintiff guilty of contributory negligence 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 of the defendant? Answer: $450.00.

Upon the last verdict the court signed the judgment for the plaintiff, which appears in the record, and thereafter, within due and proper time, the defendant duly excepted to said judgment and entered its appeal on the judgment docket, and gave the notice of appeal which appears in the record. The exception to the judgment above mentioned is defendant's exception No. 12."

T. L. Kirkpatrick and B. G. Watkins for plaintiff.
John M. Robinson and Hunter M. Jones for defendant.

ADAMS, J. In *Sasser v. Lumber Co.*, 165 N. C., 242, the jury in response to the first three issues found that the plaintiff had been injured by the negligence of the defendant; that the plaintiff by his own negligence had contributed to his injury, and that he had not assumed the risk of being injured; and in response to the fourth issue the jury assessed the plaintiff's damages at fifteen hundred dollars. The plaintiff entered a motion to set aside the verdict on the ground that the answers to the several issues were inconsistent and contradictory. The motion was denied, and in affirming a judgment for the defendant this Court said: "It is settled by the decisions of this Court that, in an action of this character, where the jury find that the plaintiff was injured by the negligence of the defendant, and further find that the plaintiff by his own negligence contributed to his injury, and then assess damages, the plaintiff is not entitled to recover, and the defendant is entitled to judgment upon the issues." This statement of the law was approved in *Holton v. Moore,* 165 N. C., 549, decided a few weeks after the opinion in *Sasser's case* had been written.

In the cases just cited the verdicts were accepted by the court and entered of record; but in the case before us the judge, under an impression (created by inconsistent answers to separate issues) that the jury had not understood his charge, gave additional instructions and directed the jury to retire for further consideration. His right to pursue this course is established. *S. v. Whitaker,* 89 N. C., 473; *Ayscue v. Barnes,* 190 N. C., 859.

But there is a fatal error in the charge. These instructions were given: "If you answer the first issue No and the second Yes, you will not go any further, but if you answer the second No, then you will consider the third; if you answer the third No, you will go to the fourth. If you answer the first issue Yes, second No, third No, then you will proceed to the fourth issue and say what you find the damages to be. I want to make this plain to you: If you answer the first No, or if you answer it Yes, and second No, and third Yes, you don't go any further, because if he was injured by his own negligence he could not

recover, or if he was injured by any danger or risk incident to his employment he cannot recover." To the latter instruction the defendant excepted.

When upon tendering the first verdict, the jury were requested to retire, this instruction was given: "I told you if you answered the first issue Yes and the second issue No, and the third issue No, then you would go to the fourth issue, and if you should reach that issue you must specify in dollars and say how much." We find no instruction as to the effect on the fourth issue of an affirmative answer to each of the first two issues. It was the duty of the judge to give this instruction, without a special prayer, because it was a substantive and not a subordinate feature of the trial, and the exceptions present the question of a failure to enlighten the jury on this aspect of the evidence. *S. v. O'Neal,* 187 N. C., 22; *S. v. Merrick,* 171 N. C., 795. For this reason there must be a new trial. Other exceptions raise serious questions which it is unnecessary to consider.

We take occasion to express our disapproval of the form in which the first two issues were submitted to the jury. They should have been framed so as to enable the jury specifically to find whether the plaintiff had been injured by the negligence of the defendant as alleged in the complaint, and whether the plaintiff by his own negligence had contributed to his injury as alleged in the answer.

New trial.

ANDREWS MUSIC STORE, INC., v. C. H. BOONE AND C. S. THOMPSON.

(Filed 8 May, 1929.)

1. Parties B a—Joinder of purchaser under conditional sales contract and his vendee not misjoinder.

In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. C. S., 456, 507.

2. Sales I b—Unregistered conditional sales contract is valid as to all but creditors and purchasers for value.

An unregistered conditional sales contract is valid as against all persons except creditors and purchasers for value, and upon conflicting evidence as to whether one defendant was a purchaser for value from the vendee under the conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. C. S., 3311.

MUSIC STORE *v.* BOONE.

APPEAL by defendant, C. H. Boone, from *Stack, J.*, at February Term, 1929, of MECKLENBURG. No error.

Action to recover of defendant, C. S. Thompson, the balance due on the purchase price of a piano sold and delivered by plaintiff to said defendant under a conditional sales contract, and also to recover of said defendant and of the defendant, C. H. Boone, possession of said piano.

The conditional sales contract by which plaintiff retained title to the said piano until the purchase price was paid was reduced to writing and signed by the defendant, C. S. Thompson; it has not, however, been registered.

Defendant, C. S. Thompson, filed no answer or other pleading; judgment by default final was rendered against him. He has not appealed from the judgment.

Defendant, C. H. Boone, admitted that the piano was in his possession. He alleged that he had acquired title to the piano, as a purchaser for value, from his codefendant, C. S. Thompson, and that, therefore, the unregistered conditional sales contract, under which plaintiff claims title to the piano, is not valid as against him.

Issues determinative of the right of plaintiff to recover of the defendant, C. H. Boone, possession of the piano were submitted to the jury and answered as follows:

1. Is the plaintiff the owner and entitled to the possession of the piano sued for in this action? Answer: Yes.

2. If so, what was the reasonable market value of the piano at the time it was seized and replevied by the defendant? Answer: $200.

3. What is the reasonable market value of the piano at this time? Answer: $200.

From judgment on the verdict, defendant, C. H. Boone, appealed to the Supreme Court.

Tillet, Tillet & Kennedy and Frank Grainger Pierce for plaintiff.
John Newitt for defendant.

CONNOR, J. There was no error in the refusal by the trial court of defendant's motion for a separate trial of plaintiff's action against him. This motion was founded upon defendant's contention that there is a misjoinder of parties defendant and of causes of action in the complaint in this action. This contention was first presented by defendant's demurrer to the complaint, which was overruled. Defendant has not set out in his brief filed in this Court his exception to the refusal of the Court to sustain his demurrer. He has, therefore, abandoned this exception. Rule 28. There was no trial of plaintiff's action against the defendant, C. S. Thompson. He filed no answer or other pleading,

and there was a judgment against him by default final. The action was tried only on the issues raised by the answer of the defendant, C. H. Boone. Notwithstanding the refusal of defendant's motion for a separate trial, there was in fact a separate trial of the action as to the defendant, C. H. Boone.

However, there is no misjoinder of parties defendant or of causes of action in the complaint in this action. It has been held by this Court that a demand for possession of property and for judgment on the debt secured by a lien or mortgage on the property may be joined in one action. *Kiger v. Harmon,* 113 N. C., 406, 18 S. E., 515. Both causes of action grow out of and are founded upon the same transaction. C. S., 507. Whereas in the instant case, it is alleged that the property which is subject to a lien, or which has been conveyed by mortgage to secure a debt, is in the wrongful possession of a person other than the debtor or mortgagor, such person is a proper party defendant in an action by the creditor whose debt is thus secured against the debtor or mortgagor to recover judgment on the debt, and also to recover possession of the property for purposes of foreclosure. Where such person has or claims an interest in the property adverse to the plaintiff, he is a necessary party to a complete determination of the questions involved, affecting plaintiff's right to the possession of the property. C. S., 456. In the instant case, the defendant, C. H. Boone, claims title to the piano adverse to the plaintiff, and contends that by reason of such title his possession of the piano is lawful as against both the defendant, C. S. Thompson, and the plaintiff. Said defendant is both a proper and a necessary party defendant in this action.

Nor was there error in the refusal of the trial court to allow defendant's motion at the close of all the evidence for judgment as of nonsuit. It is true that the conditional sales contract under which plaintiff claims title to and right to the possession of the piano as against both defendants was not registered. Notwithstanding this fact, plaintiff is entitled to recover possession of the piano from the defendant, C. S. Thompson, for it is well settled by many decisions of this Court that the contract, although not registered, is valid as between the parties. *Kornegay v. Kornegay,* 109 N. C., 191, 13 S. E., 770. The unregistered conditional sales contract is valid as against all persons except creditors and purchasers for value from C. S. Thompson. C. S., 3311. *Harris v. R. R.,* 190 N. C., 480, 130 S. E., 319. On the trial of this action there was conflicting evidence as to whether the defendant, C. H. Boone, was a purchaser for value from his codefendant, C. S. Thompson. This evidence was properly submitted to the jury. Plaintiff in an action to recover possession of personal property, under an unregistered chattel mortgage or conditional sales contract, is entitled to recover not only

of the mortgagor or bargainor, but also of a defendant in possession of said property, claiming title thereto otherwise than as a creditor or purchaser for value from the mortgagor or bargainor. *Motor Co. v. Jackson,* 184 N. C., 328, 114 S. E., 478.

Assignments of error based upon other exceptions appearing in the case on appeal have been considered. These exceptions are principally to the rulings of the court with respect to the admission or exclusion of evidence, and to instructions of the court in the charge to the jury. They cannot be sustained. The judgment is affirmed.

No error.

C. F. HARVEY v. KINSTON KNITTING COMPANY ET AL.

(Filed 8 May, 1929.)

1. Mortgages F b—Purchaser of equity of redemption does not assume the indebtedness in absence of agreement in deed.

The grantee in a deed to lands subject to an existing mortgage recited therein does not personally assume the mortgage indebtedness by accepting the deed unless the language thereof clearly imports that he does so.

2. Same—Purchaser of equity of redemption is entitled to have notes in the hands of mortgagee applied to mortgage debt for which they were given.

Where the owner mortgages his property and later agrees with the mortgagee that a part of the mortgaged premises be released from the mortgage and sold partly for cash with notes for the balance taken and secured by a mortgage from the purchaser of the released part, and that the original mortgagee hold the notes and mortgage on the released part as security for the original mortgage debt, the execution of the original mortgage is in itself an application of the mortgaged premises to the security of the debt and includes the substitution in part therefor of the mortgage of the released part, and the original mortgagor is entitled to have the proceeds of the notes, as they are paid, applied to his debt, and the purchaser of the original equity of redemption is subrogated to the right of the mortgagor in this respect.

3. Same—Right of purchaser of equity of redemption as against creditors of insolvent mortgagor.

Where the mortgagor, under agreement with the mortgagee, sells a part of the premises mortgaged for a cash payment and notes for the balance secured by a mortgage from the purchaser, and the original mortgagee holds such notes as security for the original debt, and thereafter a receiver is appointed for the original mortgagor, who sells the property at judicial sale under order of court, the purchaser at the judicial sale, not assuming the amount of the original mortgage in his deed, is subrogated to the rights of the original mortgagor and is entitled to have the proceeds of the notes applied to the original mortgage as they are paid as against the other creditors of the insolvent mortgagor.

4. Estoppel B a—Party may not take position inconsistent with that taken originally in same action.

Where the purchaser of lands at a judicial sale insists on confirmation and appeals from an adverse judgment, he may not thereafter maintain the inconsistent position on another appeal in the same case that the sale should not be confirmed.

CIVIL ACTION, before *Cranmer, J.*, at February Term, 1928, of LENOIR.

Certain phases of this case were considered by this Court in *Harvey v. Knitting Co.*, 194 N. C., 734, 140 S. E., 746, and *Harvey v. Oettinger*, 194 N. C., 483, 140 S. E., 86.

The Orion Knitting Mills issued bonds in the sum of $150,000 on 1 May, 1922, and to secure the payment thereof executed and delivered to the Virginia Trust Company a mortgage or deed of trust on all of its property consisting of real estate, machinery, etc. These bonds were endorsed by the directors of the mortgagor, C. F. Harvey, the plaintiff, and the individual defendants in this action. Some of said directors and endorsers, as aforesaid, were dead at the commencement of this action and their personal representatives were duly made parties.

Thereafter the defendant, Kinston Knitting Company, was duly organized in 1925, and this corporation became the owner of the real and personal property of the mortgagor, Orion Knitting Mills, under a contract or agreement to assume and pay off the balance due on the bonds issued by the Orion Knitting Company and secured by said deed of trust. Thereupon the Orion Knitting Mills was duly dissolved. The real estate embraced in said mortgage or deed of trust was located in Lenoir and Carteret counties.

This action was instituted by plaintiff Harvey against the Kinston Knitting Mills and the individual defendants, alleging that said corporation was insolvent and asking for the appointment of a receiver, and a receiver was appointed on 31 March, 1927. Prior to the commencement of this action the company had sold to C. E. Raynor twenty-six tenement houses covered by the lien of Virginia Trust Company for $20,000, said purchase price consisting of $1,000 in cash and notes aggregating $19,000, secured by deed of trust upon the property. These Raynor notes were endorsed by the defendant, Kinston Knitting Company, and were delivered to the lienholder, Virginia Trust Company. Whereupon, the Virginia Trust Company released the property purchased by Raynor from the operation of said deed of trust. After applying the cash proceeds derived from sales of portions of the mortgaged property, as aforesaid, there was a balance due the Virginia Trust Company of approximately $90,000, with some accrued interest. Subsequently Judge Sinclair entered an order of sale of all the property of the

defendant, Kinston Knitting Company, including, of course, the land covered by the deed of trust of the Virginia Trust Company. The order of sale directed that the property should be offered free of lien, and also "subject to the lien held by the Virginia Trust Company, trustee, so that the purchaser thereof shall take the said property burdened with and subject to the said lien aforementioned." Pursuant to said order of sale the receiver advertised for sale the property in Carteret County on 18 July, 1927, and the property in Lenoir County was to be sold on 19 July, 1927. The advertisement followed the language of the order of sale, reciting that if said property had been sold freed from lien "the same said property will immediately be offered for sale subject to the lien held under the deed of trust of the Virginia Trust Company, so that the purchaser thereof will purchase and take the property subject to the said lien held by the Virginia Trust Company." The report of sale duly made by the receivers was filed on 19 July, 1927, reciting that "the receivers further made a true and accurate statement of the status as to the indebtedness secured by the lien under the deed of trust to the Virginia Trust Company." In addition to the advertisement the receivers announced that the total indebtedness due the Virginia Trust Company as of 1 May, 1927, was $92,700. Announcement was also made at the sale that the Raynor notes and the cash payment of $1,000 made by him had been forwarded to the Virginia Trust Company.

The real estate in Carteret County, covered by said deed of trust was purchased by the plaintiff, C. F. Harvey, "subject to and burdened by the said lien," for the sum of $100, and the real estate in Lenoir County, covered by said deed of trust, was also purchased by Harvey for $300, "subject to the lien held by the Virginia Trust Company."

Thereafter, the defendants, H. E. Moseley, L. L. Oettinger, F. C. Dunn, Myrtie A. Tull, executrix, Lundsford Abbott, administrator, and Lillie T. Oettinger, executrix, filed exceptions to the confirmation of said sale, alleging that the price offered for said property was inadequate, and that Harvey, having purchased the Carteret County property for $100.00 "subject to and burdened with the indebtedness due to the Virginia Trust Company . . . in law . . . by virtue of his said bid . . . thereupon assumed as a part of his bid and agreed to pay off the secured indebtedness to the Virginia Trust Company," and that the Virginia Trust Company had in its possession $21,000 which ought not to be applied to the reduction of its indebtedness to the detriment of unsecured creditors. The objections to confirmation so filed stated in conclusion: "If the court be of the opinion that the bid placed by C. F. Harvey for the property at Beaufort (Carteret County) does not amount in law to an assumption of the

mortgage indebtedness, that then the whole sale of both the properties at Beaufort and Kinston be not confirmed."

Hearing was had upon the exceptions by Judge Cranmer at Kenansville, 7 September, 1927. At this hearing the judge found the following facts:

"1. That the sale was in all respects regular, fair and in accordance with the requirements by the court.

"2. That the bid or bids of the purchaser, C. F. Harvey, . . . is a fair and reasonable price for the said property purchased in accordance with the terms of sale.

"3. Full and specific announcement was also made before the sale of the true status of liens held by the Virginia Trust Company." Thereupon the receivers were "authorized, empowered and directed to execute and deliver unto the said purchaser, C. F. Harvey, a deed in fee simple subject to the lien held by the Virginia Trust Company."

The objectors appealed from said decree of confirmation and this appeal was considered by the Court in 194 N. C., 734.

After the decision of the Supreme Court the receivers tendered deed to Harvey and demanded the purchase money in accordance with the terms of the sale. Harvey declined to accept the deed upon the ground that announcement had been made at the sale by the receivers "that the successful bidder for the equity of redemption of the Kinston Knitting Company would get the benefit of the proceeds of the Raynor notes and of certain personal property sold by the receivers because such proceeds would be credited upon the mortgage indebtedness of $91,200. Furthermore, the purchaser contended that by reason of the delay the property had greatly depreciated in value and that it would be equitable to require him to comply with the terms of the sale and pay the purchase money. The rule to show cause was served upon the purchaser, and the matter came on for hearing before Cranmer, J., at the February Term, 1928.

The court rendered the following judgment: "This cause coming on to be heard upon an instanter rule directed to C. F. Harvey to show cause why he should not be required to accept a deed to the property heretofore sold by the receivers at public auction on 18 and 19 July, 1927, respectively, and to pay to the receivers therefor the sum of $400.00, his bid therefor; and the said C. F. Harvey having filed an answer to said rule, and also having submitted an additional affidavit of F. M. Taylor, as well as the affidavits of C. F. Harvey, C. Oettinger, L. J. Mewborn, G. V. Cowper, S. D. Ford and E. M. Long, filed in this cause 20 February, 1928, and upon a consideration thereof the court finds the following facts:

One: That the said property was offered for sale at public auction on said dates, and had been advertised by the posting and publishing of notices, in writing, in which it was stated that the Virginia Trust Company lien indebtedness was $91,200 and unpaid interest, and such other statements were made therein as appears from a copy thereof attached to the report of the receivers filed herein reporting said sale, as well as certain announcements all of which are referred to and made a part hereof.

Two: That at said sale, certain announcements were made and relied on by the purchaser, and the court finds that the statements contained in the affidavits hereinbefore filed in this court on 20 February, 1928, which affidavits were made by C. F. Harvey, G. V. Cowper, L. J. Mewborn, C. Oettinger, S. D. Ford, and E. M. Long, which affidavits, having been heretofore filed, were again filed and used on this hearing, together with the additional affidavit of F. M. Taylor, this day filed, are true, and that the answer of said C. F. Harvey is true.

Now, therefore, upon said answer, said affidavits, and the record herein, the court concludes as a matter of law that it has no power to relieve said purchaser of his said bid, for that, notwithstanding whatever the purchaser may have thought the terms of the bid were, and notwithstanding any announcement made at the sale, the terms of the bid as construed by this court were and are that the said C. F. Harvey purchased an equity of redemption of the Kinston Knitting Company, for the sum of $400.00, which said equity of redemption was subject to a lien in favor of the Virginia Trust Company, trustee, for $91,200 and interest, and that the said C. F. Harvey, in order to perfect title to said property, and clear the same from lien, would be compelled to pay to the Virginia Trust Company, trustee, on account of the lien credited by its deed of trust, the sum of $91,200, and interest, and that any sum of money, or any securities in the hands of the Virginia Trust Company, derived from sale of property made prior to 18 July, 1927, must by the Virginia Trust Company be paid and turned over to the receivers herein, upon the payment, if made, by C. F. Harvey, of the said sum of $91,200, and interest.

"Wherefore, it is ordered that the said C. F. Harvey pay to the said receivers the said sum of $400.00, together with the cost of this rule as taxed by the clerk of this court."

From the foregoing judgment Harvey appealed, assigning error.

H. G. Connor and L. R. Varser for C. F. Harvey.

E. M. Long for Virginia Trust Company.

Thomas J. White, Jr., R. A. Whitaker and R. T. Allen for receivers.

Rouse & Rouse for creditors and individual defendants.

BROGDEN, J. 1. Does the purchase of an equity of redemption at a judicial sale "subject to and burdened with the lien" of mortgage or deed of trust, constitute an assumption by the purchaser of the indebtedness secured by such lien and imply a promise to pay the same?

2. If not, what is the status of said purchaser of said equity of redemption with reference to the proceeds in the custody of the lienholder derived solely from a prior sale of a portion of the mortgaged premises?

The law answers the first question in the negative. The Supreme Court of California, in the case of *Fontana Land Co. v. Laughlin,* 250 Pac., 669, declared: "The greater weight of authority and the better reasoning is that, unless the grantee in the deed assumed or agreed to pay the mortgage, or unless the amount of the mortgage was deducted from the purchase price, a purchaser who merely takes subject to the mortgage is not estopped from showing that it has been paid or that the amount claimed is not legally owing upon it."

The same principle is stated in Jones on Mortgages, (7 ed.), Vol. 2, sections 748 and 865, as follows: "A deed which is merely made subject to a mortgage specified does not alone render the grantee personally liable for the mortgage debt; to create such liability there must be language which clearly imports that the grantee assumes the obligation of paying the debt." *Crawford v. Nimmons,* 54 N. E., 209; *Brunswick Realty Co. v. University Co.,* 134 Pac., 608; *Metropolitan Bank v. Dispatch Co.,* 149 U. S., 436, 37 Law Ed., 799; *Capital National Bank v. Holmes,* 95 Pac., 314, 16 L. R. A. (N. S.), 470. An imposing list of authorities to sustain the proposition appears in the case of *Allgood v. Spearman,* 101 S. E., 193, and also in a comprehensive note upon the subject found in L. R. A. 1917 C., 592. See, also, *Ayers v. Makely,* 131 N. C., 60, 42 S. E., 454.

The answer to the second question requires a brief review of the pertinent facts. Prior to the institution of the receivership action the Virginia Trust Company held a deed of trust upon certain real estate of Kinston Knitting Company. Payments had been made from time to time upon the indebtedness, reducing it to around $90,000 exclusive of accrued interest. The Kinston Knitting Company conveyed a small portion of the mortgaged property to C. E. Raynor for the sum of $20,000. Raynor paid $1,000 in cash and executed notes evidencing the deferred payments, which said notes were secured by deed of trust upon the property so conveyed. These notes were immediately sent to the lienholder. The cash paid by Raynor was applied by the lienholder to the item of accrued interest on the loan. Thereafter the receivership action was instituted and by consent of all parties certain machinery covered by the mortgage, was sold for cash by the receivers, and the proceeds

delivered to the lienholder, and by it was applied to the indebtedness. The Raynor notes, of course, were not to be applied to the indebtedness until they matured and were paid. On the day of the sale there was approximately $91,200 due the Virginia Trust Company and it had in its hands the Raynor notes aggregating approximately $19,000. The trial judge finds as a fact that the receiver, on the day of the sale, announced to bidders that the proceeds of the Raynor notes would be credited on the mortgage indebtedness, and that Harvey, the purchaser at the sale, relied upon such announcement. The vital question, therefore, is: Must the proceeds derived from collection of the Raynor notes, if they are paid, be credited to the mortgage indebtedness, or must said notes be turned over to the receiver to be distributed among the general creditors of the Kinston Knitting Mill?

The execution of the mortgage was in itself an application of all the property embraced in the mortgage to the payment of the debt secured therein. *Bonner v. Styron,* 113 N. C., 30, 18 S. E., 83; *Lee v. Manley,* 154 N. C., 244, 70 S. E., 385. The Raynor notes represented and were a substitute for that portion of the mortgaged premises theretofore sold and conveyed before the receivership proceedings. Thus, it would seem apparent that the law, nothing else appearing, applied the proceeds of the Raynor notes to the mortgage debt, irrespective of any announcement of such application by the receiver on the day of the sale. Clearly, the purchaser of an equity of redemption at a public sale is entitled to the property as it exists at that time. Moreover, it has been held by this Court in *Dameron v. Carpenter,* 190 N. C., 595, 130 S. E., 328, that "equity subrogates the purchaser of the equity of redemption to the rights of the mortgagor to clear the title and procure the legal estate only as to the mortgaged premises, and no further." *McKinney v. Sutphin,* 196 N. C., 318. Certainly, in the case at bar the mortgagor would have the right to require the lienholder to apply the proceeds of the Raynor notes, when collected, to the mortgage debt, and when Harvey purchased the equity of redemption he became entitled to the same right. Harvey's contention that he ought not to be required to take and pay for the equity of redemption cannot be sustained. Upon the former appeal the objecting creditors were resisting confirmation and Harvey was requesting the court to confirm the sale, and, therefore, he cannot at this time, in the same case, be permitted to take a contrary position. *Ellis v. Ellis,* 193 N. C., 216, 136 S. E., 350.

There are certain other questions with respect to the claim filed by Harvey. The judge continued the decision of this matter until the determination of a suit against Harvey, brought by the receiver, in compliance with an order of the court. It is to be assumed that in the final

judgment the equities of all parties will be properly protected, and for this reason we deem it unnecessary to discuss that aspect of the case.

The result is, as we interpret the law, that Harvey is required to accept the deed for the equity of redemption and to pay to the receivers the purchase money in accordance with his bid; and further that the proceeds of the Raynor notes, when and as paid, shall be credited to the mortgage indebtedness by the lienholder.

Modified and affirmed.

W. S. HANNA v. CAROLINA MORTGAGE COMPANY (FORMERLY CAROLINA MORTGAGE & INDEMNITY CO.).

(Filed 8 May, 1929.)

Mortgages H o—Resale of lands sold under foreclosure must be had as often as advance bid is made and statute complied with—Injunctions.

Under the provisions of C. S., 2591, relating to the foreclosure of mortgages, it is the duty of the clerk of the Superior Court to readvertise and resell the mortgaged property as often as the statute is complied with and the money for the advance bid deposited and the bid made within ten days from the date of the sale, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with.

APPEAL by plaintiff from *Harding, J.*, at September Term, 1928, of GASTON. Affirmed.

Facts: (1) Robert E. Johnson and others, on 1 September, 1925, executed a deed of trust to defendant, Carolina Mortgage Company, on a certain lot in the town of Gastonia, to secure the payment of certain notes. The mortgage was duly recorded in the office of the register of deeds for Gaston County, Book 197, p. 93.

(2) Robert E. Johnson and others made default on the payment of the notes and the Carolina Mortgage Company, in accordance with terms of the mortgage, duly advertised the lot, according to law, for sale at 12 o'clock noon on 11 June, 1928. At the sale one R. N. Aycock became the last and highest bidder.

(3) Within 10 days the Aycock bid was increased 5 per cent by one E. P. Lineberger and the lot readvertised for sale at 12 o'clock noon on 9 July, 1928. At the sale R. N. Aycock became the last and highest bidder for $7,125.03.

(4) Within ten days the Aycock bid was increased 5 per cent by plaintiff W. S. Hanna and the lot readvertised for sale at 12 o'clock noon on 3 August, 1928. All the above sales were duly reported to the clerk of the Superior Court and the clerk ordered resales according to law. At this sale plaintiff W. S. Hanna became the last and highest bidder for $7,481.28, and at this sale no increase bid was put on the lot and the lot was bid in at the advance bid theretofore made by Hanna. The attorneys for the Carolina Mortgage Company notified plaintiff by letter of 3 August, 1928, that there was no increase bid put on the lot, that he was declared the purchaser of the lot by the clerk of the Superior Court of Gaston County, in the sum of $7,481.28 and they were advising the trustee that day of the sale and requesting said trustee to forward deed for delivery to plaintiff.

(5) The clerk made an order to make deed to W. S. Hanna on 3 August, 1928. That on 4 August, 1928, the said clerk, being of the opinion that said sale should remain open for 10 days for increased bids, revoked said order and ruled that said sale should remain open for 10 days before being confirmed in lieu of said order made on 3 August, 1928, made the following order in Book No. 2, page 37, of "Record of Re-sale by Trustees and Mortgagees," on 4 August, 1928:

ORDER

"Whereas, R. N. Aycock has filed a 5 per cent bid on the purchase money paid for the above described land, and has paid the same to me; Now, therefore, it is ordered, considered and adjudged that the Carolina Mortgage Company, trustee, advertise said land for resale fifteen days in some newspaper published in Gaston County, under the provisions of chapter 146, Public Laws 1915, and chapter 124, Public Laws 1919. This 4 August, 1928. S. C. HENDRICKS, C. S. C."

The plaintiff was duly notified of the clerk's order revoking the order made on 3 August, 1928, to make deed to W. S. Hanna and the advance bid of 5 per cent made by R. N. Aycock on 4 August, 1928, which was within the 10 days after the resale, and that the lot would be advertised and resold on 20 August, 1929. According to the order, the lot was readvertised for sale. Before the sale plaintiff brought an action against defendant for specific performance, alleging the facts and also alleging that he was ready, able and willing to perform his contract and pay the $7,481.28, and asked for and obtained a temporary restraining order.

The following judgment was rendered by the court below: "This cause coming on to be heard and being heard at September Term, 1928, of the Superior Court of Gaston County, by his Honor Wm. F. Harding, judge, present and presiding, and it appearing to the court that the

temporary restraining order heretofore issued in this action should be dissolved and vacated, and that the order made by the clerk of the Superior Court of Gaston County directing said trustee to again sell the lands described in the complaint was regular and lawful because of having received an advance bid of five per cent made by R. N. Aycock, and that said trustee should be allowed to proceed to readvertise and resell said lands pursuant to said order; it is therefore, considered, ordered, adjudge and decreed by the court that the temporary restraining order heretofore issued in this action be, and is hereby dissolved and vacated."

The plaintiff excepted and assigned error and appealed to the Supreme Court.

C. D. Holland and G. W. Wilson for plaintiff.

A. E. Woltz, Paul E. Monroe and Allen & Duncan for defendant.

CLARKSON, J. The plaintiff assigns as error that the court below denied the right of the plaintiff to the specific conveyance of the land and denied making order requiring trustee to convey the land to the plaintiff and to restrain the defendant from reselling the said land. We think plaintiff's assignment of error cannot be sustained.

The principle upon which specific performance of a binding contract to convey land is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the 10-day limitation prescribed in C. S., 2591, there is no binding contract of purchase, and the bargain is incomplete. Under the provisions of this section, the bidder at the sale during the period of ten days acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. He is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. *In re Sermon's Land,* 182 N. C., 122; *Cherry v. Gilliam,* 195 N. C., 233.

C. S., 2591 is as follows: "In the foreclosure of mortgages or deeds of trust on real estate, or in the case of the public sale of real estate, by an executor, administrator, or administrator with the will annexed, or by any person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the Superior Court, the mortgagee, trustee, executor, or person offering the real estate for sale shall reopen the sale of said property and adver-

tise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell the said real estate, it shall only be required to give fifteen days notice of a resale. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate, the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties," etc.

Under the provisions of C. S., 2591, the clerk of the court has no jurisdiction, except to order a resale of land sold under the power of sale in a mortgage, when, within the ten days required by the statute, the bid at the sale has been raised; and a mere statement made at the foreclosure sale that the purchase price be paid in cash upon confirmation, implies only that the cash would be required if the bid should not be raised in the amount and time prescribed by law. *In re Mortgage Sale of Ware Property,* 187 N. C., 693.

In *Cherry v. Gilliam,* 195 N. C., at p. 234-5, citing numerous authorities, the following observations are made: "It is provided in section 2591, that in the foreclosure of the mortgages the sale shall not be deemed to be closed under ten days, and if within this time an increased bid is paid to the clerk the mortgagee, by order of the clerk, shall reopen the sale, advertise the property as in the first instance, and make a resale; and that upon the final sale the clerk shall issue an order to the mortgagee to make title to the purchaser. It has been held with respect to this statute that it was enacted for the protection of the mortgagees when sales are made under a power of sale without a decree of foreclosure by the court; that it confers no power on the clerk to make any orders unless the bid is increased; that in the absence of such bid no report is necessary; and that if an increased bid is paid, the clerk cannot make any orders until the expiration of ten days." *In re Bauguess,* 196 N. C., 278.

Chapter 146, Public Laws 1915, relating to the resale of land was amended as follows: "Section 1. That chapter one hundred and forty-six of Public Laws of one thousand nine hundred and fifteen be and the same is hereby amended by striking out all of section four and in-

serting in lieu thereof the following: 'Section 4. That resale may be had as often as the bid may be raised in compliance with this chapter.' " The section stricken out was as follows: "That not more than one sale shall be required under this act."

The plaintiff contends that plaintiff's upset bid was duly advertised for 15 days. The bidding and sale therefore was open for 15 days and there was no other bid. No one was interested enough to appear within the 15 days, or at the expiration thereof, and the upset bidder became the last and final bidder. He can be held to his bid by the court, and has right to confirmation unless another bid is put upon the mortgaged premises on the sale day. Of course, if there was an advanced bid, then the sale would lie open 10 days. There being no such bid on the sale day, and the plaintiff having been declared the purchaser by the trustee and by the clerk of court, the plaintiff insists that the clerk could not cancel his first order of confirmation and order the resale, and that the plaintiff is entitled to an order of confirmation of the sale on 3 August, 1928, and upon full payment to a deed for the premises. We cannot so hold. We do not think that the language or intent of the statute warrants plaintiff's contention. The construction is too narrow.

The fact that plaintiff became the last, only and highest bidder at the third sale, and that his bid at that time was the same as his upset bid filed within ten days after the second sale, does not preclude another upset bid from being filed within ten days after the third or any other sale.

The clerk had no power to make the order for the trustee to make deed to plaintiff until the ten days required by the statute expired. It was his duty under the statute to allow the bid to remain open for ten days and to see to it that resales be had as often as the bid was raised within the ten days and the statute complied with. Having no power to make the order, he very properly struck it out and upon an advance bid within ten days ordered a resale. The statute fixes no limit to the number of resales, which must be had as often as there is an advance bid within the ten days, and the statute complied with. It is a statute that does not hurt the mortgagee, but is beneficial to the mortgagor and often saves mortgaged property from being sacrificed. The judgment below is

Affirmed.

JAMES W. FOSTER, BY HIS NEXT FRIEND, v. GAVIN L. HYMAN AND C. C. CODDINGTON, INC.; FRED BYRD, BY HIS NEXT FRIEND, v. GAVIN L. HYMAN AND C. C. CODDINGTON, INC.; EARL FOSTER, BY HIS NEXT FRIEND, v. GAVIN L. HYMAN AND C. C. CODDINGTON, INC.

(Filed 8 May, 1929.)

1. Execution K a—Execution against the person will lie where the injury was inflicted wilfully.

Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper. C. S., 768, 673.

2. Same—Driving of automobile in this case held so reckless as to amount to intent to injure.

Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: *Held*, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper. C. S., 768, 673.

3. Same—Wilful and Wanton Injury.

An act causing injury to person or property is wilfully done when it is done purposely and deliberately in violation of law, and wantonly done when done recklessly, manifesting a reckless indifference to the rights of others, but wilfulness may be constructive, and where the wrongdoer's conduct is so reckless as to amount to a disregard for the safety of others it is equivalent to actual intent.

4. Pleadings A b—Verification of complaint by next friend in this case held in proper form and sufficient.

Objection to the sufficiency of the verification of the complaint by plaintiff's next friend on the ground that the affiant had no personal knowledge of the matters alleged will not be sustained when the allegations are not made to appear to be outside the personal knowledge of the affiant.

5. Judgments D b—Upon judgment by default and inquiry, inquiry should be made at next succeeding term.

A judgment by default and inquiry entitles the plaintiff to nominal damages without further proof, but the inquiry should be made at the next succeeding term, and when it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made according to law. C. S., 596. As to whether a party may waive this provision of the statute, *quœre?*

APPEAL by defendant Hyman from *Townsend, Special Judge,* at Special October Term, 1928, of MECKLENBURG. Error.

Consolidated actions to recover damages for injuries to person and property alleged to have been caused by the negligence of the defendants, Hyman being an employee of C. C. Coddington, Inc., in causing a collision of the car he was driving (the property of C. C. Coddington, Inc.), with the car of the plaintiffs. At the conclusion of the evidence judgment of nonsuit was granted as to C. C. Coddington, Inc., and the following verdict was returned against Hyman:

1. Were the acts of the defendant, Gavin L. Hyman, complained of, committed in a wilful and wanton manner as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff, Earl Foster, entitled to recover of the defendant, Gavin L. Hyman on account of injuries to his person? Answer: $250.00

3. What damages, if any, is the plaintiff, Earl Foster, entitled to recover on account of injury to his property? Answer: $390.00 with interest.

4. What damages, if any, is the plaintiff, James W. Foster, entitled to recover of the defendant, Gavin L. Hyman, on account of injuries to his person? Answer: $50.00.

5. What damages, if any, is the plaintiff, Fred Byrd, entitled to recover on account of injuries to his person? Answer: $50.00.

Judgment was rendered in behalf of the plaintiffs for the amounts respectively awarded them; and it was further adjudged that execution issue against the property of the defendant as provided by law, and if returned unsatisfied in whole or in part that execution issue against the person of the defendant. Hyman excepted and appealed.

T. L. Kirkpatrick and B. G. Watkins for plaintiffs.
John M. Robinson and Hunter M. Jones for defendant.

ADAMS, J. The defendant in a civil action may be arrested "Where the action is for injury to person or character, or for injuring, or wrongfully taking, detaining, or converting real or personal property." C. S., 768. If the action is one in which the defendant might have been arrested an execution against the person of the judgment debtor may be issued after the return of an execution against his property wholly or partly unsatisfied. C. S., 673. The judgment, to the signing of which the appellant excepted, provides for an execution against his person; and his appeal presents the question whether the trial court committed error in ordering such execution upon the "pleadings and the evidence." It was perhaps in consequence of the decision in *Peebles v. Foote,* 83 N. C., 102, that C. S., 673 was amended by the addition of the words, "whether such statement of facts be necessary to the cause of action or not." Laws 1891, ch. 541, sec. 2.

The appellant contends that error was committed because the complaints do not state causes of action for wilful injury. It has been held that an execution against the person which would deprive the defendant of his homestead and personal property exemption cannot issue when the judgment is for an injury sustained merely by negligence or accident, but only when the injury has been inflicted intentionally or maliciously; that there must be some element of violence, fraud, or criminality. *Oakley v. Lasater,* 172 N. C., 96. In that case the allegation in the complaint was that the injury had been inflicted wrongfully, recklessly, and wantonly, after being forbidden by the plaintiff's agent," but the issue was, "Did the defendant negligently injure the mule of the plaintiff?" In *Paul v. Auction Company,* 181 N. C., 1, 6, it is said that on recovery for a tort founded on negligence merely, arrest and imprisonment on final process would not be justified, "the cases holding further that to justify such imprisonment there must be a finding by the jury that the tort was wilfully committed." This statement of the law is in approval of the opinion to the same effect in *McKinney v. Patterson,* 174 N. C., 483. In the present case the complaint includes, not only the element of negligence, but the elements of wilfulness and wantonness. After alleging that the defendant wilfully, wantonly, and negligently failed and refused to perform certain duties imposed upon him, the plaintiffs say that the injuries they suffered were the direct and proximate result of the wilful and wanton acts as well as the negligent acts and the negligent omission of the defendant.

An act is done wilfully when it is done purposely and deliberately in violation of law (*S. v. Whitener,* 93 N. C., 590; *S. v. Lumber Co.,* 153 N. C., 610), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. *McKinney v. Patterson, supra.* "The true conception of wilful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law." Thompson on Negligence (2 ed.), sec. 20, quoted in *Bailey v. R. R.,* 149 N. C., 169.

An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. *Everett v. Receivers,* 121 N. C., 519; *Bailey v. R. R., supra.* A breach of duty may be wanton and wilful while the act is yet negligent; the idea of negligence is eliminated only when the injury or damage is intentional. *Ballew v. R. R.,* 186 N. C., 704, 706. In *Foot v. R. R.,* 142 N. C., 52, in which the jury found in response to separate issues that the plaintiff had been injured by the wanton and wilful negligence

of the defendant, distinction was noted between the wilfulness which is referred to a breach of duty and wilfulness which is referred to the injury; in the former there is wilful negligence, and in the latter intentional injury. But as stated in *Ballew v. R. R., supra,* the intention to inflict injury may be constructive as well as actual. It is constructive where the wrongdoer's conduct is so reckless or so manifestly indifferent to the consequences, where the safety of life or limb is involved, as to justify a finding of wilfulness and wantonness equivalent in spirit to an actual intent. See citations in *Ballew's case.*

In applying this principle in a criminal action we have held that the reckless operation of an automobile on the streets of a city may disclose such depravity of mind and such disregard of human life as will supply the malice that distinguishes murder in the second degree from manslaughter. *S. v. Trott,* 190 N. C., 674. In the case at bar there was evidence tending to show that the defendant was drunk; that he drove his car at night on the wrong side of the street in a business section of the city of Charlotte at the rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life; that his car struck the one in which the plaintiffs were riding, turned it upside down, hurled it against a telephone post, broke the glass, knocked the wheels off, tore out the top, and injured the plaintiffs. If it be conceded that there is no evidence of actual intent to injure the plaintiffs we cannot hold as a matter of law that the constructive intent is not supplied, or that the complaint does not state a cause of action for wilful injury. The exceptions in the first and third assignments of error are therefore overruled.

The appellant's second assignment is that the complaints are verified by persons not having personal knowledge of the facts. In *Peebles v. Foote, supra,* decided before the amendment of 1891, it is said that where the cause of arrest stated in the complaint is essential to the plaintiff's cause of action, verification of the complaint upon information and belief will not answer unless it gives the sources of information. It will be noted, however, that the allegations material to the plaintiff's cause of action are not set forth upon information and belief and there is nothing in the record to show that the affiant did not have personal knowledge of the facts therein recited.

The defendant filed no answer, and before introducing evidence the plaintiffs moved for judgment by default and inquiry as to defendant Hyman and his motion was allowed. The statute provides that when judgment by default and inquiry is entered the inquiry shall be executed at the next succeeding term. C. S., 596. The inquiry in the present case was executed at the same term at which judgment by default and

inquiry was taken. The defendant, it is true, was in the courtroom and did not except to the inquiry or to the submission of the issues to the jury; but according to the record he was there in the capacity of a witness for the plaintiff against C. C. Coddington, Inc., and in fact testified at the plaintiff's instance. Presumably he acted upon the theory that as to himself the inquiry had been continued. Granting, only for the present purpose, that the statutory provision for executing the inquiry at a succeeding term is directory and that its requirement may be waived by the defendant, still there is no finding of a waiver and, indeed, no evidence upon which such finding could properly be based. The judgment by default and inquiry was conclusive that the plaintiffs had a cause of action and were entitled to nominal damages without proof. See dissenting opinion in *Junge v. MacKnight,* 135 N. C., 105, which was declared to be the law upon a petition to rehear, in which the former decision was overruled. *Junge v. MacKnight,* 137 N. C., 285. But as the inquiry was improperly executed immediately upon rendition of the interlocutory judgment, the cause is remanded to the end that the inquiry be made as the law provides by submitting to another jury issues similar to those appearing in the record. *Brown v. Rhinehart,* 112 N. C., 772, 776.

Error.

T. G. THORNBURG v. MRS. NANNIE BURTON.

(Filed 8 May, 1929.)

Attachment C b—Court may allow amendment to affidavit of attachment or allow evidence at hearing having same effect.

An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, his findings has the effect of an amendment allowed by him. C. S., 799.

APPEAL by defendant from order of *Harding, J.,* at November Term, 1928, of MECKLENBURG. Affirmed.

This was a motion by defendant that an attachment levied upon her personal property under a warrant issued in this action be vacated and that the warrant be dismissed.

From an order denying her motion, defendant appealed to the Supreme Court.

T. L. Kirkpatrick and B. G. Watkins for plaintiff.

G. T. Carswell and Joe W. Erwin for defendant.

PER CURIAM. It is conceded that the affidavit on which the warrant of attachment was issued is insufficient, for that the grounds for plaintiff's assertion therein that defendant was about to dispose of her property and that she was about to leave the State, with intent to defraud her creditors, are not set out in the affidavit. C. S., 799. In *First National Bank v. Tarboro Cotton Factory,* 179 N. C., 203, 102 S. E., 195, it is said that the mere assertion of a belief that a defendant is about to assign or dispose of his property with intent to defraud his creditors is insufficient; the grounds upon which such belief is founded must be set out in order that the court may adjudge if they are sufficient. In that case, it was further said that the defective affidavit was not aided by the answer of the defendant.

In the instant case, the warrant was issued and the attachment levied on defendant's property on 23 November, 1927. Her motion that the attachment be vacated and dismissed was heard on the following day. At the hearing the defendant offered evidence in support of her motion; plaintiff offered evidence to sustain the warrant of attachment. The judge found from the evidence that there was reasonable ground for the attachment, and thereupon denied the motion. Defendant excepted to the signing of the judgment or order. This exception cannot be sustained.

In *Sheldon v. Kivett,* 110 N. C., 408, 14 S. E., 970, it is said to be well settled that an affidavit upon which a warrant of attachment has been issued, although wholly insufficient, may be amended by leave of court. The power to amend is recognized as in furtherance of justice. The amendment, when made, relates back to the beginning of the proceeding and may supply the facts omitted from the affidavit. *Cook v. Mining Co.,* 114 N. C., 617, 19 S. E., 664.

The order and judgment in the instant case is in effect an amendment of the affidavit. The court found from evidence offered by defendant as well as by the plaintiff that there was reasonable ground for the assertions in the affidavit and thereupon refused to vacate the attachment and dismiss the warrant. *Clark v. Clark,* 64 N. C., 150. In the cited case, defendant filed an affidavit in support of his motion that the attachment levied under a warrant issued upon an insufficient affidavit be vacated; in reply to defendant's affidavit, plaintiff filed a second affidavit which was sufficient. In the instant case, defendant instead of filing an affidavit, offered oral evidence in support of her motion; from this evidence, as well as from evidence offered by plaintiff, the court found facts which justified the issuance of the warrant. In principle, there is no distinction between *Clark v. Clark* and the instant case. In both cases the court found from evidence that the assertions in the affidavit were based upon facts which were adjudged

sufficient to support the issuance of the warrant under which the attachment was levied. It is immaterial that in the instant case the evidence was the testimony of witnesses, rather than affidavits.

The order of the court in this case is sustained by the decision in *Clark v. Clark,* and is

Affirmed.

G. H. BLACK v. TOWN OF BESSEMER CITY.

(Filed 8 May, 1929.)

Municipal Corporations E d—Where jury finds that plaintiff sustained no substantial damages from sewage disposal plant city not liable for nominal damages—Eminent Domain.

Plaintiff is not entitled to nominal damages in an action against a city for the constructive taking of property by depreciating its value by its sewage disposal plant when the city has the right of eminent domain and the jury has found that no actual damage was sustained.

CIVIL ACTION, before *Harding, J.,* at September Term, 1928, of GASTON.

The plaintiff instituted an action against the defendant to recover damages for injury to his land by reason of the erection and operation of a sewage disposal plant.

Evidence was offered in behalf of the plaintiff that the plant produced noxious odors and gases which vitiated the air and thus depreciated the value of his property, and that in addition, the stream flowing through his land was polluted by the effluent from the disposal plant and by water diverted from Long Creek into pipes, septic tanks and reservoirs, and discharged into a stream flowing through the land of the plaintiff.

Several issues were submitted to the jury. The first issue related to the ownership of the land, which was answered by consent.

The second issue was as follows: "Did the defendant divert the water from Long Creek through its tanks and water system into Crowder's Creek and thereby pollute the waters running through and over plaintiff's lands and damage plaintiff's land, as alleged?"

The jury answered this issue, "No," and returned its verdict. Judgment was entered in favor of the defendant and the plaintiff appealed.

Henry L. Kiser and George W. Wilson for plaintiff.

S. J. Durham for defendant.

PER CURIAM. The plaintiff insisted that his property had been damaged not only by the increase of the volume of water resulting from the diversion of water from Long Creek by the city, but also by reason of noxious odors and gases which invaded the atmosphere so that pollution of both water and air resulted in serious injury to his proprietary rights. Consequently, the plaintiff insisted that the pollution of the stream and of the air amounted in law to a taking of his property, and, therefore, the trial judge should have instructed the jury to award nominal damages at least. This position would be sound except for the provision of C. S., 2805, which expressly confers upon municipalities the right to "construct, establish, maintain and operate" sewerage systems, and in order to make such power effective the right of eminent domain is conferred. *Hines v. Rocky Mount,* 162 N. C., 409, 78 S. E., 410; *Rhodes v. Durham,* 165 N. C., 679, 81 S. E., 938; *Smith v. Morganton,* 187 N. C., 801, 123 S. E., 88.

The plaintiff further insists that the issue submitted by the trial judge and answered by the jury excluded the element of damages claimed by him, arising from the pollution of the air, by confining his recovery exclusively, to the aspect of diversion of water. It appears, however, from the record that this element of injury was submitted to the jury in these words: "It is proper for you, however, to consider evidence of offensive odors, evidence of the presence of mosquitoes and flies, evidence of pollution of the air made there by offensive odors."

A close scrutiny of the record does not disclose error of law, and the judgment rendered is

Affirmed.

STATE v. ED MOORE.

(Filed 8 May, 1929.)

Criminal Law G d—List of witnesses endorsed on bill of indictment not material evidence and its exclusion not error.

The defendant in a criminal action is not entitled to the introduction in evidence of the list of State's witnesses endorsed on the bill of indictment for the purpose of showing that all of them had not been examined by the grand jury nor called as witnesses at the trial.

APPEAL by defendant from *Stack, J.,* at January Term, 1929, of MECKLENBURG. No error.

This is a criminal action in which defendant was convicted of murder in the second degree.

From judgment that defendant be confined in the State's prison for a term of not less than fifteen, nor more than twenty years, defendant appealed to the Supreme Court.

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

J. F. Flowers for defendant.

PER CURIAM. Defendant's contention on his appeal to this Court that he is entitled to a new trial for errors committed on the trial in the Superior Court cannot be sustained.

There was no error in excluding the list of witnesses endorsed on the bill of indictment as evidence. Defendant's purpose in offering this list as evidence, as stated by his counsel, was to show that the grand jury did not examine all the persons whose names were endorsed on the bill of indictment as witnesses for the State, and that the solicitor had not called all these persons as witnesses on the trial. We are unable to see how any inference unfavorable to the State or favorable to the defendant could have been drawn from these facts by the jury. They were wholly irrelevant, and had no probative value as evidence.

There was no error in the charge of the court to the jury. Taken in its entirety the charge was free from error and was in full compliance with the statute. C. S., 564. The judgment is affirmed.

No error.

LULA TAYLOR v. F. L. TAYLOR AND F. W. TAYLOR.

(Filed 15 May, 1929.)

1. Pleadings D b—Complaint alleging conspiracy to defraud plaintiff out of marital rights and asking alimony not misjoinder.

A complaint in proceedings by the wife under the provisions of 3 C. S., 1667, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good, and a demurrer thereto for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject-matter or transaction.

2. Divorce E b—Validity of separation deed need not be determined before granting alimony, and both causes may be joined in one action.

Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under the provisions of 3 C. S., 1667, it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objec-

tion that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issues."

3. Marriage Promise B a—Where parties are bound by contract to marry neither may give away property without consent of the other.

Where the parties have been bound by a contract to marry, neither can give away his or her property without the consent of the other, and notice before the marriage does not hinder the party injured from insisting on the invalidity of the gift before marriage.

APPEAL by plaintiff from *Harding, J.*, at Chambers, 2 January, 1929, of MOORE. Reversed.

Civil action to obtain alimony without divorce. Heard on motion.

The allegations of the complaint are to the effect that Lula Taylor lived about a mile from the defendant F. L. Taylor, near the town of Vass, in Moore County. That the defendant F. L. Taylor had seduced the plaintiff under promise of marriage, and afterwards they were married on 14 July, 1928, in Randolph County. That on that date, or prior thereto, F. L. Taylor was the owner of certain lands in Moore and Cumberland counties, described in the complaint with particularity. That since the marriage, defendant F. L. Taylor had repeatedly and almost continuously offered to the plaintiff such indignities to her person as to render the condition of plaintiff's life intolerable and burdensome, which is set forth in detail. That he had abandoned her without providing the necessary means of subsistence according to her condition in life. Then a conspiracy and fraud is charged between F. L. Taylor and his father, F. W. Taylor, with whom F. L. Taylor lived, to defraud her out of her marital rights. The conspiracy and fraud being set forth at some length. F. L. Taylor by a deed purporting to be signed two days before his marriage with plaintiff, conveyed all his real estate to F. W. Taylor for the "consideration of $100.00, and other valuable considerations." That the deed was executed and delivered after the marriage, but if before was a part of the fraud and conspiracy. That F. L. Taylor, after he had been married two weeks, induced plaintiff to consent to go to California with him. F. W. Taylor, his father, a railroad employee, procured free passes for himself and wife, and F. L. Taylor used these passes. Before leaving North Carolina, F. L. Taylor had an attorney prepare a separation agreement, relinquishing plaintiff's marital rights for $1,000. This she refused to sign. That in carrying out the fraud and conspiracy he did not go to California, but stopped at Reno, Nevada. She was with child and pregnant for about four and a half months. She was penniless and he threatened to leave her in a strange city, far away from home. That he employed a lawyer at Reno and compelled plaintiff, by undue

influence, coercion and duress, to sign a paper-writing which he signed, and had put in it the following: "Whereas, the said F. L. Taylor has wilfully heaped upon the said Lula Taylor such indignities as to render her condition intolerable and life burdensome." The deed of separation sets forth payment of $1,000 to be made in certain installments. The complaint alleges "After the defendant F. L. Taylor paid to the plaintiff $75.00 aforesaid and after the plaintiff had signed said purported deed of separation, the defendant, F. L. Taylor, nevertheless remained with the plaintiff for one night and two days, slept with the plaintiff during said night and compelled her to have sexual intercourse with him during said night." That the payment he made in Reno was taken by plaintiff for necessary subsistence.

The allegations of fraud, undue influence, conspiracy, coercion and duress, in their most harrowing details, are set forth—unnecessary to further repeat.

The plaintiff's prayers for relief:

1. That the purported deed of separation set forth in the complaint be set aside and declared void.

2. That the purported deed from the defendant F. L. Taylor to the defendant F. W. Taylor, set forth in the complaint, be set aside and declared void.

3. That a reasonable sum be fixed and adjudged by the court for the support and maintenance of the plaintiff and for the expenses of counsel in this cause, and that the defendant, F. L. Taylor, be adjudged and decreed to pay such fixed sum from time to time to the plaintiff for her support and maintenance as the wife of the defendant, F. L. Taylor, and to that end that the lands and property of the defendant, F. L. Taylor, described and referred to in the complaint be condemned and sold under the course and practice of the court and the proceeds paid to the plaintiff as her reasonable maintenance and support due to her from the defendant, F. L. Taylor, as his wife.

4. For all such other and further relief as the plaintiff may be entitled to in law or equity under the complaint.

The defendants answer and deny any fraud, undue influence, coercion, conspiracy or duress. Defendants allege that part of the agreement has been paid and they stand ready, able and willing to pay the balance. The defendants demurred *ore tenus*.

The court sustained the demurrer *ore tenus* of the defendants that several causes of action were improperly united in the same complaint, to wit, against F. L. Taylor for alimony under C. S., 1667, with action to set aside a deed of separation executed by plaintiff to defendant, acknowledged in Nevada and probated in North Carolina, and recorded here, with still another action by plaintiff to set aside a deed of convey-

ance by the defendant, F. L. Taylor to the defendant F. W. Taylor; and the defendant F. L. Taylor further demurs to the motion of the plaintiff for alimony, and resists said motion upon the ground that the court is without jurisdiction to set aside and declare void the deed of separation set up both in the complaint and in the answer, and that so long as said deed of separation is not annulled the plaintiff is not entitled to alimony or counsel fees, and that the statute does not require the husband to pay alimony or counsel fees in an action to set aside a deed of separation alleged to have been executed under duress, or in an action to set aside a deed for property alleged to have been executed in fraud. The court sustained the demurrer and the plaintiff excepted, assigned error and appealed to the Supreme Court.

W. R. Clegg and U. L. Spence for plaintiff.

Hoyle & Hoyle, W. Duncan Matthews and H. F. Seawell & Son for defendants.

CLARKSON, J. The plaintiff's complaint seeks relief as follows: (1) For alimony and counsel fees under C. S., 1667. (2) To set aside a deed of separation between the plaintiff and defendant. (3) To set aside a deed from F. L. Taylor to F. W. Taylor. A conspiracy and scheme growing out of the marriage contract—the one transaction is charged against defendants. All flow from "The same transaction or transaction connected with the same subject of action." C. S., 507(1).

C. S., 1667 (N. C. Code, Anno.), in part, is as follows: "If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the Superior Court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid for or secured to her from the estate or earnings of her husband. *Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence and counsel fees,* and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife, and the children of the marriage, having regard also to the separate estate of the wife," etc. (Italics ours.)

Under this section, when a man marries he assumes, and the law imposes on him, certain duties and obligations to the woman. It is contended by defendants that the deed of separation must first be declared invalid. The above statute is to the contrary.

In *Barbee v. Barbee,* 187 N. C., at pp. 538-9, it is said: "Plaintiff takes the position that where the facts of marriage is in issue, as it is here, no order awarding an allowance for a reasonable subsistence and counsel fees under C. S., 1667, as amended by chapter 123, Public Laws 1921, may be made until such issue has been determined by a jury. Such was the holding in *Crews v. Crews,* 175 N. C., 169, decided 6 March, 1918, but the law in this respect has been changed by chapter 24, Public Laws 1919; and it is now provided by statute that the wife may make application for an allowance for a reasonable subsistence and counsel fees 'pending the trial and final determination of the issues involved in such action.'" *Vickers v. Vickers,* 188 N. C., 448; *Price v. Price, ibid.,* 640; *Simmons v. Simmons,* 192 N. C., 825.

On the ground of public policy, deeds of separation are not favored by the law, but under certain circumstances they are recognized by certain statutes, when signed in conformity thereto. C. S., 2515, 2516, 2529. In C. S., 2516, it is written "contracts between husband and wife not forbidden by the preceding section and *not inconsistent with public policy are valid.*"

It seems to be unquestioned that a separation agreement must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties. *Hughes v. Leonard,* 66 Colo., 500; 5 A. L. R., Anno. at p. 823. *Smith v. King,* 107 N. C., 273; *Archbell v. Archbell,* 158 N. C., 408.

If the facts alleged are found by the jury not to be true and the deed of separation sustained as valid, no harm can follow, as any subsistence allowed to plaintiff during the pendency of the action, can be credited on the amount agreed to be paid under the deed of separation.

Where the parties have bound themselves by a contract to marry, neither can give away his or her property without the consent of the other; and notice before the marriage of such a gift does not hinder the party injured from insisting on its invalidity. *Poston v. Gillespie,* 58 N. C., 258; *Logan v. Simmons,* 38 N. C., 487; *Spencer v. Spencer,* 56 N. C., 404; *Johnson v. Peterson,* 59 N. C., 12. See *Edwards v. Culberson,* 111 N. C., 342.

In *Trust Co. v. Pierce,* 195 N. C., at p. 718, citing numerous authorities, this observation is made: "A connected story is told and a com-

plete picture is painted of a series of transactions, forming one general scheme, and tending to a single end. This saves the pleading from the challenge of the demurrers." *Scales v. Trust Co.*, 195 N. C., 772.

We think the demurrer *ore tenus* should have been overruled. The judgment below is

Reversed.

CORPORATION COMMISSION OF NORTH CAROLINA v. NATHAN HARRIS.

(Filed 15 May, 1929.)

1. Banks and Banking H a—Books of bank raises prima facie presumption, subject to rebuttal, that those appearing thereon are stockholders.

Entry on the books of a bank of the issuance of stock to the defendant sought to be held for his statutory liability is only prima facie evidence that the defendant is such owner, which may be rebutted by his evidence, and a verdict directed against him upon conflicting evidence is reversible error. 3 C. S., 219(a).

2. Same—Evidence that defendant was not owner of bank stock held sufficient to be submitted to jury.

In an action against an alleged stockholder in a bank to recover his statutory liability, 3 C. S., 219(a), evidence tending to show that he had not subscribed for the stock, had received no dividends nor acted as such owner is sufficient to take the case to the jury in rebuttal of the prima facie case raised by his appearing on the books of the bank as a subscriber to its stock, and alone furnishes no evidence of ratification or estoppel.

3. Same—Owner of bank stock is relieved of statutory liability thereon only by transfer of shares on books of the bank.

A subscriber to the shares of stock of a bank is not relieved of his statutory liability thereon by selling the stock unless the transfer is made on the books of the bank in accordance with the statute. 3 C. S., 219(d).

APPEAL by defendant from *Webb, J.*, at May Term, 1928, of ROWAN. New trial.

The plaintiff alleged that as an administrative department of the State of North Carolina, created and organized as provided by law, it took charge of the business, property, and effects of the Peoples Bank of East Spencer on 30 July, 1926; and that the bank was insolvent. Thereafter the Atlantic Bank & Trust Company was appointed receiver of the Peoples Bank of East Spencer. The receiver filed a petition alleging that the defendant was a stockholder, and demanded payment of his statutory liability as provided in C. S., 219(a). It was admitted for the purpose of the trial that the assets of the Peoples Bank of East

Spencer were insufficient to discharge its obligations and that it was necessary to assess the shares of stock issued by the bank to the full amount of 100 per cent. The defendant denied liability and the following issue was submitted to the jury and answered in the affirmative: "Was the defendant Nathan Harris a stockholder in the Peoples Bank of East Spencer as alleged in the complaint?" Judgment was rendered in behalf of the plaintiff and the defendant excepted and appealed.

P. S. Carlton for the receiver.

J. Harold McKeithen, Walter H. Woodson and Parrish & Deal for defendant.

ADAMS, J. His Honor instructed the jury to answer the issue in the affirmative if they believed all the evidence. In this instruction we think there was error. The stock appeared on the books of the bank as having been issued to and in the name of the defendant but this entry, while prima facie evidence of the defendant's ownership, is not conclusive; the burden of the issue remained with the plaintiff throughout the trial to satisfy the jury by the greater weight of the evidence that the defendant Harris was a stockholder in the bank, as alleged. *White v. Hines,* 182 N. C., 276; *Austin v. R. R.,* 187 N. C., 7. There was evidence in rebuttal of the presumption arising from the entry of the stock in the name of the defendant on the books of the bank. To constitute the defendant a stockholder it was necessary to show, not only that the stock had been issued, but that it had been actually or constructively accepted by the defendant. The defendant denied that he had accepted the stock.

There was evidence tending to show that on 5 January, 1921, the Peoples Bank of East Spencer issued two shares of stock to R. H. Terry and that on 4 April, 1924, Terry's certificate was surrendered to the bank endorsed by Terry to the defendant; that certificates Nos. 103 and 104 were then issued in the name of the latter. The defendant testified that he had never bought any stock in the Peoples Bank of East Spencer, had never authorized any person to buy it for him, and had never paid for such stock. In explanation he said that four or five years before the trial, one F. J. Lassiter came to the defendant's store in Winston-Salem, told him that a letter was coming to Lassiter from East Spencer in the defendant's name, and gave the defendant instructions to deliver the letter to Lassiter without having it opened. It was in evidence that the defendant's wife opened the letter; that Lassiter came to defendant's store on the day following; that the defendant then told Lassiter that he had never authorized him to buy stock in the defendant's name; that he did not want the stock and

that he wanted Lassiter to have the entry on the books of the bank canceled. The defendant testified that after the letter was opened he signed these certificates in blank, gave them to Lassiter, and at the same time wrote the bank that he had not subscribed for the stock. He said that he transferred the certificates to Lassiter who had caused them to be sent because he thought Lassiter was the owner, and that he wanted the bank "to take the certificates out of his name." The defendant said, also, that he had never received any dividends and had never heard anything further in reference to the stock until after the appointment of the receiver.

This evidence had a direct bearing upon the questions whether the defendant had bought the stock, whether it had been sent to him without his knowledge, and whether he had refused to accept it. If he neither bought nor subscribed for the stock nor accepted it when it was sent to him, it can hardly be said that he is a stockholder subject to liability for assessment. Under these circumstances, nothing else appearing, there would be neither ratification nor estoppel which would bar the defense.

We do not say there is no evidence that the defendant accepted the stock, but merely that there is evidence to the contrary. In *Trust Co. v. Jenkins,* 193 N. C., 761, it was shown that one of the appellants admitted that he had been a stockholder in the bank and had sold his stock without having it transferred on the books of the bank. The Court said: "He was not relieved of his statutory liability as such stockholder by the sale of such stock. He remained subject to such liability so long as such shares of stock stood in his name upon the books of the bank. He could be relieved of such liability only by a transfer of such shares to a purchaser, in accordance with the provisions of the statutes. 3 C. S., 219(d)." This statement of the law will apply in the present case if the defendant's acceptance of the stock is established.

New trial.

L. H. EARNHARDT AND WIFE, BEULAH LYERLY EARNHARDT, v. FRANK R. BROWN AND STAHLE LINN, TRUSTEES, AND D. A. RENDLEMAN, TRUSTEE IN BANKRUPTCY OF PERPETUAL BUILDING & LOAN ASSOCIATION.

(Filed 15 May, 1929.)

1. Building and Loan Associations D a—Borrowing stockholder not entitled to have debt credited with amount paid in on stock.

Equality among the stockholders of an insolvent building and loan association requires that the solvent credits of the association be collected, thus placing the borrowing and nonborrowing stockholders on a parity,

second, that the debts be paid, and third that the balance be distributed according to the respective rights of the parties, and the borrowing stockholders are not entitled to first deduct from their debt to the corporation the amounts they have respectively paid on their shares of stock from the amount they are obligated for on the mortgage debt.

2. Same—Joinder of Trustee in bankruptcy not prejudicial to stockholder suing in State court to enjoin foreclosure by receivers—Parties.

Where a borrowing stockholder in a building and loan association has filed his proof of claim in bankruptcy proceedings of the association in the Federal court and brings suit in the State court to enjoin the foreclosure of the mortgage securing the loan, he may not successfully maintain that the trustee in bankruptcy, appointed in proceedings regular upon their face, made a party by order of the State court, was not a necessary party therein, nor are his rights prejudiced thereby.

APPEAL by plaintiffs from *Harding, J.,* at February Term, 1929, of ROWAN.

Civil action by plaintiffs, subscribers to stock in the bankrupt Perpetual Building & Loan Association and borrowers therefrom, to restrain foreclosure of their deed of trust and to cancel the indebtedness secured thereby, after deducting the payments made on their stock from the amount borrowed. The trustee in bankruptcy, by order of court, came in and made himself a party defendant and resisted plaintiffs' demand.

From a judgment authorizing a foreclosure of the deed of trust, and denying plaintiffs the relief sought, they appeal, assigning errors.

H. L. Taylor and Joe W. Ervin for plaintiffs.

Rendleman & Rendleman, T. C. Furr and John M. Robinson for defendants.

STACY, C. J. Equality among the stockholders of an insolvent building and loan association requires, first, that the solvent credits of the association be collected (thus placing the borrowing and nonborrowing stockholders on a parity), second, that its debts be paid, and, third, that the balance be distributed according to the respective rights of the parties. *Rendleman v. Stoessel,* 195 N. C., 640, 143 S. E., 219. This is what the defendants are trying to accord the plaintiffs in the present suit. It is all they are entitled to receive.

But failing in their effort to have the payments made on their stock deducted from the amount borrowed, which would credit them with all they have paid on their stock at the expense of the other stockholders, the plaintiffs take the position that the Perpetual Building & Loan Association is not amenable to the Federal Bankruptcy Act, and that the trustee in bankruptcy is not a proper party to this action.

The proceeding in bankruptcy, which has been pending for more than two years, and in which plaintiffs filed claim for the amount paid on their stock, is not void on its face. The allegations of the petition are sufficient to give the Federal Court jurisdiction, and it has decided the question against plaintiffs' contention. *First Nat. Bank v. Klugg,* 186 U. S., 202. This distinguishes the instant case from *Vallely v. Northern Fire & Marine Ins. Co.,* 254 U. S., 248, strongly relied on by plaintiffs. The same point was raised and resolved against the position of the plaintiffs in *Rendleman v. Stoessel, supra.*

Furthermore, it could avail the plaintiffs nothing to have this question decided in their favor. What boots it to them whether they pay their note to the trustee in bankruptcy or to receivers appointed by the State court? They must pay it to somebody. Up to the present, they have been accorded the same consideration as the other borrowing stockholders. They have no right to demand more. It is not contended that they have received less. The plaintiffs have no just cause for complaint.

The verdict and judgment will be upheld.

No error.

JOSEPH KJELLANDER v. PIEDMONT BAKING CO.

(Filed 15 May, 1929.)

Trial E d—Request for instructions not supported by evidence properly refused.

In an action to recover damages for injury alleged to have been negligently caused by a collision between plaintiff's car and the defendant's truck on a public highway, an instruction requested by the defendant is properly refused when not based upon evidence in the case but on an inference that had the plaintiff blown his horn it would have aroused the defendant's driver of the truck from his inattention in time to have avoided the injury in suit.

APPEAL by defendants from *Lyon, Emergency Judge,* at September-October Term, 1928, of BURKE.

Civil action to recover damages for an alleged negligent injury resulting from a collision between plaintiff's automobile, driven by himself, and the defendant's truck operated at the time by one of its servants or employees.

The evidence tends to show that on 9 March, 1928, the plaintiff, while driving in his automobile along highway No. 67, between Taylorsville and North Wilkesboro, saw the defendant's truck approaching from the opposite direction, astride of the center of the hard surface

(which was 18 feet wide), running at a speed of about 30 miles an hour and with its front wheels "wobbling." Realizing that something was wrong with the truck, the plaintiff ran his car entirely off the hard surface, on his right-hand side of the road, and stopped. The driver of the truck, instead of keeping with the curve of the highway, ran off the hard surface, on his left-hand side of the road, at a sharp angle and struck plaintiff's car, demolished it, and seriously injured the plaintiff. The collision occurred with the defendant's truck on the wrong side of the highway and plaintiff's car on the right side of the road entirely off the hard surface. Plaintiff ran as far to the right as he could in order to avoid a collision. He did not sound his horn.

The defendant offered no evidence, but proffered the following special instruction:

"If you find from the evidence that the plaintiff knew, or by keeping a proper lookout would have known, that the driver of defendant's truck was not aware of the approach of plaintiff's car, that when plaintiff knew—or should have known such fact—he had time to warn the defendant's driver of his presence by blowing his horn or by making other timely signal, and that plaintiff failed to so blow his horn or to make other timely signal, then the court charges you it would be your duty to answer the second issue 'Yes'; provided you further find from the evidence, and by its greater weight, that the defendant's driver, upon giving such signal, would have turned the truck to the right and thereby avoided the collision and the injury to plaintiff." Prayer refused; defendant excepted.

The usual issues of negligence, contributory negligence and damages were submitted to the jury, and from a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

W. C. Ervin, S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
Self, Bagby & Patrick for defendant.

STACY, C. J. The learned counsel for appellant, Mr. Self, advances the following argument in favor of the special instruction proffered by the defendant, but which the court declined to give:

"It may be that the driver of defendant's truck yielded for a few seconds to a demand for sleep; he may have allowed his mind to wander from the business in hand to contemplation of some real or fancied trouble; he may have fallen into a 'brown study' or a fit of absent-mindedness. But whatever the reason for his lapse, it is highly probable that he would have 'snapped out of it' instantly if the plaintiff had sounded his horn, and there would have been no collision."

The argument is ingenious, and worthy of preservation, but it would seem that the instruction was properly declined, as the defendant offered no evidence to support its contention. The cross-examination of plaintiff did not supply the defect in this respect. The court committed no error in refusing the instruction as requested. The case was fully covered in the charge.

A careful perusal of the record discloses no reversible error committed on the trial, hence the verdict and judgment will be upheld.

No error.

COMMERCIAL INVESTMENT TRUST, INC., v. J. S. WINDSOR, AND JOHN P. BISHOP, JOHN F. FULTON, AND REX F. BISHOP, COPARTNERS TRADING AS "THE MOTOR COMPANY."

(Filed 15 May, 1929.)

1. Bills and Notes I c—Rights and liabilities of parties upon certification of check.

A drawer of a check by having the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. C. S., 3115.

2. Same—Conflicting evidence as to whether certification was made by drawer or payee should be submitted to jury.

Where the evidence is conflicting as to whether the drawer of a check has it certified at the drawee bank or whether this was done by the payee thereof or his agent, a peremptory instruction that the drawer of the check was relieved from liability is reversible error, the issue being for the determination of the jury under proper instructions.

3. Payment A b—Where check given for prior installment is returned unpaid without knowledge of agent receiving check certified by drawer for full balance, drawer not relieved of liability.

Where the defendant purchased an automobile through a local dealer under a title retaining contract securing notes for monthly payments and was sued thereon by the financing corporation claiming as a holder in due course for value, and the defense of payment was pleaded with evidence tending to show that the defendant made payment by certified check given by his agent to the agent of the plaintiff for the full balance due by the defendant, and that the check was rejected by the plaintiff on account of a check given for a prior installment having been returned unpaid, and the rejected check was returned to the defend-

ant's agent and credited to his account, and the evidence as to whether the check was certified by the drawer or the payee was conflicting: *Held*, a peremptory instruction that the drawer of the check would be relieved of liability in the absence of a new contract or understanding was reversible error to the plaintiff's prejudice.

APPEAL by plaintiff from *Clement, J.*, at January Term, 1929, of GUILFORD. New trial.

Action to recover an amount alleged to be due on a note and to subject personal property to the payment of the amount due. The defendant Windsor purchased from his codefendant, The Motor Company, an Oakland automobile, and as evidence of and to secure the purchase price executed and delivered to The Motor Company the following promissory note:

"$876.00 Greensboro, N. C., 8/14/24.

After date, I, we, or either of us, promise to pay to The Motor Company or order, in twelve equal monthly installments of $73.00 each, the first payable one month after date, eight hundred seventy-six and 00/100 dollars with interest from maturity at the highest lawful rate.

And if allowed by law, 15 per cent of the principal and interest of this note as attorney's fees, if placed in the hands of an attorney for collection, and authority is given, irrevocably to any attorney at law to appear for me in any court, and waive the issue and service of process and confess a judgment against me in favor of the holder hereof, for such amount as may appear to be unpaid hereon after maturity, together with costs and attorney's fees, and to release all errors and waive all right to appear. Value received without relief under any exemption or insolvency law. Upon nonpayment of any installments at its maturity all remaining installments shall become immediately due and payable.

Negotiable and payable at the office of Commercial Investment Trust, Incorporated, 41 East Forty-second Street, New York City, with exchange on New York.

(Signed) J. S. WINDSOR."

Contemporaneously with the execution of the note, Windsor and The Motor Company signed a conditional sales contract, by the terms of which Windsor purchased and The Motor Company sold the automobile, the seller retaining title until all the terms of the note and the contract were complied with. Immediately after the execution of these papers they were endorsed and assigned to the plaintiff, who claims to be a holder in due course. On the date they were transferred The Motor

Company guaranteed the payment of the note, waived demand, protest, and notice of protest for nonpayment. In a separate written instrument dated 11 September, 1923, The Motor Company had guaranteed the prompt and faithful discharge of all its present and future liabilities and obligations to the plaintiff growing out of the purchase of its notes—the agreement being continuous and applying to transactions taking place between The Motor Company and the plaintiff after the execution of the paper.

The plaintiff caused the car purchased by Windsor to be seized under proceedings in claim and delivery and it was sold by the sheriff at public auction at the price of $460. The defendants contended that the full amount due on the note in question was paid to the plaintiff prior to the institution of the action. Issues were submitted to the jury and answered as follows:

Is the plaintiff the owner and entitled to the possession of the automobile as alleged in the complaint? Answer: No.

What was the market value of said automobile at the time it was taken by order of claim and delivery? Answer: $700 (and interest from 12 May, 1925).

In what amount, if any, are defendants indebted to plaintiff? Answer: None as to J. S. Windsor. $438 (and interest from 10 April, 1925) by John P. Bishop, John F. Fulton, Rex F. Bishop, trading as The Motor Company.

It was adjudged upon the verdict that the defendant Windsor recover of the plaintiff and the U. S. Fidelity and Guaranty Company as surety upon his bond the penal sum of $1,000 to be discharged upon payment to the defendant Windsor of the sum of $700 with interest as therein provided and that the plaintiff recover of The Motor Company $438 with interest from 19 October, 1925, and the cost of the action. Plaintiff excepted and appealed upon error assigned.

Shuping & Hampton for plaintiff.
Harry R. Stanley for defendants, Rex. F. Bishop and John F. Fulton.
Frazier & Frazier for J. S. Windsor.

ADAMS, J. The defendant Windsor bought an Oakland automobile from his codefendants, The Motor Company, and to secure a part of the purchase price executed the note in controversy and the conditional sales contract. Immediately after they were signed these papers were duly endorsed and transferred to the plaintiff. The note, which was payable in twelve monthly installments, contained a provision that upon nonpayment of any installment at its maturity all remaining in-

stallments should then become due. The plaintiff alleged that Windsor had made default in the payment of four successive installments and by letting one of his checks be protested had incurred an additional liability of one dollar and fifty cents. In virtue of the maturing clause the plaintiff brought suit to recover $512.50 with interest, the whole amount claimed to be unpaid. The only answer filed was that of Windsor, who alleged that the note sued on had been fully paid and satisfied before the summons was issued. The plea of payment was controverted, and as to this defense the evidence tended to show the following circumstances: In the latter part of March, 1925, J. W. Holman, who was in the service of the plaintiff, in consequence of a demand made on John P. Bishop, for payment of the note held by the plaintiff, received from Bishop a check in the sum of $438, which the plaintiff refused to accept. Holman made a second demand for payment on 10 April, 1925. Windsor then paid Bishop $438 and Bishop gave to Holman a check which with the endorsement is as follows:

"GREENSBORO NATIONAL BRANCH

AMERICAN EXCHANGE NATIONAL BANK, GREENSBORO, N. C.

10 April, 1925.

Pay to the order of Commercial Investment Trust, Inc., $438.00—not over four hundred thirty-eight dollars and no cents not over.

UNITED MOTOR SALES.

By Jno. P. Bishop.

Acct. No. 227912—14-E

Payment in full note J. S. Windsor, and check previously given on same. . . . And certified as follows:

Certified. Good when properly endorsed. Greensboro National Branch, American Exchange National Bank, Greensboro, N. C. $438.00.

I. F. PEEBLES, *Cashier.*"

And endorsed on back as follows:

"For deposit only pay to the order of any bank, banker, or trust company. COMMERCIAL INVESTMENT TRUST."

The bank charged the check to the account of Bishop, or the United Motor Sales. Holman sent the check to the plaintiff and a clerk in the plaintiff's office stamped the last endorsement on the back of the paper. The plaintiff seeing that the check fell short of the remainder due on the note, sent it back to Holman. Holman turned it over to Bishop, telling him that it could not be accepted in full payment of the note because a check given by Windsor on one of the installments had been

returned unpaid, and that to the $438 for which the check was given must be added the unpaid installment ($73 and $1.50, protest fee), making a total unpaid indebtedness of $512.50. The check was returned to the bank by Bishop and was credited on the account of the United Motor Sales; it was never paid to the plaintiff.

There are a number of exceptions to the charge, but in our view of the case it is necessary to consider only the one which was taken to the following instruction: "But if you find that Holman, the agent of the company, took this check from this defendant Windsor, or that he had Windsor to execute this check to Bishop, and that the check was then taken at the request of Holman to the bank and certified, and that he received that check he would be receiving the check from Windsor, and that after the check was certified, that unless he made a new contract or had a new understanding with Windsor about the matter, then Windsor would be relieved from further liability."

This part of the charge is subject to criticism. There is evidence tending to show that when Holman called on the defendants for a settlement he did not have the note, but, according to the testimony of Windsor, only "a duplicate record of the balance due," and that when Holman received the certified check there was due the plaintiff, in addition to the $438 for which the check was given, an unpaid installment of $73 and protest charges of $1.50, making a total of $512.50. It may plausibly be contended that Windsor at that time had knowledge of his unpaid installment and of the charges for his protested check and that Holman did not. At any rate the certified check was not accepted by the plaintiff because, as insisted, it was insufficient to cancel the note; it was returned by the plaintiff to Bishop whose bank account, or that of the company he represented, was then credited with four hundred and thirty-eight dollars. The plaintiff has never received the proceeds of the certified check. Under these conditions was Windsor necessarily relieved of liability for the want of a new contract or a new understanding between him and the plaintiff or the plaintiff's agent?

As to the certification of the check the evidence is conflicting. Holman testified that he procured the certified check from Bishop; that Bishop had it certified and gave it to him. Windsor said on his cross-examination that he gave the money to Bishop; that Holman wanted a certified check; that Bishop gave him a check and had it certified. He said also that "they (Bishop and Holman) went to the bank and had it certified"; but he did not go with them and did not know what occurred there. In another part of his testimony Windsor said he paid Holman. The cashier did not remember who was with Bishop when the check was certified. In this conflict of testimony it will be observed that the in-

struction excepted to is based upon these hypotheses: (1) that Holman as agent of the plaintiff received the check from Windsor; *or* (2) that he had Windsor to make the check to Bishop; and (3) that the check was then taken to the bank at the request of Holman and certified, and that "he received it in that manner." The first and second of the hypothetical findings are disjunctive, and there is no evidence to support the second. The language is susceptible of the interpretation that if Windsor deposited $438 with Bishop and the United Motor Sales through the agency of Bishop drew its check for this sum and Bishop had the check certified at the request of Holman and then delivered the check to Holman, Windsor would be released from liability to the plaintiff unless a new contract was made. The jury may have understood this to be the meaning; if so, they may have been misled as to the law. The drawer of a check may have it certified before it is delivered to the payee; he may deliver it without certification and the payee may then have it certified for his own benefit. In the latter case the liability of the drawer is not the same as in the former. The distinction is thus pointed out in 5 R. C. L., 524: "When a check payable to another person than the drawer is presented by the drawer to the bank for certification, the bank knows that it has not been negotiated, and that it is not presented for payment, but that the drawer wishes the obligation of the bank to pay it to the holder when it is negotiated, in addition to his own obligation; but when the payee or holder of a check presents it for certification the bank knows that this is done for the convenience or security of the holder. The holder may demand payment if he choose, and it is only because, instead of payment, the holder desires certification, that the bank certifies the check instead of paying it. In one case the bank certifies the check for the use or convenience of the drawer, and in the other for the use or convenience of the holder. If the drawer delivers the check already certified the relations, duties, and obligations between him and the payee or holder are the same as if such check had not been certified. It is otherwise where the check is delivered without certification, and the holder, instead of presenting it for and receiving payment, presents and procures it to be certified. When the drawer of a check procures its certification before delivering it to the payee, this does not discharge him. He remains the creditor of the bank, and still liable to the holder of the check for the amount thereof. The bank, by certifying the check, becomes liable for the amount thereof, but the drawer may nevertheless be held in case the holder exercises due diligence in presenting the check to the bank for payment and giving notice of the dishonor. The only effect of a certification obtained by the drawer is to give additional currency by adding to his credit

the credit of the drawee bank; the bank thereby becomes bound, but beyond that nothing is added to the legal force or effect of the instrument." C. S., 3115.

This statement of the law is sustained in cases which are assembled in the annotation of *Blake v. Hamilton Dime Sav. Bk. Co.*, 128 A. S. R., 684, 696; *First Nat. Bank v. Currie*, 9 L. R. A. (N. S.), 698; *Dille v. White*, 10 L. R. A. (N. S.), 510, 536. The drawer is not discharged when the check is certified by his procurement even if it is certified at the request of the payee. Brannan's Negotiable Instruments Law, 898, sec. 188.

The evidence may be considered as tending to establish the fact that Bishop and the company for whom he acted acquiesced in the return of the check and accepted the amount of it as a credit on the drawer's bank account. The drawer therefore was not released from liability; he cannot accept the benefit and reject the burden. Whether under these circumstances Windsor was discharged depends upon his relation to the drawer. He testified as follows: "I paid the money over to Bishop in the presence of Mr. Holman. I had a bank account with the Atlantic Bank & Trust Company at that time. I might have given my check but I didn't. Mr. Holman asked for a check and he then wanted it certified, so I gave the money to Bishop and he gave him a check and had it certified. Although I was doing business with the Atlantic Bank & Trust Company, and had money there, instead of drawing my check on that bank, I turned the money over to Bishop and asked him to settle the bill, so he did it. I told John F. Bishop to settle the note. There were present, myself, Mr. Holman and Mr. Bishop; all three of us. I paid over to Mr. Bishop $438, and Mr. Bishop then issued the check offered in evidence." His answer to the following question, also, may be considered: "When the check was made out on 10 April, you procured Mr. Bishop to handle the transaction for you, to represent you, and to close the transaction for you instead of closing it with Mr. Holman, who was there present?" He answered, "I told him to go ahead and close it. We were both there together. I could have settled direct with Mr. Holman but I would rather Mr. Bishop would do it for me. He had done it all the way through when it was necessary. I could have taken my money to the bank, deposited it and drawn my own check and delivered it to Holman."

There was evidence that the plaintiff never authorized Bishop or The Motor Company to collect any money from Windsor, and that Bishop's connection with the transaction ceased, except as to his personal liability, when the note and contract were assigned to the plaintiff. It was contended by the plaintiff that Windsor constituted Bishop or The Motor

Company his agent to make payment and to settle the controversy with the plaintiff and that any negotiation between the plaintiff and Bishop or The Motor Company was also the negotiation of Windsor. We cannot agree with the appellees that there is no evidence to sustain this contention. If Windsor saw fit to negotiate a settlement with the plaintiff through the agency of Bishop or The Motor Company instead of communicating directly with the plaintiff the scope of the authority thus conferred should be submitted to and determined by the jury. Other instructions present serious questions which need not be considered.

New trial.

P. P. DULIN, EXECUTOR ET AL., v. WILLIAM DULIN ET AL.

(Filed 15 May, 1929.)

1. Wills E i—Executor may bring action to construe will.

An executor of a will may seek the advice of the court in the interpretation of the instrument and the disposition of the testator's estate within the intent and meaning of the language used therein.

2. Wills D b—Issue of devisavit vel non may be joined in action for construction of will by consent of parties.

In a suit by the executor to interpret the will of the testator wherein the issue of *devisavit vel non* has been raised, the court, with the consent of all the parties interested may treat the case as having arisen upon the issue ordinarily raised upon the caveat to the will probated in common form, and construe the instrument upon an affirmative finding upon that issue.

3. Wills D i—Correct form of issue of devisavit vel non is sufficient and presents all issuable matters to the jury.

The form of an issue submitted to the jury upon the caveat to a will "is the paper-writing and every part thereof offered in evidence the last will and testament of the deceased" is sufficient to present every phase of the case to the jury under proper instructions from the court, and when the writing is sought to be established as a holographic will, it is not error for the court to refuse to submit an issue with further inquiry as to its having been found among the testator's valuable papers, or other evidentiary matters arising in the inquiry under the issue submitted.

4. Executors and Administrators A d—Word "executor" not necessary to appointment of will imposes executor's duties upon appointee.

Where a letter written by a deceased person to his brother is proven as the holographic will of the deceased, it is not necessary that the writing specifically make use of the word "executor" if the terms employed in the letter confer the powers of executor upon the person addressed.

5. Wills C d—It is sufficient if holographic will is found among papers regarded as valuable by testator.

In order to establish a valid holographic will it is not necessary that the papers among which it is found after the death of the testator be the most valuable of his papers, and it is sufficient if he regarded them as papers of value, and worthy of preservation.

6. Wills D i—Instruction that "every part" of holographic will must be in testator's handwriting includes signature—Burden of proof.

An instruction that the caveators must prove that "every part" of the paper-writing be in the handwriting of the deceased includes the signature and is sufficient and correct.

7. Trial E c—Hypothetical illustrations in charge not prejudicial error.

Hypothetical illustrations explaining the law arising upon the evidence in a case will not be held for reversible error in the absence of potential prejudice to the complaining party.

8. Wills E f—Construction of will as to beneficiaries thereunder.

Where the obvious language of a will manifests the intent of the testator that his nieces and nephews are to take as beneficiaries thereunder, his brothers and sisters are excluded by necessary implication.

9. Same—Construction of will as to share of beneficiaries.

Where according to the direction of a will the estate is to be equally divided between the nieces and the two nephews of the testator after deducting a certain amount of money from the shares of the nephews, the amount named is to be deducted from the sum of both their shares, each share burdened with one-half the amount named, before equal distribution of the balance is to be made.

10. Same—Under facts of this case direction in will for education of beneficiary includes support and maintenance.

A direction to an executor to educate certain beneficiaries under the will includes the support and maintenance of such beneficiaries, under the facts of this case, and the degree of education to be given them is within the discretion of the executor, and the executor has the authority to deduct within his reasonable discretion a certain amount of money from the corpus of the estate for this purpose before making distribution among other beneficiaries as further directed by the will.

11. Executors and Administrators E a—Direction that estate be equally divided gives implied power to sell estate for division.

The power given in a will to an executor to divide the estate among the beneficiaries therein named implies the power to sell and convey both the real and personal property when necessary to effectuate the intent of the testator as gathered from the instrument.

APPEAL by Ann Maxwell and her husband, Emmett Maxwell, and Sarah Maxwell and Frances Maxwell, by their guardian *ad litem*, from *Harding, J.*, at March Term, 1929, of IREDELL. No error.

The following paper-writing purporting to be the last will and testament of C. A. Dulin was probated in common form before the clerk of Superior Court of Iredell County and duly registered in the Record of Wills:

"Bro. P. P. Dulin, 11 August, 1926.

If should die or get kill give Fannie Millsaps $2,000 of my estate educate sister Anns two girls and devide the rest equal except Paul Lentz and Ralph Lentz give them $5,000 less than the others or nothing at all of my nephews and neases. C. A. DULIN."

Thereafter P. P. Dulin duly qualified as executor of C. A. Dulin's estate. Fannie Millsaps died during the life of C. A. Dulin and her legacy lapsed. On 10 January, 1929, the plaintiffs instituted this action in the Superior Court of Iredell seeking the advice of the court as to the proper construction of the will. Pleadings were filed and certain of the defendants raised an issue of *devisavit vel non*. It was then agreed by all parties in open court that the action should be treated as a caveat to the will and as a proceeding to have the will probated in solemn form, and that if the issue should be answered for the propounders the construction of the will should be determined by the court. Evidence was introduced and the defendants tendered this issue:

Did C. A. Dulin write all of paper-writing propounded, with intent that it should be operative as his last will and testament, and was it found after his death among his valuable papers or effects?

The following verdict was returned: "Is the paper-writing and every part thereof offered in evidence as Exhibit A the last will and testament of C. A. Dulin, deceased?" Answer: "Yes."

The appellants excepted to the issue submitted and to the refusal to submit the one they tendered. After adjuding that P. P. Dulin had been duly appointed executor, the trial judge construed the will as follows:

"Upon the prayers by the executor for instructions and an interpretation of said will, it is ordered, adjudged and decreed by the court, as follows: (a) That the extent, manner and degree of education of Frances and Sarah Maxwell (admitted by all parties to be Sister Ann's two girls referred to in the will) is in the sound discretion of the executor and the executor has right to set apart an amount which he deems sufficient for that purpose and divide the rest of the estate among those entitled. (b) In view of the fact that the two girls, Sarah and Frances Maxwell are without any means of support and maintenance, which fact was known to C. A. Dulin at the time he made said will, the education of said girls includes their maintenance and support dur-

ing the period that they are being educated. (c) That the said girls, Sarah and Frances Maxwell shall share equally with the other nieces and nephews in said estate after receiving their education from said estate. (d) That the shares of Paul Lentz and Ralph Lentz (two of the nephews of C. A. Dulin) are to be charged with $2,500 each before they participate in the estate with the other nieces and nephews but the executor has no right in his discretion to exclude them entirely from participation in his estate. (e) That it is the duty of the executor under the will to sell and dispose of all the estate of C. A. Dulin, both real and personal and after the payment of all debts of the said estate and charges and expenses of the administration of said estate and after setting apart a sum which the executor deems sufficient for the education of Frances and Sarah Maxwell and their support and maintenance during the period that they are being educated, as set forth in the above sections (a) and (b), the executor shall divide the estate equally among the following nieces and nephews of C. A. Dulin, whom the court finds to be all of the nieces and nephews of C. A. Dulin, living at the time of his death, subject, however, to the charge of $2,500 each against the shares of Paul and Ralph Lentz as set forth in section (d) above: William Dulin, Lucile Dulin (children of P. P. Dulin, brother of C. A. Dulin); Frances Maxwell, Sarah Maxwell (children of Mrs. Ann Maxwell, sister of C. A. Dulin; Ralph Lentz, Fred Lentz, Ben Miller Lentz, Wilma Marjorie Lentz, Jerry Junior Lentz, Elizabeth Ellen Lentz and Paul Lentz (children of Mrs. Mary E. Lentz, sister of C. A. Dulin). (f) That under the said will P. P. Dulin, the executor, has power to sell and convey the real estate of C. A. Dulin without securing an order of court through a special proceeding instituted for that purpose.

"It is further ordered, adjudged and decreed that P. P. Dulin, Mrs. Ann Maxwell and Mrs. Mary E. Lentz, the brother and two sisters of C. A. Dulin, deceased, have no share or interest in the estate of C. A. Dulin, under the aforesaid will, but that all of said estate, both real and personal, is bequeathed and devised to the nieces and nephews of C. A. Dulin, hereinbefore named, and subject to terms hereinbefore mentioned."

Judgment was rendered for the plaintiffs and the appellants named above duly excepted and appealed upon error assigned in the record.

Scott & Collier and E. M. Land for plaintiffs.
Buren Jurney for defendant appellees.
P. T. Stiers for defendant appellants.

ADAMS, J. In *Harper v. Harper,* 148 N. C., 453, 458, the Court said this: "We note that this proceeding, brought to term, includes both the

issue of *devisavit vel non* and proceedings for the construction of the will. This is certainly unusual, but all the parties are before us, and ask that the whole matter be determined in this action. It is not a question of jurisdiction (which we would be compelled to notice *ex mero motu),* for the clerk is part of the Superior Court. No exception is taken, and the whole matter, under the consent and request of parties, is disposed of." The parties to the present suit agreed to pursue the same course and accordingly did not except to the form of the action. It is not denied that the executor had the right to invoke the equitable jurisdiction of the court for direction as to the discharge of his trust. *Freeman v. Cook,* 41 N. C., 373; *Alsbrook v. Reid,* 89 N. C., 151; *Bank v. Alexander,* 188 N. C., 667; *Trust Co. v. Stevenson,* 196 N. C., 29.

The appellants excepted to the issue submitted and to the judge's refusal to submit to the jury the issue which they tendered. The exception is overruled upon the familiar principle reiterated upon similar facts in *Cornelius v. Brawley,* 109 N. C., 542: "The issue submitted arose on the pleadings, and was such as afforded either party opportunity to present any view of the law arising upon the evidence through the medium of pertinent instructions, and was therefore sufficient *(Humphrey v. Church, ante,* 132; *McAdoo v. R. R.,* 105 N. C., 140; *Denmark v. R. R.,* 107 N. C., 187, *Leach v. Linde,* 108 N. C., 547), and indeed, follows the precedents in such cases. Eaton's Forms, 282. The issues suggested by appellants presented rather evidential than constitutive facts, and were properly rejected. *Grant v. Bell,* 87 N. C., 34; *Patton v. R. R.,* 96 N. C., 455."

The jury were clearly instructed that the burden was upon the plaintiffs, who are the propounders, to satisfy the jury by the greater weight of the evidence that the paper in question is the last will and testament of C. A. Dulin; and this part of the charge was followed by the more specific instruction that it was incumbent upon the plaintiffs to prove that the purported will was found among the valuable papers of the testator, that it was intended by him to be a will disposing of his property, and that every part of it was in his own handwriting—the words "every part" of the paper necessarily including the signature. *Mayo v. Jones,* 78 N. C., 402; *Syme v. Broughton,* 85 N. C., 367; *In re Hedgepeth,* 150 N. C., 245; *In re Ross,* 182 N. C., 477. The "affirmative and direct proof" declared to be necessary in *St. John's Lodge v. Callender,* 26 N. C., 335, may be found in the testimony of the witnesses in the case before us, though in the case just cited *Chief Justice Ruffin* no doubt had reference primarily to the insufficiency of hearsay evidence. The appellants have no just cause of complaint against the charge upon the burden of proof.

There was evidence tending to show that the contested paper was found at C. A. Dulin's home, in a trunk which was kept in his bedroom with his clothing; that the trunk was locked, the key in a bookcase; that in the trunk were deeds, plats, paid checks, personal letters, and photographs. It was testified that other papers of a different character and apparently of less value were found elsewhere in the house. The appellants contended that the asserted will was not found among the maker's valuable papers, and excepted to the instruction given on this question.

The following definition of "valuable papers" was approved in the case of *In re Jenkins,* 157 N. C., 429: " 'Valuable papers' within the meaning of the statute are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for land, obligations for the payment of money, or certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently, the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator. Pritchard on Wills, sec. 237; *Winstead v. Bowman,* 68 N. C., 170; *Marr v. Marr,* 2 Head., 303; *S. c.,* 5 Sneed, 385; *Allen v. Jeter,* 6 Lea, 672; *Reagan v. Stanly,* 11 Lea, 316."

The substance of this definition was included in the charge. The imaginary cases proposed by the trial judge, to which exception was noted, were nothing more than hypothetical illustrations of this definition, containing so far as we can see no potential prejudice to the position taken by the appellants or to the defenses on which they rely.

The remaining exceptions relate to the interpretation of the will. It was first adjudged that P. P. Dulin is the duly appointed executor. The word "executor" does not appear in the will, but the testator imposed upon P. P. Dulin certain duties which are usually performed only by a person acting in a representative or fiduciary character. An appointment of this kind may be indicated by any words which confer upon a designated person the rights, powers, and duties of an executor. The intent of the testator is shown, the appointee is identified, and to him is committed the disposition of the estate. The testator's language, we think, is sufficiently definite to warrant the conclusion that he intended to appoint his brother the executor of his estate. 23 C. J., 1020, 1021; *Harper v. Harper, supra.*

It does not definitely appear whether the testator had assets to be collected and debts to be paid; but we should hesitate to say that the direction to "divide the rest equal" does not import the power to collect as well as the power to disburse. Without deciding this question we may say that the conferred power to divide the property reasonably imports the power to sell it for distribution. *Foster v. Craige,* 22 N. C., 209; *Vaughan v. Farmer,* 90 N. C., 607; *Council v. Averett,* 95 N. C., 131. The exception to the order directing the executor to sell and dispose of the testator's real and personal property must therefore be overruled.

The brother and the two sisters of the testator were properly excluded. In construing the will we must have regard to the testator's intention, but as was said in *McIver v. McKinney,* 184 N. C., 393, it is not the intention that may have existed in his mind if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The testator's expressed intention was to provide for his nephews and nieces—not to give his estate in equal parts to his next of kin.

We have considered all the exceptions but are unable to concur in the appellants' interpretation of the will. We find

No error.

J. A. SHELTON v. M. S. HODGES ET AL.

(Filed 15 May, 1929.)

Appeal and Error J a—Appeal from denial of judgment on pleadings will be dismissed.

An appeal to the Supreme Court will lie only from final judgment, and an appeal from the denial of a motion for judgment on the pleadings will be dismissed.

APPEAL by plaintiff from *Schenck, J.,* at November Term, 1928, of HENDERSON.

Civil action arising *ex contractu* for certain construction work and to recover on an award.

Defendant filed answer, alleged noncompliance on the part of plaintiff, and asked for judgment by way of counterclaim.

Plaintiff moved for judgment on the pleadings. Overruled; exception and appeal. This is the only assignment of error appearing on the record.

L. B. Prince for plaintiff.

Blythe & Sheppard for defendant.

PER CURIAM. The appeal must be dismissed on authority of *Gilliam v. Jones,* 191 N. C., 621, 132 S. E. 566.

The denial of a motion for judgment on the pleadings is not appealable, as there is no final judgment.

Appeal dismissed.

C. H. NANCE v. J. A. AND J. H. HULIN.

(Filed 15 May, 1929.)

Appeal and Error J d—Burden of showing error is on appellant.

On appeal to the Supreme Court the burden of showing error is on the appellant.

CIVIL ACTION, before *Sinclair, J.,* at April Term, 1928, of MONTGOMERY.

The facts are stated in a former appeal reported in 192 N. C., 665, 135 S. E., 774.

Two issues were submitted to the jury. The issue of indebtedness was answered in favor of defendants, and from judgment upon the verdict plaintiff appealed.

W. A. Cochran for plaintiff.
Brittain, Brittain & Brittain for defendant.

PER CURIAM. The evidence presents an issue of fact and no more. No reversible error is pointed out, and the burden to show such error is upon the appellant.

Affirmed.

R. A. NORMAN v. W. R. PORTER.

(Filed 15 May, 1929.)

1. Master and Servant D b—Father employing son not liable for independent act of son outside of scope of son's employment.

Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in the stove in defendant's store on Saturday when the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. C. S., 567.

2. Negligence D b—Acts in aid of person injured are not evidence of admission of negligence and liability therefor.

Where the evidence is sufficient to sustain an action for a negligent personal injury, the defendant's acts of mercy in taking the plaintiff to a hospital after the injury and paying the bill cannot be imputed as an admission of liability for damages.

APPEAL from *Finley, J.*, at March Term, 1928, of CLEVELAND. Affirmed.

Defendant kept a store and his young son, Bobby, about 14 years of age, who went to school, but on Saturdays was helping his father in his store, threw a cartridge in the stove and it exploded and the shell struck plaintiff in the eye putting it out.

At the close of the plaintiff's evidence, the defendant moved for judgment as in case of nonsuit, C. S., 567. The court below granted defendant's motion. Plaintiff excepted, assigned error and appealed to the Supreme Court.

B. T. Falls for plaintiff.
Ryburn & Hoey for defendant.

PER CURIAM. We cannot hold, under the facts and circumstances of the case, that the mischievous act of the defendant's young son was in the scope of his employment and hold the defendant, his father, liable. It was a deplorable affair, but it was a boyish prank that so often brings disaster—but we cannot hold the father responsible.

The fact that defendant procured a doctor, took plaintiff to a hospital and paid the bill is in no sense an implied admission or circumstance tending to admit liability. It was an act of mercy, a humanitarian act to repair as far as possible his boy's mischievous conduct. *Barber v. R. R.*, 193 N. C., at p. 696. The judgment of the court below is

Affirmed.

GEORGE C. SCOTT v. E. A. GILLIS, TRADING AS E. A. GILLIS & COMPANY.

(Filed 22 May, 1929.)

1. Injunctions D b—Upon conflicting evidence continuance of temporary injunction is proper.

Where the evidence upon the return of a preliminary restraining order raises serious questions as to the existence of facts which make for plaintiff's rights, and sufficient to establish them if found in his favor, and damages may not be ascertained in law, the preliminary order will be continued to the final hearing.

2. Appeal and Error J c—Where findings of fact do not appear of record they are presumed correct.

Where the record does not show a request by the defendant for a finding of fact by the trial court upon which he continues a temporary injunction to the final hearing, the presumption is that the court found the facts to be as alleged in the complaint, and his order based thereon will be affirmed.

3. Appeal and Error J a—Supreme Court may find facts in injunctive proceedings.

In injunctive proceedings the Supreme Court has the power to find the facts and to review the findings of fact by the trial court.

4. Appeal and Error J d—Burden of showing error is on appellant.

The burden is on the appellant to assign and show error on appeal to the Supreme Court.

5. Contracts A f—Contract in restraint of trade not void if reasonable and does not affect rights of public.

A contract not to engage in a certain business within a reasonable area for a reasonable length of time, and which does not affect the interests of the public is not void as being a contract in restraint of trade, and is valid and enforceable.

6. Same—In this case held, contract not void as being in restraint of trade.

A contract between a certified public accountant and his employee providing that the employee was not to solicit or do business as an accountant for any one of the plaintiff's customers for a period of three years after the termination of the employment, is not one in restraint of trade against public policy, and, in a suit by the employer to restrain its breach, a continuance of a restraining order against the employee to the final hearing upon proper facts being made to appear in plaintiff's favor, will be upheld on appeal.

7. Injunctions B c—Breach of contract not to engage in certain business may be enjoined upon proper facts.

Where it is made to appear that the plaintiff will be damaged by the breach by his former employee of a contract not to solicit or do business of certified public accountant for the customers of his employer within three years after the termination of the employment, a sufficient consideration is shown for the granting of injunctive relief, and the fact that the work was not unique does not affect the question.

APPEAL by defendant from *Stack, J.*, 8 April, 1929, of MECKLENBURG. Affirmed.

The complaint filed by the plaintiff alleges substantially the following facts: That the plaintiff and the defendant are at the present time both engaged in the business of certified public accountants, that on 2 May, 1927, the plaintiff and the defendant entered into an agreement whereby the plaintiff employed the defendant at a salary of $350.00 per month for the first six months, and then for a salary of $375.00

per month; that the defendant promised to perform such duties as should be assigned to him by the plaintiff and promised that he would not, for a period of three years after he left the employ of the plaintiff, solicit or accept any business involving the work generally done by certified public accountants from any person, firm or corporation for whom the defendant performed services while in the employment of the plaintiff; that pursuant to this agreement the defendant remained in the employment of the plaintiff for approximately nineteen months; that the plaintiff paid the defendant the $350.00 per month during the first six months and $375.00 per month after the first six months; that on 1 January, 1929, the defendant voluntarily left the employment of the plaintiff and has since that time started in the business of a certified public accountant for himself and has in violation of his contract solicited and accepted work from persons, firms and corporations for whom he performed services while in the employment of the plaintiff; that the defendant has informed the plaintiff that he intends to so solicit and accept work from any person, firm or corporation that might wish his services. That the plaintiff has no way of ascertaining the amount of damages the defendant is causing him; that the plaintiff is suffering irreparable injury so that the plaintiff has no adequate remedy except to apply to the court for an injunction restraining the defendant from soliciting or accepting, for a period of three years, business generally done by certified public accountants from anyone for whom he performed services while in the employment of the plaintiff.

The matter was heard below on affidavits and the court rendered the following judgment: "In this cause it is ordered and adjudged, that the restraining order heretofore entered in this action be and the same is continued to the hearing as to parties for whom the defendant performed services on an account while in plaintiff's employment and no further."

The defendant excepted and assigned error to the judgment as signed and appealed to the Supreme Court.

F. G. Pierce, Tillett, Tillett & Kennedy for plaintiff.
E. A. Hilker for defendant.

CLARKSON, J. This is a civil action brought by plaintiff against defendant, for the purpose of securing a restraining order to the hearing, restraining defendant from violating an alleged contract of employment, containing a restrictive clause prohibiting the defendant for a period of three years from soliciting or doing business with any clients of the plaintiff or any person for whom the defendant, during the plaintiff's employment, performed services.

In *Tise v. Whitaker-Harvey Co.*, 144 N. C., at p. 510-11, the following is stated: "It is the rule with us that in actions of this character, the main purpose of which is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for plaintiff's right, and sufficient to establish it, that a preliminary restraining order will be continued to the hearing." *Cain v. Rouse*, 186 N. C., 175; *Camel City Coach Co., v. Griffin*, 196 N. C., 559; *Realty Co. v. Barnes, ante*, 6. "Ordinarily, the right to injunctive relief to compel the observance of covenants and restraintive clauses, is recognized in this jurisdiction." *Realty Co. v. Barnes, supra.*

The record shows no request by the defendant for the court below to find the facts. As there was evidence to support plaintiff's contention, there is a presumption that the court below found the facts to be as alleged in the complaint. In injunctive proceedings, this Court has the power to find and review the findings of fact by the court below on appeal, but the burden being on appellant to assign and show error. Where there is a serious conflict over the material questions of fact, the preliminary restraining order will be continued to the hearing.

Plaintiff and defendant are certified public accountants. N. C., Code, 1927, Anno., 7024a-7024n, ch. 116.

The main question involved in this controversy: Did the court commit error in continuing to the final hearing the order restraining the defendant from violating his contract by soliciting and accepting accounting work from persons, firms and corporations for whom the defendant performed services while he was in the employment of the plaintiff? We think not.

"In *Mar-Hof Co. v. Rosenbacker*, 176 N. C., 330, it is said that although at common law agreements in restraint of trade were held void as being against public policy, this position has been modified until it has come to be the generally accepted principle that agreements in partial restraint of trade will be upheld when they are 'founded on valuable consideration, are reasonably necessary to protect the interests of the parties in whose favor they are imposed, and do not unduly prejudice the public interest.'" *Hill v. Davenport*, 195 N. C., at p. 272. In *Faust v. Rohr*, 166 N. C., 187, the law as to contracts in restraint of trade is exhaustively discussed.

In *Baumgarten v. Broadway*, 77 N. C., 8, the defendant was enjoined from engaging in photography in Charlotte for ten years. In *Cowan v. Fairbrother*, 118 N. C., 406, the defendant was enjoined from engaging in the newspaper business in the State of North Carolina for a period of ten years. In *King v. Fountain*, 126 N. C., 196, the defendant was restrained from engaging in the livery stable business for a period of three years in the town of Greenville. In *Anders v. Gardner*, 151 N. C.,

604, the defendant was restrained from engaging in the livery stable business in Gastonia. In *Morehead Sea Food Co. v. B. C. Way,* 169 N. C., 679, the defendant was enjoined from engaging in the business of a fish dealer for a period of ten years within 100 miles of Morehead City. There are numerous other cases in this State to the same effect.

The cases usually cited are where the parties for a consideration purchased a business and the good will, in which they covenanted not to engage in the business—the time limit and territory being reasonable.

In the present case, it was an employee who agreed with the employer, if he left the employer, for three years thereafter not to solicit or accept business from his former employer's clients. By his employment he knew and became associated intimately with his employer's clientele who ordinarily employed his employer. We see no reason why in good conscience a court of equity would not enjoin him from a breach of his contract. Damages would be hard to measure. It can readily be seen how easily he could take business away from his former employer. Ethical business outside of a court of equity would frown on such conduct. There can be no question that there was consideration to support the promise.

The principle is well settled in 6 R. C. L. (Contracts), sec. 206, p. 805, as follows: "At least where the character of the business and the nature of the employment are such that the employer requires such protection, an agreement by an employee not to engage in business in competition with the employer after the termination of the employment, is valid if it is reasonable under the circumstances. As it is lawful and proper to protect a business about to be acquired, from certain acts by the seller, who is familiar with such business, it is equally lawful and proper to protect an established business from such acts by one who has become familiar therewith. If the restrictions are not otherwise contrary to public policy, they must be held to be valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights, and do not unreasonably restrict the rights of the employee, due regard being had to the subject-matter of the contract, and the circumstances and conditions under which it is to be performed. This rule seems to be especially applicable to agreements by assistants to professional men. Such agreements enable an employer to instruct his assistant without fear of afterwards having a rival. Few professional men would take assistants and intrust them with their business, impart to them their knowledge and skill, bring them in contact with their clients and patients, unless they were assured that the knowledge and skill imparted and the friendships and associations formed would not be used, when the services were ended, to appropriate the very business such assistants were employed to maintain and enlarge."

The defendant contends: "The restrictive covenant herein is ancillary to a contract of employment and raises a question heretofore not passed upon by this Court. If the agreement is to be accepted as the basis for the employment and the basis for the restrictive covenant this is not a case in which the services contracted for are unique, extraordinary, unusual or nonduplicated."

In *Sarco Co. of N. J. v. Gulliver,* 129 Atl., at 402, citing numerous authorities, the Court said: "The next point made by the defendant is that defendant's services are not of a kind requiring unique skill and ability. It would seem that counsel is confusing this case with the class of cases where injunction is sought against the violation of a covenant to perform services. There is nothing in the law as to the enforcement of these negative covenants so far as I am aware which makes unique skill or ability a factor in the case. It is simply a question of reasonable protection to the employer (or vendee of a business) against competition by the covenantor who has received consideration for the covenant." The same Court also said, in the same case, citing numerous authorities: "It is entirely settled that negative covenants of the kind in question, ancillary to contracts of sale or of employment are valid and enforceable, if reasonable in their terms."

In *Grainger v. Craven,* 159 Minn., 296, 199 N. W., 10, in which the Supreme Court of Minnesota enjoined a young surgeon and former employee of the plaintiff from engaging in the practice of medicine and surgery or any of the branches thereof, either directly or indirectly, in the city of Rochester, or within twenty miles thereof, for three years after leaving the plaintiff's employ, it is said: "Courts scrutinize carefully all contracts limiting a man's natural right to follow any trade or profession anywhere he pleases and in any lawful manner. But it is just as important to protect the enjoyment of an establishment in trade or profession, which its possessor has built up by his own honest application to every-day duty and the faithful performance of the tasks which every day imposes upon the ordinary man. What one creates by his own labor is his. Public policy does not intend that another than the producer shall reap the fruits of labor. Rather it gives to him who labors the right by every legitimate means to protect the fruits of his labor and secure the enjoyment of them to himself. Freedom to contract must not be unreasonably abridged. Neither must the right to protect by reasonable restrictions that which a man by industry, skill and good judgment has built up, be denied." The judgment of the court below is

Affirmed.

M. C. BRASWELL, INC., v. CITIZENS NATIONAL BANK OF RALEIGH, N. C.

(Filed 22 May, 1929.)

1. Bills and Notes I b—Payee of check is liable where drawee bank pays check by its draft on another bank which is not paid.

Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of 3 C. S., 220(aa), 220(g) as being a check presented by or through a "postoffice," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon.

2. Same—Presentment of check for payment through mail is good.

A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. 3 C. S., 220(n).

3. Customs and Usages B a—One depositing check not bound by custom of drawee bank paying same by its draft on another bank.

One depositing a check for collection in a bank is not ordinarily bound by a custom among banks that a collecting bank accepts the draft of the drawee bank on another bank in payment.

APPEAL by plaintiff from *Barnhill, J.*, at February Term, 1928, of NASH. Affirmed.

Action to recover of defendant the sum of $6,760.50, as damages alleged to have been sustained by plaintiff, resulting from the negligence of defendant as its agent for the collection of a check drawn on a bank chartered by this State, and payable to the order of plaintiff.

Defendant received said check endorsed by plaintiff, and forwarded same, by mail, to the drawee bank, and accepted in payment of the proceeds thereof the draft of the drawee bank on another bank, which upon due presentment was not paid. The drawer of the draft has been duly adjudged insolvent.

From judgment dismissing the action at the close of the evidence for plaintiff, as upon nonsuit, plaintiff appealed to the Supreme Court.

Battle & Winslow and James P. Bunn for plaintiff.
Smith & Joyner and O. B. Moss for defendant.

CONNOR, J. On or about 23 December, 1925, O. B. Taylor & Company, engaged in business as cotton buyers, at Whitakers, N. C., purchased of plaintiff, a corporation, engaged in the mercantile business at Battleboro, N. C., a lot of cotton. In payment of the purchase price of said cotton, the said O. B. Taylor & Company, drew their check on

the Bank of Whitakers of Whitakers, N. C., for the sum of $6,760.50, payable to the order of plaintiff, and delivered said check to plaintiff. On or about 31 December, 1925, said check, bearing the endorsement of plaintiff, and also the subsequent endorsements of the Planters Bank of Battleboro, and of the defendant, Citizens National Bank of Raleigh, N. C., and marked "Paid," and duly canceled, was delivered by the Bank of Whitakers to the said O. B. Taylor & Company, with a statement showing the status of their account with said bank, as of that date. Said account had been charged with the amount of said check. From the date of said check until it was received and accepted for payment by the Bank of Whitakers, the said O. B. Taylor & Company, had on deposit with said bank, subject to their check, a sum in excess of the amount of said check. The amount of said deposit was reduced by the amount of said check, leaving a balance due thereon to the said O. B. Taylor & Company.

Plaintiff received said check from O. B. Taylor & Company, on 23 December, 1925. On said date, the said check, endorsed by plaintiff, was deposited with the Planters Bank of Battleboro for collection, and credited to the account of plaintiff. The Planters Bank of Battleboro endorsed said check and immediately forwarded same by mail to the defendant, Citizens National Bank of Raleigh, N. C., for collection. The Citizens National Bank received said check on 24 December, 1925, and having first endorsed the same, immediately forwarded said check, by mail, to the Bank of Whitakers for payment. The Bank of Whitakers received said check through the mail and charged same to the account of the drawers, O. B. Taylor & Company. On the date of its receipt of said check, the Bank of Whitakers had in its vaults, available for the payment of said check, currency in excess of the sum of $14,000. The Bank of Whitakers, in accordance with the custom of banks, and in the exercise of its option, by virtue of the statute, remitted for the proceeds of said check by its draft on the National Bank of Commerce of Norfolk, Virginia, payable to the order of defendant, Citizens National Bank of Raleigh, N. C.

On 30 December, 1925, the defendant, Citizens National Bank of Raleigh, N. C., received, through the mail, from the Bank of Whitakers, its draft on the National Bank of Commerce of Norfolk, Va., for an amount which included the amount of the check drawn on said Bank of Whitakers by O. B. Taylor & Company, and payable to the order of plaintiff. This draft was accepted by defendant and forwarded by it to the National Bank of Commerce of Norfolk, Va., by mail, for payment. Upon due presentment of said draft, the National Bank of Commerce refused to pay the same. On Monday, 4 January, 1926, the Bank of Whitakers closed its doors and ceased to do business. It was

thereafter duly adjudged insolvent. Plaintiff was promptly notified by defendant of its inability to collect the draft which it had received from the Bank of Whitakers in payment of the proceeds of the check. The Planters Bank of Battleboro has charged the amount of said check to plaintiff's account with said bank, with the result that plaintiff has not received payment in money, of the proceeds of said check.

The evidence offered by plaintiff tends to show the foregoing facts: There was no evidence tending to show the facts to be otherwise, or to show other or additional facts pertinent to the decision of the question presented by plaintiff's appeal from the judgment dismissing the action as upon nonsuit.

This question may be stated as follows: When a bank has received from the owner, for collection, a check drawn on a bank or trust company, chartered by this State, and has forwarded said check, by mail, to the drawee bank for payment, and the drawee bank has accepted said check and charged same to the account of the drawer and thereby paid it, with the result that the drawer is discharged, and has remitted the proceeds of said check to the collecting bank by its draft on another bank, in accordance with the custom of bankers, or in the exercise of its option to pay said check by such draft, rather than in money, and such draft upon due presentment is not paid, because of the insolvency of the remitting bank, duly adjudged subsequent to the date of the draft, and prior to its presentment for payment, is the collecting bank liable for the loss sustained by the owner of the check, because of negligence in failing to require of the drawee bank payment in money, and in accepting its draft on another bank in payment of the proceeds of the check?

In view of the provisions of section 2, chapter 20, Public Laws 1921 (3 C. S., 220aa), we need not now discuss or decide the question presented by this appeal, as to whether the owner of a check, which has been deposited by him with a bank for collection, is bound by the custom which the evidence in this case tends to show prevails among bankers, relative to the means by which the proceeds of a check which has been paid by the drawee bank, are remitted by such bank to the collecting bank. The evidence tends to show the existence of a custom among bankers in accordance with which such remittance is made by means of a draft drawn by the remitting bank, on another bank, and payable to the order of the collecting bank. It cannot be held, however, that the owner of a check who has deposited same with a bank for collection, in the absence of knowledge, actual or presumed, of its existence, is bound by a custom among banks, in accordance with which the collecting bank accepts in payment of a check, which has been deposited with it for collection, the draft of the drawee bank on another

bank, payable to its order. In the absence of a special agreement to the contrary, or of a local custom of which the owner of the check has actual knowledge, or of a general custom so all-pervading as to affect all persons who deal with banks, or of a statute, which modifies or repeals the general rule of law that checks are payable only in money, the collecting bank is liable to the owner of the check, for loss sustained by its acceptance of payment otherwise than in money. *Bank v. Malloy,* 264 U. S., 160, 68 L. Ed., 617.

In *Gilmer v. Young,* 122 N. C., 806, 29 S. E., 830, it is said: "A custom, in order to amount to notice to all persons, must, like the common law, be general. A local, or general local custom is not notice to any one, unless there be actual knowledge of it, and it will not be treated as entering into the contract without such knowledge." In *Oil Co. v. Burney,* 174 N. C., 382, 93 S. E., 912, it is said to be "established doctrine that the terms of a contract may be explained and interpreted by a prevailing custom or usage and it is recognized further that such custom may be so general and all-pervading, that the parties may be presumed, in some instances, conclusively presumed, to have made their contract in contemplation of it."

The decision of the question presented by this appeal is determined by the provisions of section 2, chapter 20, Public Laws 1921 (3 C. S., 220aa), which are as follows:

"In order to prevent the accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall, unless specified on the face thereof to the contrary by the maker or makers thereof, be payable in exchange drawn on the reserve deposits of said bank, when any such check is presented by or through any Federal Reserve Bank, postoffice or express company or any respective agent thereof."

The check of O. B. Taylor & Company, on the Bank of Whitakers, payable to the order of plaintiff, upon presentation to said bank for payment otherwise than "by or through any Federal Reserve Bank, postoffice or express company, or any respective agent thereof" was payable in money. In the absence of specification on the face of said check to the contrary by the makers, the said check was payable in exchange, drawn on the reserve deposits of the Bank of Whitakers—that is, by draft on another bank, with which the Bank of Whitakers had a deposit to its credit (3 C. S., 220g), when such check was presented by or through any Federal Reserve Bank, postoffice or express company or any respective agents thereof. The plaintiff as owner of the check exercised its option to have the check presented to the

drawee bank by or through the postoffice, for it must be held that both plaintiff and its agent for collection, the Planters Bank of Battleboro, knew when the check was sent to the defendant for collection, that defendant would avail itself of the postoffice as the means by which the check would be presented to the Bank of Whitakers for payment. *Bank v. Bank,* 75 N. C., 534. When so presented, by virtue of the statute, the Bank of Whitakers had the option to pay the check by its draft on another bank. Plaintiff, therefore, must be held to have authorized defendant to accept the draft in payment of the check. Defendant having presented the check for payment, by or through the postoffiee, as it was authorized to do, could not by virtue of the provisions of the statute, require payment in money, *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3. Defendant was, therefore, not negligent in accepting the draft of the drawee bank, and cannot be held liable to plaintiff for any loss which has or may result from such acceptance. Plaintiff and not defendant, is a creditor of the Bank of Whitakers, for the amount of the check drawn upon and paid by said bank, and may file claim for such amount with the receiver of said bank.

The forwarding of the check by defendant to the Bank of Whitakers, by mail, was a good presentment (8 C. J., 561) and was expressly authorized by statute. 3 C. S., 220(n).

It may be noted that under the provisions of C. S., 218(c), as amended by chapter 113, Public Laws 1927, claims against the estate of an insolvent bank for amounts due on collection made and unremitted for, or for which final actual payment has not been made by the bank, are now given preference, in the final distribution of the assets of said bank. See subsection 14, of C. S., 218(c). Michie's North Carolina Code, 1927.

By virtue of the provisions of the statute applicable to this case, when the payee or holder of a check drawn on a bank or trust company chartered by this State, and payable at the option of the drawee bank by its draft on another bank, deposits such check with a bank for collection, with knowledge that the collecting bank will in due course present such check for payment by or through a Federal Reserve Bank, postoffice, or express company or any respective agent thereof, and when the drawee bank accepts such check, and pays the same by charging it to the account of the drawer, who is thereby discharged, and in the exercise of its option remits the proceeds of such check to the collecting bank by its draft on another bank, which upon due presentment is not paid, because of the insolvency of the remitting bank, the payee or holder of the check, and not the collecting bank must bear the loss, if any, resulting from the nonpayment of the draft. Nothing else

appearing the collecting bank cannot be held liable to the owner of the check for negligence in accepting payment of the proceeds of the check by the draft of the drawee bank on another bank, and in failing to require that payment shall be made in money. There is no error in the judgment. It is

Affirmed.

HENRY C. BERGER v. S. M. STEVENS, ABNER R. ARNOLD, THE FINANCE COMPANY, FRANK A. BARBER, L. B. JACKSON, R. G. SCRUGGS AND HAYDEN GRINDSTAFF.

(Filed 22 May, 1929.)

1. Aliens A a—Alien of friendly nation may sue in courts of this State.

A nonresident alien of a friendly nation may invoke the jurisdiction of the courts of this State to maintain his rights of property in the absence of statutory restrictions.

2. Usury C a—Usury must be pleaded.

Usury must be pleaded and the question may not be raised by demurrer.

APPEAL by defendants from *Schenck, J.*, at April Term, 1929, of BUNCOMBE. Affirmed.

The plaintiff in his complaint alleges that he is a citizen and resident of Nice, in the Republic of France. The defendant The Finance Company is a corporation created and doing business under the laws of North Carolina, principal office in Asheville, N. C. The other defendants are citizens and residents of Asheville, N. C.

That on or about 12 October, 1926, at Asheville, the defendants, S. M. Stevens and Abner R. Arnold, made and delivered to the defendant, The Finance Company, their three promissory notes in writing, dated on that day, each for the sum of six thousand and forty-two and 50/100 dollars ($6,042.50), wherein and whereby they promised to pay said amounts to said The Finance Company or its order, at Asheville, on or before one, two and three years, after date, respectively, with interest from date at the rate of six per cent per annum until paid, interest payable semiannually. Balance purchase money on land.

That The Finance Company, before the maturity of said notes, endorsed and delivered said notes to the defendants Frank A. Barber, L. B. Jackson, R. G. Scruggs and Hayden Grindstaff, for value, and thereafter, and prior to the maturity of said notes, said Frank A. Barber, L. B. Jackson, R. G. Scruggs and Hayden Grindstaff endorsed said notes for a valuable consideration and transferred said notes to the plaintiff Henry C. Berger.

That plaintiff is now the owner and holder of said notes, and no part thereof has been paid, except half of the interest that had accrued thereon to 12 April, 1927. The two notes payable 12 October, 1928, 1929, were protested for nonpayment.

Plaintiff prays judgment: "(1) That he have and recover of the defendants the sum of $18,127.50, with interest on said notes at the rate of six per cent compound semiannually from the date of said notes, subject only to a credit of one-half of the interest on said notes that had accumulated prior to 12 April, 1927; (2) that he recover the sum of $6.40 as protest fees; (3) that he recover his costs herein incurred; (4) that he have such other and further relief as to the court shall seem proper and just."

The defendants demur: (1) For that it appears upon the face of the complaint that the plaintiff has no legal capacity to sue in the courts of this State. (2) For that it appears upon the face of the said complaint that there is a defect of parties defendant to this action. (3) For that it appears upon the face of said complaint that several causes of action have been improperly united or joined herein. (4) For that it appears upon the face of said complaint that the plaintiff seeks to collect compound interest upon an unlawful contract which is void in law. (5) For that it appears upon the face of said complaint that the complaint does not state facts sufficient to constitute a cause of action."

The court below rendered the following judgment: "This matter coming on to be heard before Schenck, Judge, upon the demurrer filed by the defendants, and being heard, the demurrer is overruled."

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

Mark W. Brown for plaintiff.
Joseph W. Little and George W. Craig for defendants.

CLARKSON, J. The major contest of defendants is founded on the allegation in the complaint that the plaintiff is a nonresident alien and is living in Nice, in the Republic of France. The question arises: Can a nonresident alien sue in the courts of this State? We think a resident of any friendly nation can sue.

In 1796 the question arose in this jurisdiction and an English subject was allowed to sue. In a *per curiam* opinion, in *Executors of Cruden v. Neale,* 2 N. C., at p. 344, the following observations are made: "All persons in general, as well foreigners as citizens, may come into this court to recover rights withheld, and to obtain satisfaction for injuries done, unless where they are subject to some disability the law imposes. Foreigners are in general entitled to sue, unless a war exists between

our country and theirs. . . . It is incompatible with a state of national friendship, and is a cause of war, if the citizens of another country are not allowed to sue for and obtain redress of wrongs in our courts."

The law is stated in 2 C. J. (Aliens), p. 1070, part sec. 37, as follows: "It may be laid down, as a general rule, that aliens, except alien enemies, who are *sui juris,* and not otherwise specially disabled by the law of the place where the suit is brought, may there maintain suits in the proper courts to vindicate their rights and redress their wrongs. This right is not affected by the fact that a similar remedy is not afforded to aliens in the country to which plaintiff belongs. The right of an alien to sue is a matter of comity as distinguished from a matter of right, and, while the courts will not ordinarily deny the right in the absence of positive legislation taking it away, they should not permit the privilege to be exercised so as to work injury to the interests of citizens of the state."

1 R. C. L. (Aliens), p. 824, sec. 35, and part 36: "It seems to have been the rule of the early common law that an alien could not maintain real or mixed actions. The reason given was that the maintenance of real actions was not necessary for the encouragement of commerce as in case of personal actions, and that an alien should not be allowed to bring an action to recover property that he could not hold against the state. But the old common-law rule has long since been changed. If an alien may take and hold real estate against every person, he surely may maintain an action to recover its possession from those who wrongfully withhold it from him. If it is the property of the alien as against everybody but the government, he has the right to the use of it; and if necessary to prosecute for it, surely the right to prosecute is necessarily consequent upon the right to its enjoyment. And such is the law at the present time, unless changed by statute. (Sec. 36) As to personal actions, arising or recognized within the jurisdiction, an alien friend, either resident or nonresident, may maintain suit in the courts without any special statutory authority; such was the rule of the early common law, and such is the rule today." See *Krachanake v. Manufacturing Co.*, 175 N. C., 435.

We have no statute in this State prohibiting aliens from instituting an action in the courts of this State.

"The policy of the United States in all cases of complaint made by foreigners is to extend to them the same means of redress as is enjoyed by our own citizens. . . . In the courts of the United States alien friends are entitled to claim the same protection of their rights as citizens." Moore's International Law Digest, Vol. 4, sec. 536, p. 7. *Van Kempen v. Latham,* 195 N. C., at p. 394.

In *Hinton v. Hinton,* 196 N. C., p. 341, it was held in this jurisdiction that an alien was not qualified to act as a juror for as such he was an integral part of the due administration of the law.

It is a matter of common knowledge that the French, and especially the French Huguenots in America, at the breaking out of the Revolutionary War, to a man, joined the American cause. There were no Tories among them. Some of the best fighters, generals and others, were French or of French descent. France came to our rescue during the Revolution and helped us win our independence. It is a disputed fact, but worth preserving, that Gen. John J. Pershing, head of the American Expeditionary Forces during the World War, stood at LaFayette's tomb and said "LaFayette, we are here." The debt we owed to France was not and should never be forgotten. France has always been and is now a friendly nation. We can see no reason why one of her citizens cannot sue in the courts of this State, although a nonresident.

As to the interest proposition, if usury, it must be pleaded. 27 R. C. L. (Usury), sec. 70. The demurrer cannot be sustained.

The other causes of demurrer cannot be sustained. C. S., 507. *Taylor v. Ins. Co.,* 182 N. C., at p. 122. The judgment below is

Affirmed.

G. W. JUSTICE, FRED McBRAYER AND J. FOY JUSTICE, TRUSTEE, v. W. M. SHERARD, R. P. FREEZE AND F. A. BLY.

(Filed 22 May, 1929.)

1. Pleadings D a—Demurrer will not be sustained if cause of action is sufficiently alleged.

A demurrer to a pleading on the ground that the complaint does not state a cause of action will not be sustained if its allegations are sufficient to state a good cause, and facts establishing its insufficiency may not be pleaded in the demurrer.

2. Same—In this case held complaint alleged good cause of action.

Where the complaint alleges that a partner purchased a certain tract of land for the partnership, but in his own name for the convenience of the partnership, and the deed is taken in the name of the partner and the mortgage and notes for the purchase price are executed by him, a demurrer by the other partners on the ground that a cause of action is not stated by them is bad, since it may be shown that the transaction was a partnership undertaking and that the partnership was liable.

3. Pleadings D c—Defenses may not be pleaded in demurrer.

Where the complaint alleges that a written contract in the name of one partner was in fact for the benefit of them all and a partnership act, and so recognized by them all, a demurrer on the grounds that it fell within

the meaning of the statute of frauds as being a promise to answer for the debt or default of another, or that the defendants were estopped by the written contract from showing parol matters contrary to its terms, is bad as a "speaking demurrer" and is properly overruled.

4. Partnership D a—Where one partner executes obligation it may be shown that it was a partnership act.

Where a partnership executes a contract to purchase a certain tract of land, and the agreement is executed in the name of one of the partners for the firm as a matter of convenience, and the deed made to him upon his execution of a mortgage and notes for the purchase price, it may be shown that the transaction was a partnership act and that the partnership was liable thereon.

APPEAL by defendants, R. P. Freeze and F. A. Bly, from *Schenck, J.*, at Chambers, in Hendersonville, 8 December, 1928. From HENDERSON. Affirmed.

The allegations of the complaint are to the effect that these defendants, together with the other defendant, W. M. Sherard, were conducting a real estate business in Henderson County, under the style of Bly, Freeze & Sherard, and as a part of said business were buying and selling lands; that on 26 September, 1925, the plaintiffs, G. W. Justice and Fred McBrayer, and defendants entered into a contract for the purchase by defendants of the lands described in the complaint that was executed by the defendants in their firm name; that the contract was consummated on 5 January, 1926, the defendants paying the cash payment, and at the request of all of the defendants the deed was executed by the plaintiffs to the defendant, W. M. Sherard, and that on said date the defendant, W. M. Sherard, executed the notes sued on, and also executed a deed of trust to the plaintiff, J. Foy Justice, trustee, on the lands purchased, to secure said notes; that thereafter said partnership made a payment of $150 on the first note due; that the appealing defendants were active in the purchase of said land and that at the time the notes and deed of trust were executed they represented that the land was being bought for the partnership; that the payment of the purchase price was a partnership obligation, but that as a matter of convenience in conveying the property, which the partnership was purchasing, the deeds were being taken in the name of defendant, Sherard, and that the notes and deed of trust were being executed by the defendant, Sherard, only as a matter of convenience; that the partnership was liable for the payment of the purchase price and that the notes and deed of trust were accepted by the plaintiffs, G. W. Justice and Fred McBrayer, with the distinct understanding and agreement that they were the obligation of the partnership and that all of the partners were liable thereon.

The defendants demurred to the allegations of the complaint on the following grounds:

"1. That the execution and delivery of the deed by the plaintiffs, Fred McBrayer and G. W. Justice, to W. M. Sherard, and the acceptance by said plaintiffs of the notes and deed in trust referred to in the complaint executed only by W. M. Sherard constitutes a written agreement between said G. W. Justice and Fred McBrayer and the defendant, W. M. Sherard, separate and apart and in lieu of the original written contract between said plaintiffs and the firm of Bly, Freeze & Sherard; and the said plaintiffs having accepted satisfaction of the original written agreement by conveying the land to E. M. Sherard and receiving his notes and deed in trust as representing the balance of the purchase price, are now estopped as a matter of law and have waived their legal right, if any they have, arising out of the original contract.

"2. That the alleged contract between G. W. Justice, Fred McBrayer and R. P. Freeze and F. A. Bly, was a promise to answer for the debt or default of W. M. Sherard, and was not in writing as required by the statute of frauds."

The court below rendered the following judgment: "This cause coming on to be heard before the undersigned, Michael Schenck, resident judge, and judge holding the courts of the Eighteenth Judicial District, at Chambers, in Hendersonville, North Carolina, on this, 8 December, 1928, upon the demurrer of R. P. Freeze and F. A. Bly, two of the defendants above named, both parties being represented by counsel, and the court being of the opinion that the demurrer should not be sustained: It is therefore ordered, adjudged and decreed, that said demurrer be, and the same is hereby overruled."

The defendants duly excepted, assigned error and appealed to the Supreme Court.

Shipman & Arledge for plaintiff.

Ray & Redden, Ewbank, Whitmire & Weeks for defendants.

CLARKSON, J. In *Pittsburgh Plate Glass Co. v. Hotel Corporation et al., ante,* at p. 12, the following principle is laid down and now reiterated: "A demurrer goes to the heart of a pleading and challenges the right of the pleader to maintain his position in any view of the matter, admitting, for the purpose, the truth of the allegations of fact contained therein," citing authorities.

In *Brick Co. v. Gentry,* 191 N. C., at p. 642, it is said: "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," citing authorities.

On demurrer we cannot anticipate what the answer will set forth and the law arising on all the facts relevant to the issues; we look only to the language and allegations of the complaint. On the present record a cause of action is alleged.

In *Poole v. Lewis,* 75 N. C., at p. 423, it is said: "If a vendor sells goods to a firm, and chooses to take the obligation of the purchasing parties, and waives his right to hold the firm liable, he may do so. But in such case it is necessary for the firm to prove that the vendor knew that the party was a member of the firm, and elected to give credit to the purchasing parties alone—in other words, to take the less instead of the greater security to which he was entitled." *Thornton v. Lambeth,* 103 N. C., 86; see *Supply Co. v. Windley,* 176 N. C., 18.

20 R. C. L., at p. 941 (Partnership), sec. 161, in part, is as follows: "Where a note or bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only as collateral security, according to the nature of the transaction and circumstances attending it." See 20 R. C. L., p. 859, sec. 66.

The defendants present in their demurrer and brief questions that we do not now consider. The judgment of the court below is

Affirmed.

MRS. ELLIE ALEXANDER SPRINGS v. MARY MATTHEWS DOLL.

(Filed 22 May, 1929.)

1. Negligence A b—Question of whether doctrine of res ipsa loquitur applies is one of law.

The question of whether the doctrine of *res ipsa loquitur* applies to a given state of facts is one of law for the court, and when facts upon which the doctrine applies are established the reasonableness of defendant's explanation is for the jury. The principles upon which this doctrine rests discussed by BROGDEN, J.

2. Same—Doctrine of res ipsa loquitur does not apply in this case involving injury from skidding automobile.

Upon evidence tending to show that the plaintiff as an invited guest was riding in the defendant's car with the defendant driving, and that the latter was forced from the highway by a truck negligently driven thereon,

causing her car to skid on the wet road, which resulted in the injury in suit, the doctrine of *res ipsa loquitur* does not apply, and the jury's verdict that the defendant was not guilty of negligence is upheld under the facts of this case.

CIVIL ACTION, before *Harding, J.*, at October Term, 1928, of MECKLENBURG.

On 17 January, 1928, the plaintiff was invited by the defendant to ride in her automobile from Lincolnton to Charlotte. The defendant was driving the car and the plaintiff was seated in the back seat. After proceeding some distance rain began to fall and the road became a little wet. A large moving van was approaching the defendant and was traveling in the middle of the road with the front wheels on the white center line on the pavement and the body of the truck protruding beyond the center of the road.

The defendant testified: "I pulled to the extreme right of the road to avoid hitting the truck, and in doing that my front wheels left the paving and in coming back, trying to straighten myself in the road, my car skidded and I put on my brakes, and my car turned and went up an embankment and turned over."

Plaintiff testified: "We saw a truck coming. She moved over just a little to let the truck pass and after it passed she seemed to have lost control of her car. The car began jumping and pitching and started up an embankment and turned back and then turned over. . . . As to how high the embankment was I might say it was eight feet. I didn't take special notice of that. . . . I was not paying any attention to the speed. I have ridden with Miss Doll several times. . . . I said I had no criticism to make at all as I am no judge of driving."

There was evidence relating to serious injury sustained by the plaintiff.

Issues of negligence, contributory negligence and damages were submitted to the jury, and the first issue as to negligence of the defendant was answered in the negative.

From judgment upon the verdict the plaintiff appealed.

John M. Robinson and Hunter M. Jones for plaintiff.
C. H. Gover for defendant.

BROGDEN, J. Does the principle of *res ipsa loquitur* apply to the skidding of an automobile resulting in injury to a passenger?

The principle of *res ipsa loquitur* has been frequently stated in various decisions of this Court and of other courts, and therefore requires no restatement or elaboration. There are, however, certain well estab-

lished exceptions or limitations to the application of the rule. The most important of these exceptions or limitations may be classified as follows:

(1) The apparatus must be such that in the ordinary instances no injurious operation is to be expected, unless from a careless construction, inspection or user; (2) both inspection and user must have been, at the time of the injury, in the control of the party charged; (3) the injurious occurrences must have happened irrespective of any voluntary action at the time by the party injured. *Stewart v. Carpet Co.*, 138 N. C., 60, 50 S. E., 562.

The principle does not apply: (1) when all the facts causing the accident are known and testified to by the witnesses at the trial, *Baldwin v. Smitherman*, 171 N. C., 772, 88 S. E., 854; *Orr v. Rumbough*, 172 N. C., 754, 90 S. E., 911; *Enloe v. R. R.*, 179 N. C., 83, 101 S. E., 556; (2) where more than one inference can be drawn from the evidence as to the cause of the injury, *Lamb v. Boyles*, 192 N. C., 542, 135 S. E., 464; (3) where the existence of negligent default is not the more reasonable probability, and where the proof of the occurrence, without more, leaves the matter resting only in conjecture, *Dail v. Taylor*, 151 N. C., 284, 66 S. E., 135; (4) where it appears that the accident was due to a cause beyond the control of the defendant, such as the act of God or the wrongful or tortious act of a stranger, *Heffter v. Northern States Power Co.*, 217 N. W., 102, 25 A. L. R., 713, note 2; (5) when the instrumentality causing the injury is not under the exclusive control or management of the defendant, *Saunders v. R. R.*, 185 N. C., 289, 117 S. E., 4; (6) where the injury results from accident as defined and contemplated by law.

In the case at bar it does not appear that there was any defect in the automobile or that it was operated at an excessive rate of speed or in any other negligent or careless manner. Therefore, the mere skidding of the automobile, causing it to run upon the embankment and turn over, is the sole basis of the claim of the plaintiff.

The general rule is stated in Huddy on Automobiles (7 ed.), sec. 373, as follows: "The mere fact of the skidding of a car is not of itself such evidence of negligence as to render the owner liable for an injury in consequence thereof." This proposition of law is amply supported by the authorities cited. Thus in *Linden v. Miller*, 177 N. W., 909, the Court said: "Skidding may occur without fault, and when it does occur it may likewise continue without fault for a considerable space and time. It means partial or complete loss of control of the car under circumstances not really implying negligence. Hence plaintiff's claim that the doctrine of *res ipsa loquitur* applies to the present situation is not well founded. In order to make the doctrine of *res ipsa loquitur* apply, it must be held that skidding itself implies negligence. This it does not

do. It is a well known physical fact that cars may skid on greasy or slippery roads without fault either on account of the manner of handling the car or on account of its being there." *Williams v. Holbrook,* 103 N. E., 633, 5 A. L. R., 1240; 12 A. L. R., 688; *Bartlett v. Town Taxi Co.,* 160 N. E., 797.

It cannot be reasonably contended that the loss of control of an automobile by the driver thereof is, under all circumstances, sufficient evidence of negligence to carry the case to the jury. His control is limited by the condition of the pavement and by the negligence and unexpected acts and conduct of other drivers of vehicles. Moreover, all the facts are known and testified to by the witnesses, and all sources of information were as accessible to the plaintiff as to the defendant.

Indeed, some courts have held that the doctrine of *res ipsa loquitur* is to be used sparingly and to be invoked only when the facts and the demands of justice make its application essential. *Heffter v. Northern States Power Co., supra; Riggsby v. Tritton,* 129 S. E., 493.

We do not hold that the principle of *res ipsa loquitur* does not apply to any given state of facts involving injuries flowing from the use of automobiles, but we do hold that the principle is not applicable to the facts disclosed by this record. Upon admitted or proven facts the question as to whether the principle applies is a question of law for the court in the first instance; but, if upon such facts, the principle is applicable, the reasonableness of the explanation made by the defendant is for the jury.

No error.

LEANNA STALEY v. LUZINA LOWE.

(Filed 22 May, 1929.)

1. Executors and Administrators D a—In this case held evidence of express promise to pay for services rendered deceased insufficient.

Evidence that the deceased's mother had told the witness, her son, in plaintiff's absence, that "whoever waited on her should have all that she had" is too vague and indefinite to constitute an express contract to pay her daughter for services rendered, and the daughter may not recover thereon, after her mother's death, against the administratrix.

2. Same—Child living with mother as family may not recover on implied promise to pay for services rendered deceased.

An adult child living with her mother as a part of the family, and rendering services to her cannot after her mother's death recover their value upon a *quantum meruit,* it being assumed that the services were rendered gratuitously in the absence of evidence to the contrary, and the mere ren-

dition of the services is insufficient evidence of an expectation of payment on one hand and the intention to pay on the other, and the mere moving from the old family home to a new home without evidence of a change in the relationship is insufficient to change this result, and defendant's motion as of nonsuit is properly granted.

CIVIL ACTION, before *Townsend, J.*, at March Term, 1928, of RANDOLPH.

The plaintiff is a daughter of Martha Staley, who died intestate on or about 6 February, 1923. The defendant is also a daughter of the deceased.

The deceased lived at the home place after the death of her husband, although it seems no dower had been allotted to her and by common consent she was occupying the entire plantation. About the year 1919 the plaintiff and her sister, who were unmarried and who had previously been living with the deceased, bought a tract of land and moved to their own property and took their mother with them to their new home. The evidence discloses that the mother and two daughters lived together in the same house until the death of the mother. Upon the death of the mother, plaintiff instituted an action against the defendant on 23 April, 1925, to recover for services rendered her mother, Martha Staley. The defendant resisted the action upon the ground that there was no express contract and that the plaintiff could not recover on *quantum meruit* for the reason that the mother and daughters lived together as one family.

Two issues were submitted to the jury, as follows:

"1. What amount, if any, is defendant indebted to plaintiff?

"2. Is plaintiff's cause of action barred by the three-year statute of limitations?"

The jury answered the first issue, "$1,000," and the second issue, by direction of the court, "Yes, except nine months and sixteen days."

From judgment upon the verdict the defendant appealed.

No counsel for plaintiff.

J. A. Spence for defendant.

BROGDEN, J. The plaintiff bases her cause of action upon two theories:

1. That there was an express contract between the plaintiff and the deceased to pay for services rendered.

2. That if there was no express contract, the law implied a promise by the deceased to pay the reasonable worth of the services rendered by the plaintiff and accepted by the deceased.

The only evidence relied upon to establish an express contract was the following statement by a brother of the plaintiff: "Martha Staley

said whoever waited on her should have all that she had. I heard her make that statement before and after going to the Smith place." It does not appear from the evidence that the plaintiff was present when these conversations took place, or that they were communicated to her by her brother. Moreover, the statement itself was too vague, uncertain and indefinite to constitute a contract. *Brown v. Williams,* 196 N. C., 247.

Upon the second theory involving *quantum meruit,* the law is thus stated in *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540: "It is equally well established that when a child resides with a parent as a member of the family or with one who stands to the child in *loco parentis,* services rendered under such circumstances by the child for the parent are, without more, presumed to be gratuitous and no promise will be implied and no recovery can be had without proof of an express and valid promise to pay, or facts from which a valid promise to pay can be reasonably inferred. This last position is usually considered as an exception to the general rule, and in this and most other jurisdictions obtains both as to adult and minor children. Wherever the same has been applied, however, to claims by adult children so far as we can discover, it has been made to depend not alone on the fact of kinship in blood, but also on the fact that the adult child has continued to reside with the parent as a member of the family."

In the case at bar the plaintiff and her mother lived together as one family at the old home place. The plaintiff purchased a new home and the family moved away from the old home to the new home. We see nothing in the evidence to indicate there was any break in the family unity except the mere fact of moving together from one place to another. Furthermore, there is no evidence in the record tending to show that the services were rendered in expectation of payment or that deceased intended to make payment, except perhaps the mere fact of the rendition of services. There is no decision in this jurisdiction where such family relationship exists holding that the mere rendition of services, without more, is sufficient evidence of an expectation of payment on one hand and the intention to pay on the other. *Winkler v. Killian,* 141 N. C., 575, 54 S. E., 540; *Dorsett v. Dorsett,* 183 N. C., 354, 111 S. E., 541; *Ellis v. Cox,* 176 N. C., 616, 97 S. E., 468.

We therefore hold that the motion for nonsuit should have been allowed.

Reversed.

C. J. POOLE v. L. M. RUSSELL, D. T. RUSSELL, A. R. BOATWRIGHT, AND DORIS RUSSELL BOATWRIGHT.

(Filed 22 May, 1929.)

Evidence D a—Evidence as to identification of boundaries by parties held in this case to be inadmissible as a transaction with decedent.

Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication between the witness and a deceased person prohibited by C. S., 1795, and its exclusion on the trial is not error.

APPEAL by defendants from *Oglesby, J.*, at September Term, 1928, of MONTGOMERY. No error.

Action to recover land in which judgment was rendered for the plaintiff upon the following verdict: "Is the plaintiff the owner and entitled to the possession of the land described by the lines B, C, F, E? Answer: Yes."

Brittain, Brittain & Brittain for plaintiff.
R. T. Poole for defendants.

ADAMS, J. The plaintiff brought suit to recover a small strip of land represented on the plat by the letters B, C, F, E. It was admitted that he and the defendants derived whatever title they have from W. B. Beaman as a common source. The two decisive questions were whether the boundaries in the plaintiff's deed include the land in controversy, and if they do, whether the plaintiff's title was barred by the adverse possession of the defendants. Both questions were resolved in favor of the plaintiff and from the judgment awarded the defendants appealed.

We have considered the exceptions and find that only one requires special comment. W. B. Beaman and his wife conveyed a town lot to Mrs. Russell on 13 February, 1904. L. M. Russell, her husband, was introduced as a witness for the defendants and was asked this question: "State if on the survey made 11 February, 1904, you saw the corner established by driving down iron stakes at the corner?"

The defendants proposed to prove that on 11 February, 1904, an actual survey was made of the lot conveyed to Mrs. D. T. Russell, and that iron stakes were driven down at the points E and F on the plat by W. B. Beaman and the surveyor; that corners were established and that the witness saw Beaman drive the stakes down. Upon the plaintiff's objection the proposed evidence was excluded and the defendants excepted.

One of the rules adopted for settling questions relating to the boundary of lands is thus stated in *Cherry v. Slade,* 7 N. C., 82: "Whenever it can be proved that there was a line actually run by the surveyor, was marked and a corner made, the party claiming under the patent or deed shall hold accordingly, notwithstanding a mistaken description of the land in the patent or deed." This statement is somewhat clarified in *Clarke v. Aldridge,* 162 N. C., 326: "It has long been held for law in this State that when parties, with a view of making a deed, go upon land and make a physical survey of the same, giving it a boundary which is actually run and marked, and the deed is thereupon made, intending to convey the land which they have surveyed, such land will pass, certainly as between parties or voluntary claimants who hold in privity, though a different and erroneous description may appear on the face of the deed. This is regarded as an exception to the rule, otherwise universally prevailing, that in case of written deeds the land must pass according to the written description as it appears in the instrument (*Reed v. Schenck,* 13 N. C., 415); but it is an exception so long recognized by us that it must be accepted as an established principle in our law of boundary." See *Watford v. Pierce,* 188 N. C., 430.

In asking the excluded question the appellants sought to apply this rule. The appellee's assigned ground of objection was that by virtue of C. S., 1795, the proposed testimony was inadmissible. This section provides that a party or a person interested in the event of an action shall not be examined as a witness in his own behalf or interest against a person deriving his title or interest from, through, or under a deceased person concerning a personal transaction or communication between the witness and the deceased person except under certain conditions which do not exist in this case. The appellants offered to show that certain corners and lines had been established by Beaman and Russell at the time of the survey in 1904, although the distances called for in the deed to Mrs. Russell did not extend to these intended boundaries. Beaman is dead; from him the plaintiff derived his title. Russell is a party to the action and interested in the event. The proposed testimony was therefore incompetent if it discloses a communication or transaction between Russell and Beaman. Does it reveal a communication or personal transaction or a substantive and independent fact? If it contained nothing more than what the witness saw there might be some reason for regarding it as an independent fact. *McCall v. Wilson,* 101 N. C., 598; *Lane v. Rogers,* 113 N. C., 171. But when the survey was made Beaman and Russell (Russell representing his wife) were engaged in fixing boundary lines as preliminary to the execution of the deed, and the location of the boundaries was as much a part of the contract as the execution of the deed two days afterwards. Testimony that

Beaman set the stakes at certain corners would in effect have been equivalent to testimony that the corners had been established by Beaman's consent at points beyond the calls in the deed. It is in this sense that an attempt to show that corners had been fixed by the parties beyond the distances set forth in the deed would have introduced the element of a communication or personal transaction between Russell and Beaman, making the proposed testimony incompetent. It may be noted that in *Clarke v. Aldridge, supra,* there is a strong intimation that an agreement of this character would not be binding upon purchasers for value without notice. There was no error in excluding the proposed evidence.

The remaining exceptions call for no discussion.

No error.

STATE v. EDGAR BARBEE, ALIAS BUDDIE BARBEE, CHARLES FAIRCLOTH, ORLEY O. SCURLOCK, J. W. GARVIN AND O. S. IVEY.

(Filed 22 May, 1929.)

Receiving Stolen Goods D c—Verdict in this case held fatally defective.

Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a *venire de novo* will be ordered on appeal.

APPEAL by defendant, E. B. Barbee, from *Sink, Special Judge,* at September Term, 1928, of RANDOLPH.

Criminal prosecution tried upon an indictment charging the defendant, E. B. Barbee, and others, (1) with the larceny of a Chevrolet roadster, valued at $564, the property of Johnson Chevrolet Company, and (2) with receiving said Chevrolet roadster, valued at $565, the property of Johnson Chevrolet Company, knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: "Not guilty as to John Garvin. Verdict as to Charlie Faircloth, E. B. Barbee and Odell Scurlock, guilty of having car in their possession knowing it to be stolen." (As shown by return to writ of *certiorari,* but not appearing in original record.)

Judgment: Imprisonment in the State's prison as to each of the defendants convicted for not less than five nor more than ten years at hard labor.

The defendant, E. B. Barbee, alone appeals, assigning errors.

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

George A. Younce and Walter E. Brock for defendant, Barbee.

STACY, C. J. The defendants, other than Garvin, admitted that the car in question was found by the officers in their possession, but they denied having received it, knowing at the time that it had been feloniously stolen or taken. C. S., 4250. They offered evidence tending to show that a man by the name of Brooks or Yow came along driving the Chevrolet roadster, picked up the defendants, carried them in the direction of Sanford and on towards Fayetteville, and somewhere near the latter place, the said driver left the automobile, and went off; whereupon the defendants drove the car to the home of the defendant, Garvin, where it was found.

The State contended that Brooks or Yow was but an imaginary person or a mere man of straw, and that the defendants alone were responsible for the larceny of the automobile.

Viewed in the light of the evidence and the charge of the court, the verdict would seem to be defective or insufficient to support a judgment, as it is not responsive to the indictment. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621; *S. v. Whitaker,* 89 N. C., 472. See, also, *S. v. Gregory,* 153 N. C., 646, 69 S. E., 674, and *S. v. Parker,* 152 N. C., 790, 67 S. E., 35. It is not found that the defendants *received* the car in question knowing at the time that the same had been feloniously stolen or taken. *S. v. Dail,* 191 N. C., 231, 131 S. E., 573; *S. v. Caveness,* 78 N. C., 484. Nor was the jury instructed that such a finding would be necessary before the defendants could be convicted on the second count. *S. v. Caveness, supra.*

On the record as it now appears, the appealing defendant is entitled to a *venire de novo;* and it is so ordered.

Venire de novo.

WILLIAMS-FULGHUM LUMBER COMPANY v. I. M. WELCH.

(Filed 22 May, 1929.)

1. Pleadings E a—Allegations of counterclaim deemed denied when not served on plaintiff.

Public Laws of 1924, ch. 18, providing that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff or his attorney, is not referred to in Public Laws of 1927, ch. 66, and construing the two acts together there is no repugnancy between them so as to repeal by implication the former law on the subject.

2. Statutes C b—Repeal of statute by implication is not favored.

Repeals of statutes by implication or construction are not favored by the courts, and for a later statute to repeal a former one the repugnancy between them must be clear, and then the repeal will operate only to the extent of the repugnancy.

3. Judgments D a—Judgment by default on counterclaim properly set aside in this case.

It is proper for the judge of the Superior Court to set aside a judgment by default on defendant's counterclaim under the provisions of Public Laws of 1924, ch. 18, when the plaintiff, or his attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made.

APPEAL by defendant from *McElroy, J.*, at December Term, 1928, of BUNCOMBE.

Civil action wherein plaintiff seeks to recover for breach of contract in connection with the sale of a certain quantity of lumber. Summons issued and complaint filed 25 November, 1927. Defendant answered 10 December, 1927, denied liability and set up a counterclaim for $3,600.

The answer of the defendant, containing said counterclaim, was not served upon the plaintiff, and no answer, demurrer, or reply denying the same, was filed by the plaintiff; whereupon, on 26 March, 1928, judgment by default and inquiry was entered against the plaintiff and in favor of the defendant on said counterclaim.

Thereafter, 21 December, 1928, on motion of plaintiff, said judgment by default and inquiry was set aside on the ground that no copy of the answer, containing the counterclaim, was ever served on the plaintiff or its attorney.

From this order, vacating the default judgment, the defendant appeals, assigning error.

Wells, Blackstock & Taylor for plaintiff.

Hoyle & Rudisill, W. A. Sullivan and J. M. Horner, Jr., for defendant.

STACY, C. J. It is provided by chapter 18, Public Laws, Extra Session, 1924, among other things, that "if a counterclaim is pleaded against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served upon the plaintiff or plaintiffs or his or their attorneys of record, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same." Clearly, under this provision of the law, the trial court was correct in setting aside the judgment entered by default and inquiry on the defendant's counterclaim.

But it is contended on behalf of the defendant that chapter 18, Public Laws, Extra Session, 1924, was repealed by chapter 66, Public Laws, 1927, for in the latter act it is provided that "The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith."

The 1924 act deals exclusively with counterclaims, while no specific reference is made to counterclaims in the 1927 act. Hence it could hardly be said that a repeal was intended by the Legislature or that such has resulted by operation of law. *S. v. Perkins,* 141 N. C., 797, 53 S. E., 735. Repeals by implication are not favored by the law, and it is the policy of the courts to avoid such construction unless the repugnancy between a subsequent act and one of prior date be irreconcilable. *Bunch v. Commissioners,* 159 N. C., 335, 74 S. E., 1048. "Repeals by implication or construction are not favored, and for such a repeal to take effect, the repugnancy between the latter statute and one of earlier date must be clear, and only then will the repeal operate to the extent of such repugnancy." *Waters v. Commissioners,* 186 N. C., 719, 120 S. E., 450. To like effect is the decision in *Litchfield v. Roper,* 192 N. C., 202, 134 S. E., 651.

No such irreconcilable conflict exists between the two statutes now under consideration. Hence, it would appear, from a proper construction of both statutes, that unless a copy of the answer containing a counterclaim, is served on the plaintiff or his attorney, the allegations going to make up the counterclaim are to be considered and dealt with as denied.

It follows, therefore, that the defendant has no just cause for complaint at the action of the trial court in allowing the motion of the plaintiff to strike out the judgment entered by default and inquiry on his counterclaim.

Affirmed.

WHITAKER-HOLTSINGER HARDWARE COMPANY ET AL. V. W. T. WHITTEN ET AL.

(Filed 22 May, 1929.)

Abatement and Revival B a—In this case held, present action barred by prior action between same parties nonsuited upon one phase only.

Where the mortgagee brings action to foreclose on his mortgage on the defendant's stock of goods, and thereafter the plaintiffs bring a creditors' bill to recover on their claims and to set aside the mortgage on the grounds of fraud, and the two actions are consolidated, and upon trial it is adjudged that there was no evidence of fraud in procuring the mort-

gage, and upon this phase the action is nonsuited, and it is further adjudged that the balance arising from the sale of the stock, after paying the mortgage, be turned over to a receiver, appointed in the action, for the benefit of the creditors: *Held*, a subsequent creditors' bill, seeking the same relief, is barred by the prior action, the plaintiffs having had their day in court, and being still in court in the other action.

APPEAL by plaintiffs from *McElroy, J.*, at October Term, 1928, of MADISON.

Creditors' bill filed by plaintiffs to recover on their claims against W. T. Whitten and to set aside a mortgage on the defendant's stock of merchandise.

The lien in question was a purchase-money mortgage given by Whitten to W. C. Fowler 1 April, 1927, at the time of the purchase of the said stock of merchandise. Default having occurred in the payment of the notes secured by said mortgage, Fowler on 31 December, 1927, instituted suit against Whitten to recover thereon and seized the stock of goods under claim and delivery.

Thereafter, the plaintiffs herein filed a creditors' bill against W. T. Whitten, asked for the appointment of a receiver, joined W. C. Fowler as a party defendant, and assailed the validity of the mortgage held by him, alleging that the same was procured by fraud.

At the May Term, 1928, Madison Superior Court, these two suits, by consent, were consolidated and tried together. As a result of this hearing, it was adjudged that the purchase-money mortgage given by Whitten to Fowler was a valid encumbrance on the stock of goods in question; that the creditors in their suit had offered no evidence of fraud in the procurement of said mortgage, and, to this extent, the same was "nonsuited"; but it was further adjudged, as a result of said hearing, that the balance arising from a sale of the stock of goods, after paying the first encumbrances enumerated therein, should be turned over to the receiver, appointed in said action, for the benefit of the creditors of W. T. Whitten.

This judgment was held to be a bar to the present action, instituted 3 August, 1928, as a second creditors' bill and again attacking the validity of the Fowler mortgage. Plaintiffs appeal, assigning errors.

C. B. Mashburn and Thomas S. Rollins for plaintiffs.

Guy V. Roberts and John H. McElroy for defendants, Fowler and Gudger.

STACY, C. J., after stating the case: It is apparent from the record that the first creditors' bill was "nonsuited" only so far as it assailed the validity of the purchase-money mortgage given by Whitten to Fowler, and this upon the ground that no evidence had been offered to support the

allegation of fraud. Hence, the trial court properly held that the judgment entered in the consolidated action tried at the May Term, 1928, Madison Superior Court, was a bar to the present suit. The plaintiffs have had their day in court; they are still in court in the other action; they have no just cause for complaint at the action of the trial court in dismissing the present suit. *Morrison v. Lewis, ante,* 79; *Allen v. Salley,* 179 N. C., 147, 101 S. E., 545.

Affirmed.

C. G. MORRIS, TRADING AS C. G. MORRIS & COMPANY, v. D. W. AND W. A. CLEVE, THE NATIONAL BANK OF NEW BERN, AND H. P. WHITEHURST, RECEIVER OF THE BANK OF VANCEBORO.

(Filed 22 May, 1929.)

1. Bills and Notes I d—Endorser paying check is subrogated to rights of payee.

Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of C. S., 446, to determine the liability of the parties.

2. Pleadings A c—Where the Supreme Court upholds judgment sustaining a demurrer trial court has discretionary power to allow amendment.

A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power, in the exercise of his sound discretion, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Superior Court of the certificate showing that the judgment of the Superior Court had been affirmed. C. S., 515.

3. Pleadings D e—Demurrer on ground that cause of action not stated challenges only sufficiency of allegation of complaint.

A demurrer to the complaint on the grounds that it does not state a cause of action does not deal with the merits of the controversy, but only with the sufficiency of its allegations.

4. Pleadings D d—Right to demur for misjoinder is waived by failure to plead in apt time.

Failure to demur to the pleadings upon the ground of misjoinder of parties and causes of action or to take exception thereto on these grounds is a waiver of the right.

5. Bills and Notes I b—Drawer of check is relieved of liability upon payment by drawee bank either in cash or by its check on another bank.

The payee of a check has the right to demand payment by the drawee bank in cash if the drawer has therein a deposit sufficient for payment; and where a bank receives a check in payment of a note and elects to put it in the hands of a Federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency, C. S., 3108, 3167, 3042; and this result is not affected by 3 C. S., 220(aa), providing that a drawee bank may pay a check drawn on it by its check on another bank, unless the face of the check demands payment in cash, when the check is presented for payment by any Federal reserve bank, since the payee bank has the option of presenting the check for payment through the Federal reserve bank or not.

6. Bills and Notes I a—Evidence of acceptance of check by drawee bank held sufficient to be submitted to jury.

Where the evidence is conflicting as to whether a drawee bank accepted the check of a drawer bank, charged it to the account of the drawer bank, and that the charge remained on the books of the drawee bank until the next day, when the drawee bank marked the charge "error" on account of the insolvency of the drawer bank on that day, and returned the check protested, the question of the liability of the drawee bank thereon is properly submitted to the jury, and judgment upon its verdict in favor of the plaintiff will be affirmed on appeal.

APPEAL by defendants, D. W. and W. A. Cleve, and the National Bank of New Bern, from *Moore, Special Judge,* at May Term, 1928, of BEAUFORT. In Cleves's appeal, reversed. In Bank's appeal, no error.

This is an action to recover the sum of $2,000 and interest from 13 December, 1923. The facts alleged in the complaint as constituting plaintiff's cause of action against the defendants are set out in the opinion below.

The action was begun on 23 September, 1923. The defendants named in the summons, which was duly served on each of the said defendants, are the Bank of Washington, the Federal Reserve Bank of Richmond, Virginia, D. W. and W. A. Cleve, the National Bank of New Bern, and H. P. Whitehurst, receiver of the Bank of Vanceboro. In the complaint as orginally filed and as subsequently amended by leave of court, plaintiff prays judgment that upon the facts alleged therein he recover of each and all of the defendants the sum of $2,000, with interest from 13 December, 1923.

At the close of all the evidence, plaintiff submitted to a voluntary nonsuit of the action as to the defendant, the Bank of Washington. Upon its motion for judgment as of nonsuit (C. S., 567), the action

was dismissed as to the defendant, the Federal Reserve Bank of Richmond. Issues involving the liability of these two defendants upon the allegations of the complaint were withdrawn from the jury.

Issues involving the liability of the three remaining defendants were submitted to the jury and answered as follows:

1. Are the defendants, D. W. and W. A. Cleve, indebted to the plaintiff on account of the matters set out in the complaint; if so, in what amount? Answer: Yes, $2,000, and interest from 5 December, 1923.

2. If so, is said cause of action barred by the statute of limitations? Answer: No.

5. Did the National Bank of New Bern wrongfully fail and refuse to pay the check which was sent by Bank of Vanceboro to Federal Reserve Bank and by Federal Reserve Bank sent to said National Bank of New Bern for payment? Answer: Yes.

5½. Is plaintiff's cause of action as to National Bank of New Bern barred by the statute of limitations? Answer: No.

6. In what amount, if any, is National Bank of New Bern indebted to plaintiff on account of matters and things referred to in the fifth issue? Answer: $2,000, and interest.

7. In what amount is defendant, Whitehurst, receiver, indebted to plaintiff? Answer: $2,000, with interest from 5 December, 1923.

Upon the foregoing verdict, it was, on motion of counsel for plaintiff, ordered, considered and adjudged "that plaintiff recover of the defendants $2,000, with interest from 13 December, 1923, together with the costs of this action. The payment of this judgment by the defendants or either of them other than the defendant receiver, will entitle the defendants so paying to recover such dividend as may arise and accrue in the hands of the receiver in favor of the claim of the plaintiff."

From this judgment, both the defendants, D. W. and W. A. Cleve and the National Bank of New Bern, appealed to the Supreme Court.

H. C. Carter and Ward & Grimes for plaintiff.

W. C. Rodman and Guion & Guion for defendants, D. W. and W. A. Cleve.

Henry P. Whitehurst and Ward & Ward for defendant, National Bank of New Bern.

CONNOR, J. The original complaint in this action was filed on 23 September, 1924. The defendants, D. W. and W. A. Cleve, demurred to said complaint, chiefly on the ground that the facts stated therein are not sufficient to constitute a cause of action against them. From judgment sustaining said demurrer, plaintiff appealed to this Court. The judgment was affirmed. *Morris v. Cleve,* 193 N. C., 389, 137 S. E., 162.

It appeared upon the face of the complaint that plaintiff had discounted the note executed by said defendants and payable to his order, for value and before maturity, and that he was not the holder of said note at the date of the commencement of this action. It did not appear from the complaint that plaintiff was or had ever been the holder of the check drawn by the defendants on the Bank of Vanceboro, and payable to the order of the Bank of Washington. Nor did it appear that plaintiff had paid to the Bank of Washington the sum of $2,000, or any other sum, on account of his liability as an endorser on both the check and the note. It was, therefore, held that plaintiff had failed to state in his complaint facts sufficient to constitute a cause of action upon which he was entitled to recover of the defendants, D. W. and W. A. Cleve. Plaintiff was not the real party in interest with respect to the cause of action, if any, alleged in the complaint against the said defendants. He could not, therefore, prosecute the action, upon the allegations of the complaint, for it is expressly provided by statute that every action must be prosecuted by the real party in interest, except as otherwise provided. C. S., 446. Plaintiff was neither the legal nor the equitable owner of any claim against the defendants, founded upon the facts alleged in the complaint; nor was he a trustee of an express trust. *Chapman v. McLawhorn*, 150 N. C., 166, 63 S. E., 721.

The decision of this Court affirming the judgment of the Superior Court of Beaufort County, by which the demurrer to the complaint was sustained, was rendered on 23 March, 1927. The said decision was certified by the clerk of this Court to the clerk of the Superior Court of Beaufort County on the first Monday of April, 1927. C. S., 1417. Rule 38. At the April Term, 1927, of the Superior Court of Beaufort County, which began on 11 April, 1927, plaintiff moved for an order allowing him to amend his complaint. This motion was continued from the April Term to the May Term, 1927, of said court when it was heard by the judge presiding at said May Term. From his order allowing said motion, defendants, D. W. and W. A. Cleve, appealed to this Court. This appeal was dismissed on the ground that it was premature. *Morris v. Cleve*, 194 N. C., 202, 139 S. E., 230. We said that the proper procedure was for the defendants to note an exception to the order, which they insisted was erroneous, and to appeal from the final judgment, if adverse to them. The question as to whether there was error in the order allowing plaintiff to amend his complaint after it had been held that said complaint did not state facts sufficient to constitute a cause of action, is now properly presented to this Court for decision. Upon plaintiff's motion made within ten days after the receipt by the clerk of the Superior Court of Beaufort County of the certificate from the clerk of this Court, showing that the judgment of said court sustaining

the demurrer to the complaint had been affirmed by this Court, the judge had the power, in the exercise of his discretion, to make the order allowing plaintiff to amend his original complaint. It is expressly so provided by statute. C. S., 515. This statute is in aid of an expeditious administration of justice and should be liberally construed and applied to the end that actions pending in the courts of this State to enforce rights alleged to have been violated or to redress wrongs alleged to have been committed, shall be tried on their merits and not dismissed because of defective pleadings. A defendant who has a good defense to an action is not ordinarily prejudiced by an amendment to the complaint therein, whereas a plaintiff may thereby be saved needless delay and useless expense. A demurrer too often serves no other purpose than merely to challenge the skill of the draughtsman of the complaint. When, as in the instant case, the court must, as a matter of law, sustain a demurrer to the complaint, on the ground that the facts stated therein are not sufficient to constitute a cause of action, the court ought to have, and by virtue of this statute, does have the power, in the exercise of its discretion, to permit an amendment to the complaint, and thus to expedite a trial on the merits of the controversy which has become the subject-matter of a civil action. A demurrer does not ordinarily deal with the merits of the controversy; it deals only with the sufficiency of the allegations of the complaint. *Furniture Co. v. R. R.*, 195 N. C., 636, 143 S. E., 242.

There was no error in the order allowing plaintiff to amend his original complaint, after the demurrer of the defendants had been sustained by both the Superior Court and the Supreme Court. Assignments of error based on exceptions by both the appealing defendants to the order, are not sustained.

After the original complaint had been amended by the plaintiff, pursuant to the order of the court, both the appealing defendants demurred *ore tenus* to the complaint as amended, upon the ground that notwithstanding the allegations of the amendment, the facts stated therein are not sufficient to constitute a cause of action, in favor of the plaintiff and against said defendants. In the original complaint it did not appear therefrom that plaintiff was the real party in interest with respect to cause of action alleged therein against the defendant. For this reason the demurrer was sustained. In the amendment to the complaint, it is alleged, in substance, that after the Bank of Washington had been notified that the check drawn by defendants, D. W. and W. A. Cleve, on the Bank of Vanceboro, payable to the order of the Bank of Washington, had not been paid, because the draft drawn by the Bank of Vanceboro, on the National Bank of New Bern, payable to the order of the Federal Reserve Bank of Richmond, had not been paid, the

plaintiff was required by the Bank of Washington, by reason of his liability as endorser of said check, to pay to said Bank of Washington the amount of said check, to wit: $2,000. Upon the facts alleged in the amendment to the complaint, plaintiff was subrogated to the rights of the Bank of Washington against the defendants. Plaintiff has acquired by subrogation the right to enforce the liability of defendants, if any, founded upon the facts alleged in the complaint. *Graham v. Warehouse,* 189 N. C., 533, 127 S. E., 540. It should be noted that neither of the defendants has demurred to the original complaint or to the complaint as amended, on the ground that there was a misjoinder of parties, or of causes of action therein. C. S., 511. If the complaint was subject to demurrer on either of these grounds, the objection has been waived. C. S., 518. Each of the defendants has filed an answer to the complaint.

Assignments of error based on exceptions by both the appealing defendants to the refusal of the court to sustain their separate demurrers *ore tenus,* to the complaint, cannot be sustained. The merits of the controversy between plaintiff and defendants, which is the subject-matter of this action, are presented for trial by the pleadings.

The facts alleged in the complaint, and not denied in the answers of the defendants, and therefore admitted, are as follows:

On 16 October, 1923, the defendants, D. W. and W. A. Cleve, who are residents of Vanceboro in Craven County, North Carolina, for value received, executed their note for the sum of $2,000, payable, sixty days after date, to the order of the plaintiff, who is a resident of Washington, in Beaufort County, North Carolina.

For value and before its maturity, plaintiff, having first endorsed the said note, discounted the same at the Bank of Washington, of Washington, N. C. The amount of said note was credited to the account of plaintiff, with said Bank of Washington. Defendants, D. W. and W. A. Cleve were notified by plaintiff that the Bank of Washington held said note, and that payment of same should be made to said bank, and not to plaintiff.

On 4 December, 1923, defendants, D. W. and W. A. Cleve, having been advised by plaintiff that the Bank of Washington had declined their request to renew said note or a part thereof, at its maturity, drew their check on the Bank of Vanceboro, N. C., for the sum of $2,000, payable to the order of the Bank of Washington, and sent same by mail to plaintiff, with the request that said check be delivered to the Bank of Washington, in payment of said note. When plaintiffs tendered said check to the Bank of Washington, as requested by said defendants, he was required by said bank to endorse the same, because of his liability, as endorser on the note. The check for $2,000, endorsed by plaintiff, was accepted by said bank, in payment of said note, on 6 December,

1923. The note marked "Paid, Bank of Washington," was sent by mail to the defendants, D. W. and W. A. Cleve.

The Bank of Washington, having accepted the check drawn by the defendants, D. W. and W. A. Cleve, on the Bank of Vanceboro, and endorsed by plaintiff, in payment of said note, forwarded the same by mail to the Federal Reserve Bank of Richmond, Virginia, for collection. The Federal Reserve Bank received said check and forwarded same by mail to the Bank of Vanceboro, for payment. The Bank of Vanceboro received said check, and charged same to the account of defendants, D. W. and W. A. Cleve. The said check marked "Paid," was thereafter delivered by the Bank of Vanceboro to said defendants.

On 10 December, 1923, the Bank of Vanceboro drew its check on the National Bank of New Bern of New Bern, N. C., payable to the order of the Federal Reserve Bank of Richmond, and forwarded same by mail to said Federal Reserve Bank in remittance of the proceeds of the check of defendants, D. W. and W. A. Cleve, payable to the order of the Bank of Washington. The Federal Reserve Bank received said check, and forwarded same to the National Bank of New Bern, for payment. The National Bank of New Bern received said check, on 12 December, 1923, and declined to pay same. The said check was protested for nonpayment on 13 December, 1923. On said day the Bank of Vanceboro closed its doors and ceased to do business. It was thereafter duly adjudged insolvent.

The Bank of Washington was advised by the Federal Reserve Bank that the check drawn by defendants, D. W. and W. A. Cleve, and payable to its order, although duly presented for payment, had not been paid. The Bank of Washington thereupon charged the amount of said check, to wit, $2,000, to the account of plaintiff, because of plaintiff's liability as endorser on said check, and also because of his liability as endorser on the note, for the payment of which said check had been delivered to said bank. Plaintiff admitted his liability to the Bank of Washington, and conceded the right of said bank to charge his account with the sum of $2,000, by reason of said liability.

With respect to the liability of defendants, D. W. and W. A. Cleve, to the plaintiff for the sum demanded in this action, there was evidence tending to show not only the facts admitted in the pleadings, as above stated, but also that continuously from the date of their check on the Bank of Vanceboro, payable to the order of the bank of Washington, to the date on which the Bank of Vanceboro closed its doors and ceased to do business because of its insolvency, including the date on which said check was charged to their account, and marked "Paid," by said bank, the said defendants had on deposit with said Bank of Vanceboro,

to their credit, and subject to their check, a sum largely in excess of the amount of said check. There was no evidence to the contrary.

There was evidence also tending to show that continuously from the date of said check to the date on which the said Bank of Vanceboro closed its doors and ceased to do business, because of its insolvency, the said Bank of Vanceboro was open during banking hours, for the transaction of business, receiving deposits and paying checks in the usual course of business; that on the date of its receipt from the Federal Reserve Bank of Richmond of defendants' checks for $2,000, payable to the order of the Bank of Washington, the Bank of Vanceboro had in its vaults, currency and cash, largely in excess of the amount of said check, which was available for its payment; and that in addition to said currency and cash, the said Bank of Vanceboro had at said date to its credit, and subject to its check or draft, in solvent banks, deposits in excess of the amount of said check, which were available for its payment. If payment of said check, in currency or in cash, or by check or draft on some correspondent bank, other than the National Bank of New Bern, had been demanded, on the day of its receipt through the mail from the Federal Reserve Bank, such payment could and would have been made by the Bank of Vanceboro. The books of the Bank of Vanceboro, on the date of its check on the National Bank of New Bern, payable to the order of the Federal Reserve Bank of Richmond, showed that said Bank of Vanceboro had to its credit with the National Bank of New Bern, subject to its check or draft, a sum sufficient for the payment of said check. There was no evidence to the contrary.

For the purpose of deciding the principal question presented for decision by the appeal of the defendants, D. W. and W. A. Cleve, it may be conceded that the check of the Bank of Vanceboro on the National Bank of New Bern, was duly presented for payment, and that upon such presentation the said check was not paid by the National Bank of New Bern. This question is presented by defendants' assignment of error based on their exception to the refusal of the court to allow their motion, at the close of all the evidence, for judgment of nonsuit (C. S., 567), and may be stated as follows: Was the check of the defendants, D. W. and W. A. Cleve, on the Bank of Vanceboro, payable to the order of the Bank of Washington, upon the facts which all the evidence with respect to the liability of these defendants to plaintiff, in this action, tends to show, paid by the Bank of Vanceboro, with the result that said defendants were discharged as drawers of said check, and also as makers of the note executed by them, and held by the Bank of Washington, as a purchaser for value from plaintiff?

If said check was not paid, then the note remains due and unpaid, and defendants are liable not only as drawers of the check, but also as makers of the note. *Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3. The check was accepted by the Bank of Washington in payment of the note, conditionally. There was no evidence of a special agreement by which the Bank of Washington accepted said check in payment of the note, absolutely.

It is well settled as a general rule of law that a check when duly presented for payment, and accepted by the drawee bank, is payable in money. The payee or holder of the check has the right to demand of the drawee bank, when the check is accepted for payment, that payment shall be made in money. If the bank refuses to pay the check in money, the payee or holder may retain possession of the check, and hold the drawer liable for the amount thereof. If, however, the payee or holder accepts from the drawee bank payment in any medium other than money, and surrenders the check, as he may do, he does so at his risk, and not at the risk of the drawer. In such case, the drawer is discharged of liability on the check, just as if payment had been made in money, notwithstanding any loss which the payee or holder may thereafter sustain. The drawer of the check is discharged of liability when the check has been paid, either in money, or otherwise at the option of the payee or holder.

In *Federal Reserve Bank v. Malloy,* 264 U. S., 160, 68 L. Ed., 617, 31 A. L. R., 1261, it is held that the acceptance by a collecting bank, as agent for the payee or holder, of the check or draft of the drawee bank, in payment of the check of the drawer, has the effect of releasing the drawer; the drawer is thereby discharged, for the reason that as between him and the payee or holder his check has been paid. In the opinion in that case, the following quotation from *Anderson v. Gill,* 79 Md., 317, 25 A. L. R., 200, 47 Am. St. Rep., 29, Atl., 527, is approved, as a correct statement of the law:

"Now, a check on a bank or banker is payable in money, and in nothing else. Morse, Banks and Banking (2 ed.), 268. The drawer having funds to his credit with the drawee has a right to assume that the payee will, upon presentation, exact in payment precisely what the check was given for, and that he will not accept, in lieu thereof, something for which it had not been drawn. It is certainly not within his contemplation that the payee should, upon presentation, instead of requiring cash to be paid, accept at the drawer's risk a check of the drawee upon some other bank or banker."

In *City of Douglass v. Federal Reserve Bank of Dallas,* 271 U. S., 489, 70 L. Ed., 1051, it is held that payment of a check sent by a collecting bank to the drawee is effected by its debiting the drawer's

account with its amount, stamping it "Paid," returning it to the drawer, and forwarding its own check to the collecting bank for the amount. Upon the authority of *Malloy v. Federal Reserve Bank, supra,* it is said: "The check was paid, and the drawer and endorsers discharged."

A check is defined in the Uniform Negotiable Instruments Act, which has been enacted by the General Assembly of this State, as "a bill of exchange drawn on a bank payable on demand." C. S., 3167. It is, therefore, an unconditional order in writing, addressed to a bank, signed by the drawer, requiring the bank to which it is addressed, upon its presentation, and upon demand to pay a sum certain in money to the payee, or to his order or to bearer. C. S., 3108. The drawer, by drawing the check engages that on due presentment it will be paid in money, if such payment is demanded by the payee or holder, and that if it be dishonored by nonpayment, and the necessary proceedings on dishonor be duly taken, he will pay the amount of the check to the payee or holder. C. S., 3042. If the check is duly presented and paid by the drawee bank according to its tenor, the drawer is discharged. If the payee or holder waives his right to demand payment in money, and accepts payment from the drawee bank in any medium other than money, he does so at his risk, and not at the risk of the drawer. In the latter case, the drawer is discharged equally as in the former. If the law was otherwise, the drawer of a check could be held liable for the default not only of his drawee, but also of others of whose existence he was ignorant when he drew his check, and delivered it to his creditor.

It is contended, however, that the rule recognized and applied by the Supreme Court of the United States that a check is payable only in money has been changed in this State by statute. Chapter 20, Public Laws 1921.

It has been held that this statute, authorizing in certain instances payment of a check by the check or draft of the drawee bank on another bank, does not violate any of the provisions of the Constitution of the United States. *Farmers & Merchants Bank v. Federal Reserve Bank,* 262 U. S., 649, 67 L. Ed., 1157. In the opinion in that case, in answer to the argument that the statute compels a Federal Reserve Bank to accept in payment of checks, drawn on banks in this State, exchange drafts on reserve deposits, whether good or bad, and, therefore, deprives such bank of its liberty to contract, it is said: "To this argument the answer is clear. The purpose of the statute, as its title declares, was to promote the solvency of banks. We should in the absence of controlling decisions by the highest Court of the State to the contrary, construe the statute not as authorizing payment in a 'bad' draft, but as authorizing payment in such exchange drafts only as had customarily been used in remitting for checks."

When a drawee bank has accepted the check of its depositor, which it has received through the mail, from the payee or holder, or from a collecting bank, and has charged the amount of said check to the depositor's account, the drawee bank becomes the debtor of the payee or holder, or of the collecting bank for the proceeds of the check. *Corp. Com. v. Bank,* 137 N. C., 697, 50 S. E., 308. By accepting the check, and charging its amount to the account of its depositor, the drawee bank has discharged its debt to its depositor, *pro tanto.* It is no longer the debtor of the drawer of the check, for the amount thereof; it has become the debtor of the owner of the check. When the bank in discharge of its liability to the owner of the check, for the amount thereof, remits the proceeds of the collection made by it, to the owner of the check, by its check or draft on another bank, such check or draft is in payment of its debt to such owner, and not in payment of a debt of the bank to the drawer of the check. The check or draft forwarded in payment of its debt, is a conditional payment, only; if such check or draft is not paid, upon due presentment, and is therefore "bad," the bank, as drawer of the check, is liable not only on the check, but also for its debt to the owner of its depositor's check. The well settled principle that in the absence of a special agreement to the contrary acceptance of a check does not operate as payment of a debt, unless the check is paid, is applicable to the exchange check or draft, and not to the check of the depositor, which the bank has accepted and charged to his account. We do not construe the statute as authorizing a bank in this State to pay its debt by a "bad" check or draft. A creditor of the bank who accepts its check or draft in payment of its debt to him, upon nonpayment of such check, may hold the bank liable either on the check, or on the debt. The relationship of debtor and creditor, with respect to the amount of the check, between the bank and its depositor was ended when the bank charged the check to the account of the depositor, the bank at the time having money in its possession sufficient and available for the payment of the check. The depositor's check having been paid, the bank becomes the debtor of the owner of the check, for its amount.

In *Cleve v. Craven Chemical Co.,* 18 Fed. (2d) 711, 52 A. L. R., 980, the United States Circuit Court of Appeals, Fourth District, recognizes the general rule that acceptance of the check or draft of the drawee bank, in payment of a check drawn on such bank, operates as payment of the check, and discharges the drawer of the check from further liability. In the opinion in that case, it is said that "the reason of the rule is that a check is payable only in cash, and if the holder accepts something other than cash, he assumes the risk incident thereto and is estopped

to deny payment as against the drawer." It is held, however, that this rule has been changed by statutes in this State, and that as the drawer of the check did not specify in the face of the check that payment should be made in cash, he must be held by reason of the statute to have impliedly agreed that the drawee bank might pay the check by an exchange draft on reserve deposits, if the check should be presented by or through a Federal Reserve Bank. It is said: "The Reserve Bank could not require payment in any other medium, *Federal Land Bank v. Barrow,* 189 N. C., 303, 127 S. E., 3. The Reserve Bank, therefore, presented a check which, under the law, the Bank of Vanceboro was authorized at its option to treat as an order for an exchange draft. When it exercised this option, and gave an exchange draft pursuant to the order, was such draft payment, when not itself paid? We think not."

Section 2, chapter 20, Public Laws 1921 (3 C. S., 220a(2)), which is the only provision of the statute pertinent to a decision of the question here presented, is as follows:

"In order to prevent accumulation of unnecessary amounts of currency in the vaults of the banks and trust companies chartered by this State, all checks drawn on said banks and trust companies shall unless specified on the face thereof to the contrary by the maker or makers thereof, be payable at the option of the drawee bank, in exchange drawn on the reserve deposits of said bank, when any such check is presented by or through any Federal Reserve Bank, postoffice or express company, or any respective agents thereof."

This statute being in derogation of a general rule of law should be construed strictly. *Price v. Edwards,* 178 N. C., 493, 101 S. E., 33. In the opinion in the cited case, *Walker, J.,* quotes with approval from Black on Interpretation of Laws, page 367, as follows: "It is a rule generally observed (except where prohibited by statute), that acts of the Legislature made in derogation of the common law will not be extended by construction; that is, the Legislature will not be presumed to intend innovations upon the common law, and its enactments will not be extended in directions contrary to the common law, further than indicated by the express terms of the law, or by fair and reasonable implications from its nature or purpose or the language employed."

As said by *Parker, Circuit Judge,* in *Cleve v. Craven Chemical Company, supra:* "The history and purpose of the act, and particularly of this section (section 2, quoted in the opinion) are clearly set forth in the opinion of *Mr. Justice Brandeis* in *Farmers & Merchants Bank v. Federal Reserve Bank, supra.*" The statute was enacted to relieve banks and trust companies, chartered by this State, of embarrassments growing out of the policy theretofore pursued by the Federal Reserve Bank of

Richmond, with respect to the collection by said reserve bank of checks drawn on said banks and trust companies. The statute does not deal with or purport to deal with the rights or liabilities of depositors who in the transaction of their business draw checks on their deposits with said banks and trust companies. Neither their rights nor their liabilities with respect to their checks are affected by the statute. The purpose of the statute, and its only effect, is to confer upon banks and trust companies chartered by this State, the right, in certain instances, to pay checks drawn on them in a medium other than money, and to deprive the payee or holder of such checks of the right to demand payment in money.

When a depositor therein draws his check on a bank or trust company, chartered by this State, and delivers same to the payee, the general rule of law that such check is payable, upon due presentment, in money, or at the option of the payee or holder, in a medium other than money—such payment being at the risk of the payee or holder, and not at the risk of the drawer—is in force in this State. The general rule of law is not changed by the statute, as we construe its provisions. The construction to the contrary in *Cleve v. Craven Chemical Company, supra,* does not seem to us, after full and careful consideration, to be sustained by the authorities, or to be supported on principle.

The payee or holder of a check drawn on a bank or trust company, chartered by this State, may or may not, at his option, cause the check to be presented for payment "by or through a Federal Reserve Bank, postoffice or express company, or any respective agents thereof." If the check is presented for payment, in person, or by an agent for collection other than as prescribed by statute, payment in money may be required; it is only when the check is presented "by or through a Federal Reserve Bank, postoffice or express company, or any respective agent thereof," that payment may be made, at the option of the drawee bank, in exchange drawn on the reserve deposit of said bank. It is true that under the statute, the drawer has the right to specify on the face of the check, that payment shall be made in money, and that in this case, the drawee bank or trust company, must pay in money, in any event. However, the payee or holder has the option to determine the agency by which presentment shall be made. If he selects as his agent for collection a Federal Reserve Bank, he impliedly authorizes such agent to accept in payment the check of the drawee bank on another bank. This he does at his own risk, and not at the risk of the drawer of the check. When the drawee bank has to the credit of the drawer funds sufficient and available for the payment of his check, and accepts and charges the check to the drawer's account, the check is paid, and the drawer is discharged of liability not only on the check, but also for the debt in pay-

ment of which the check was drawn and delivered. *Dewey Bros. v. Margolis,* 195 N. C., 307, 142 S. E., 22; *Quarles v. Taylor,* 195 N. C., 313, 142 S. E., 25.

There was error in the refusal of the court to allow the motion of defendants, D. W. and W. A. Cleve, at the close of all the evidence, that the action as against them be dismissed as of nonsuit. For this error the judgment that plaintiff recover of the defendants, D. W. and W. A. Cleve, the sum of $2,000, and interest, must be reversed.

The facts alleged in the original complaint, as constituting plaintiff's cause of action against the defendant, the National Bank of New Bern, are as follows:

"Sec. 3. That a certain draft drawn by the Bank of Vanceboro, as agents of the defendants, Cleves, and by their consent and intended by it to be in payment of said check, was presented to the defendant, the National Bank of New Bern, on or about 13 December, 1923, and refused payment.

"Sec. 4. That he is informed and believes and alleges that it was the duty of the said National Bank of New Bern to pay said draft at the time it was received, and that its failure to do so was wrongful and unlawful, and directly caused the loss to the plaintiff hereinafter set out."

At May Term, 1928, during the trial of the action, plaintiff was permitted, over the objection of said defendant, to amend paragraph four of his complaint by adding thereto the following:

"It (the National Bank of New Bern) having in fact accepted the same by entering it on the books as a charge against the Bank of Vanceboro, and credited it to the sender, and held it for more than 24 hours thereafter during which it failed and refused to return it accepted or nonaccepted."

There was no error in the order permitting the plaintiff to amend his complaint. The effect of the amendment was to aid a defective statement of a good cause of action alleged in the complaint, and not to allege a new cause of action. Amendments to pleadings are ordinarily within the discretion of the court. C. S., 547. It is said in *Lefler v. Lane,* 170 N. C., 181, 86 S. E., 1022, that under our present system of procedure "the power of amendment has been very broadly conferred and may and ordinarily should be exercised in furtherance of justice, unless the effect is to add a new cause of action or change the subject-matter thereof, and our cases on the subject hold that, when the amendment is germane to the original action, involving substantially the same transaction, and presenting no real departure from the demand as originally stated, it shall, when allowed, have reference by relation to the original institution of the suit." See cases cited by *Hoke, J.*

Defendant, the National Bank of New Bern, filed an answer in which it specifically denied the allegations of the fourth paragraph, as amended. There was conflicting evidence relative to the fifth issue, which involves the questions presented by the pleadings as to the liability of the defendant, the National Bank of New Bern. This evidence was submitted to the jury under instructions which are full, clear and free from error. The evidence for the plaintiff tended to show that when it received the check drawn by the Bank of Vanceboro on it, the National Bank of New Bern charged the same to the account of said Bank of Vanceboro, in due course of business; that said charge remained on the books of the National Bank of New Bern until the next day; and that because of the refusal in the meantime of the National Bank of New Bern to extend further credit to the Bank of Vanceboro, on collaterals in the hands of said National Bank of New Bern, the Bank of Vanceboro closed its doors on the next day. The charge against the Bank of Vanceboro of the amount of its check, was marked "error," on the next day, and its draft was protested. Although there was evidence on behalf of the defendant in contradiction of the evidence of the plaintiff, tending to show that the draft of the Bank of Vanceboro was accepted and paid by the National Bank of New Bern, and that the National Bank of New Bern thus collected the draft and failed to remit the proceeds, the jury found in accordance with the contentions of the plaintiff, as shown by the answer to the fifth issue.

Assignments of error relied upon by the National Bank of New Bern on its appeal to this Court have been carefully considered. They cannot be sustained. The judgment that plaintiff recover of said defendant the sum of $2,000, and interest is affirmed.

The receiver of the Bank of Vanceboro has not appealed from the judgment that plaintiff recover of him the sum of $2,000 and interest. As the jury found that the check of the Bank of Vanceboro on the National Bank of New Bern was paid, and that said bank is now indebted to the plaintiff for the proceeds of said check, it would seem that the judgment against the receiver is not consistent with the judgment against the National Bank of New Bern. This matter is not, however, presented on the record.

Our conclusion is that the judgment against defendants, D. W. and W. A. Cleve must be reversed; and that on the appeal of the defendant, the National Bank of New Bern, there is no error.

Reversed in appeal of D. W. and W. A. Cleve.

No error in appeal of First National Bank of New Bern.

W. L. BROWN v. C. M. SHEETS, W. G. LINDSAY AND ARCHIE ELLEDGE, TRUSTEE.

(Filed 22 May, 1929.)

1. Appeal and Error J c—Findings of fact supported by sufficient evidence will be sustained.

Where the trial court is authorized to find the issuable facts in controversy in lieu of a jury, his findings supported by sufficient legal evidence will be sustained on appeal.

2. Same—Finding that jury trial was waived controlling on appeal in absence of proof to the contrary by appellant.

Where the statute authorizing the establishment of a county court provides that a party waives his right to a jury trial unless he demands it, the finding of the court that a jury trial had been expressly waived by the parties litigant will be controlling on appeal, the presumption being in favor of the correctness of the proceedings with the burden of showing error on the appellant.

3. Mortgages H m—Subsequent purchaser without notice of irregularities in foreclosure sale takes title free from infirmities.

The sale of land under foreclosure of a mortgage or deed of trust is only voidable for failure to advertise for the period of time fixed by law, and the innocent purchaser at the foreclosure sale, without notice of an irregularity, acquires the absolute title which he may convey to another who likewise holds it unaffected by the infirmity, if he has not participated in the fraud or irregularity.

4. Mortgages H p—Mortgagor not entitled to have sale set aside for irregularities as against purchaser for value without notice.

Where lands have been foreclosed under mortgage or deeds of trust and many times resold under the provisions of C. S., 2591, and the owner of the equity of redemption has not protected himself at the sales, he may not have the deed at the final foreclosure sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith.

5. New Trial B g—Newly discovered evidence must not be merely accumulative to entitle movant to new trial.

The party moving for a new trial upon the ground of newly discovered evidence must show to the sound discretion of the trial court, its materiality and competency, and that he was not guilty of laches in not discovering it in time for introduction at the trial, and that the evidence is not merely cumulative and its reception would probably change the verdict as rendered.

APPEAL by plaintiff from *Moore, J.*, at ..... Term, 1929, of FORSYTH. No error.

This action was tried in the County Court of Forsyth County, N. C., before Judge Oscar O. Efird. The following judgment was rendered:

"This cause coming on to be heard, and being heard at 15th October, 1928, Term of the Forsyth County Court, and neither the plaintiff nor the defendants in their pleadings, having asked for jury trial, and both the plaintiff and the defendants having in open court, through their respective counsel, entered of record consented that a jury should be dispensed with, and that the judge of the Forsyth County Court should find the facts in the case, and on such findings of fact should enter a judgment in accordance with law, such agreement being made in the presence of all parties to the action, and both the plaintiff and the defendants having introduced evidence, and having argued the case, thereupon the court makes the following findings of fact, such findings of fact being in addition to the formal admissions made by the parties in open court:

Finding No. 1: The plaintiff, W. L. Brown, through his agent, J. G. Nance, became the last and highest bidder at the foreclosure sale held on 9 September, 1925.

Finding No. 2: Such bid made by the plaintiff, through his agent, J. H. Nance, was made in bad faith, and for the purpose of wrongfully delaying and preventing the foreclosure of the deed of trust, and without intent to comply with the terms of such bid.

Finding No. 3: The sale held on 2 December, 1925, was advertised by the trustee under the order of the clerk of Superior Court dated 20 October, 1925, by the publication of a notice in the *Twin-City Sentinel,* a newspaper published in Forsyth County, on the 18th and on the 25th days of November, 1925, and also by posting such notices at the courthouse door and three other public places in Forsyth County for fifteen days prior to such sale, such notice being in due form, and such notice, both as to form and manner of publication, complying with the terms of the order of resale of the clerk of the Superior Court for Forsyth County, dated 20 October, 1925. The sale on 2 December, 1925, was held on Wednesday, and was the third day of a term of the Superior Court for Forsyth County.

Finding No. 4: C. M. Sheets, one of the defendants, became the purchaser from Mock and Wiseman, the purchasers at the foreclosure sale, of the lands described in the complaint for a valuable consideration ($1,433.66) in good faith, and without knowledge of any irregularities in the foreclosure proceedings.

Finding No. 5: The defendant, W. G. Lindsay, thereafter became the purchaser from C. M. Sheets of the part of the lands described in the complaint for a valuable consideration, with notice that the foreclosure sale of 2 December had been advertised by notices published in the newspaper for only once a week for two weeks preceding the sale; and with notice that the plaintiff claimed the sale and had been irregularly held and that the plaintiff claimed to be the owner of the property; that the

said W. G. Lindsay did not in any way participate in the manner or method of advertising such resale, or any irregularities connected therewith.

Finding No. 6: That there was a delay and a postponement of the resale advertised for 5 November, 1925, such delay being granted at the request of the plaintiff, and that such delay was not a waiver or condonation of the conduct of the plaintiff in bidding in bad faith at the sale held on 9 September, 1925, as set out in findings of fact No. 2.

Finding No. 7: That the deed of trust under which such property was sold, same being recorded in the registry of Forsyth County, Book of Deeds of Trust 176, page 132, secured a note in the sum of $1,007.50 with interest; that the same was past due and unpaid; that at the request of the holders of said note (Mock and Wiseman), the trustee, A. R. Bridgers, duly advertised said property for sale in April, 1925, and thereafter on increased bids being filed with the clerk of the Superior Court for Forsyth County, several resales were duly ordered by said clerk and duly advertised, and that a resale was duly ordered by the clerk of the Superior Court for Forsyth County to be held on 9 September, 1925, and such sale was duly advertised. And, that as a matter of law, all proceedings were regular up to and through the sale of 9 September, 1925, except as appears in the second finding of fact above.

The above findings of fact cover all issues raised by the pleadings or tendered by either party to the action, except the issues tendered by defendant, Lindsay, relating to betterments.

On such findings of fact the court orders, adjudges and decrees, that the plaintiff take nothing by his action, and that the same be dismissed, and the costs be taxed against the plaintiff:

Further, that the court orders, adjudges and decrees that the title of C. M. Sheets and W. G. Lindsay in and to the lands described in the complaint is good, and that the plaintiff, W. L. Brown, has no right, title, interest or estate whatsoever in or to said lands; that all claims of the said W. L. Brown in or to such lands are hereby adjudicated and resolved against him, and that insofar as the said W. L. Brown is concerned the title and estate of the said defendants under their respective deeds referred to above are hereby quieted and declared to be valid."

Numerous exceptions and assignments of error were made and on appeal to the Superior Court the following judgment was rendered: "This cause coming on to be heard before his Honor, Walter E. Moore, judge, on appeal from the Forsyth County Court, from a judgment in favor of the defendants, and the court having heard argument of counsel and having considered the exceptions of the plaintiff as appear in the record and having found that none of the exceptions of the plaintiff constitute reversible error and that the judgment of the Forsyth County

Court should be affirmed: It is, therefore, ordered, adjudged and decreed that each and every one of the exceptions of plaintiff are overruled and the judgment of the Forsyth County Court is hereby affirmed; and it is ordered that the action be remanded to the Forsyth County Court for disposition in accordance with this judgment, and that the costs of the appeal be taxed against the plaintiff."

From this judgment the plaintiff, appellant, made numerous exceptions and assignments of error and appealed to the Supreme Court.

Richmond Rucker and John J. Ingle for plaintiff.
Parrish & Deal and W. T. Wilson for defendants.

CLARKSON, J. The main and material question: Plaintiff, appellant, excepts and assigns error to the refusal of the court to grant the plaintiff's motion for judgment on the pleadings: "The appellant contends that judgment for the plaintiff on the pleadings should have been granted for the reason that the answer and further defense clearly show that the sale under foreclosure was irregular and that from the records incorporated by reference in their pleadings the defendants had notice or acted in bad faith in acquiring the property." We cannot so hold. The record discloses that the court below found the facts to the contrary and there was sufficient evidence to sustain the findings. *In the Matter of Assessment Against R. R.,* 196 N. C., at p. 758-9.

Chapter 520, Public-Local Laws of 1915, sec. 3(a), the act establishing the Forsyth County Court provides: "That in the trial of civil cases in said court either the plaintiff at the time of filing the complaint or the defendant at the time of filing the answer may in his pleadings demand and have a jury trial as provided in the trial of causes in the Superior Court; that failure to demand a jury trial at the time herein provided shall be deemed a waiver of the right to a trial by jury; that the judge of said court, when in his opinion the ends of justice would be best served by submitting the issues to the jury, may have a jury called of his own motion and submit to it such issues as he may deem material."

Under the statute, neither party requested a jury trial. The judgment of the Forsyth County Court so finds and further that the agreement to waive a jury trial was "entered of record." C. S., 568. *Morris v. Bogue Corporation,* 194 N. C., 279; *Burlington Hotel Corp. v. Dixon,* 196 N. C., 265. The presumption is that the proceedings in the court below are correct and the appellant must show error. *Parker v. Debnam,* 195 N. C., at p. 60.

The record "imports verity." *S. v. Wheeler,* 185 N. C., 670; *S. v. Palmore,* 189 N. C., 538; *S. v. Berry,* 190 N. C., 363.

The court below found: C. M. Sheets, one of the defendants, became the purchaser from Mock and Wiseman, the purchasers at the foreclosure sale, of the lands described in the complaint for a valuable consideration ($1,433.66) in good faith, and without knowledge of any irregularities in the foreclosure proceedings.

In *Jenkins v. Griffin,* 175 N. C., 184, 186, it is said: "The presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly the burden was on defendant (here on plaintiff) to show it." *Douglas v. Rhodes,* 188 N. C., at p. 584.

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." *Whitley v. Powell,* 191 N. C., at p. 477; 19 R. C. L., 623.

The defendant, Sheets, therefore, got a good title because the court below found that he was a bona fide purchaser from the purchasers at the foreclosure sale for value, and without notice of any irregularities. As to the defendant, Lindsay, to whom Sheets subsequently sold a part of these lands, the court has found on disputed evidence that Lindsay had been informed that there were claims of irregularities in the foreclosure prior to the time he purchased. This is immaterial, because once Sheets had acquired good title, he had the right to convey good title to any one who had not participated in any wrongdoing. If this was not so a bona fide purchaser for value without notice would have the title to his land "bottled up."

2 Pomeroy's Equity Jurisprudence (4 ed.), sec. 754, states the rule as follows: "There are two special rules on the subject which have been settled since an early day; one being a mere application of the general doctrine, and the other a necessary inference from it. The first is, that if a second purchaser for value and without notice purchases from a first purchaser who is charged with notice, he thereby becomes a bona fide purchaser and is entitled to protection. This statement may be generalized. If the title to land, having passed through successive grantees, and subject in the hands of each to prior outstanding equities, comes to a purchaser for value and without notice, it is at once freed from these equities; he obtains a valid title, and, with a single exception, the full power of disposition. This exception is, that such a title cannot be conveyed, free from the prior equities, back to a former owner

who was charged with notice. If A., holding a title affected with notice, conveys to B., a bona fide purchaser, and afterwards takes a reconveyance to himself, all the equities revive and attach to the land in his hands, since the doctrine requires not only valuable consideration and absence of notice, but also *good faith*. The second rule is, that if a second purchaser with notice acquires title from a first purchaser who was without notice, and bona fide, he succeeds to all the rights of his immediate grantor. In fact, when land once comes, freed from equities, into the hands of a bona fide purchaser, he obtains a complete *jus disponendi*, with the exception last above mentioned, and may transfer a perfect title even to volunteers."

In *Phillips v. Buchanan Lumber Co.*, 151 N. C., at 521, this Court, speaking to the subject, said: "Besides, a purchaser for value from one whose deed was procured by fraud gets a good title if he has no notice of the fraud. *Odom v. Riddick*, 104 N. C., 515, and cases there cited. Even a purchaser with notice of the fraud from an innocent purchaser without notice gets good title. *Glenn v. Bank*, 70 N. C., 205; *Fowler v. Poor*, 93 N. C., 466."

It appears from the record that numerous resales of the property in controversy were had in accordance with C. S., 2591. It is alleged by defendants "more than ten times being advertised, each time for sale and resale, according to law." This matter has been recently discussed in *Hanna v. Car. Mortgage Co., ante*, 184. We need not repeat. It is there said that "It is a statute that does not hurt the mortgagee, but is beneficial to the mortgagor and often saves mortgaged property from being sacrificed." The plaintiff had opportunity, time and time again, to bid on the property in controversy at resales, and as the holder of the equity of redemption to protect himself. He slept on his rights and, although a hardship, we cannot change well settled principles of law. "Hard cases are the quicksands of the law." *Leak v. Armfield*, 187 N. C., 625.

The plaintiff's motion for a new trial on the ground of newly discovered evidence cannot be allowed. We have read the affidavits carefully. The law in regard to newly discovered evidence is well stated in *Johnson v. R. R.*, 163 N. C., at p. 453: "Applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct and that there has been a lack of due diligence. 14 Am. and Eng. Enc. Pl. and Pr., 790. We require, as prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material and relevant; (4) that due diligence has been used and the means employed, or that there has been no

laches, in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail," citing numerous authorities.

This decision has been cited time and time again. The newly discovered evidence is merely cumulative.

As to the regularity of the sale, for the reasons given on the other aspects of the case, it is not necessary to consider, but see *Guilford v. Georgia Co.*, 109 N. C., 310; *Whitley v. Powell*, 191 N. C., 476.

From a thorough examination of the record, carefully prepared briefs and affidavits on the motion, we can find in law

No error.

SALLIE H. JONES, ADMINISTRATRIX C. T. A. OF THE LAST WILL AND TESTAMENT OF S. V. PICKENS, DECEASED, AND AS COMMISSIONER APPOINTED BY THE COURT, v. C. S. FULLBRIGHT AND MICHAEL SCHENCK, EXECUTORS OF THE LAST WILL AND TESTAMENT OF CORNELIA S. PICKENS, DECEASED.

(Filed 22 May, 1929.)

1. Gifts A b—Certificate of deposit in husband's name, payable to husband's or wife's order is not gift inter vivos to wife.

A certificate of deposit issued by a bank in the name of the husband, payable to his or his wife's order on return of the certificate properly endorsed, creates an agency in the wife to withdraw the money which is revoked at the death of the husband, and does not operate as a gift *inter vivos*.

2. Same—Deposit in name of husband, payable to order of husband or wife does not fall within provisions of C. S., 230.

The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of C. S., 230, the statute applying only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common.

3. Wills E b—Wife takes only life estate in personalty bequeathed to her for life with power of disposition during her life.

A bequest to the wife by her husband of all his personal property during her life, to dispose of as she may see fit, and such not disposed of to be sold after her death, with limitation over to his and her heirs, does not give the wife the power to dispose of any of the property by will.

4. Same—Certificate of deposit in husband's name, payable to husband or wife, does not operate to enlarge life estate in personalty to her.

Where a certificate of deposit issued by a bank in effect creates an agency in the wife to withdraw the money during her husband's lifetime,

it cannot be held that the provisions in the husband's will bequeathing his personalty to her for life to dispose of as she pleased during her life, with limitation over, enlarges the wife's life estate or gives her the power of disposition by will.

APPEAL by defendants from *MacRae, Special Judge,* at March Term, 1929, of HENDERSON. Affirmed.

The material facts are admitted. S. V. Pickens died on 19 June, 1919, leaving a will in which he appointed as executrix his wife, Cornelia S. Pickens, who duly qualified as such on 28 July, 1919. On 26 April, 1919, S. V. Pickens deposited in the Citizens National Bank of Hendersonville the sum of $13,194.66, for which he received from the bank four certificates of deposit in the respective sums of $6,679.66, $5,315, $1,000, and $200. Each certificate was in the following form:

"THE CITIZENS NATIONAL BANK
of Hendersonville, N. C.

HENDERSONVILLE, N. C., 26 April, 1919.

The Citizens National Bank.

This is to certify that S. V. Pickens has deposited in this bank six thousand, six hundred seventy-nine dollars sixty-six cents ($6,679.66). Not subject to check. Payable to the order of self or Cornelia S. Pickens, his wife, on the return of this certificate properly endorsed with interest at the rate of 4 per cent per annum if left on deposit three months or longer. Interest to cease after twelve months unless renewed. No. 3424. C. S. FULLBRIGHT, *Cashier.*"

Cornelia S. Pickens as executrix collected from the bank $13,332.50, the face of the certificates with interest. She claimed one-half this amount ($6,666.25) as her individual property because the certificates were "payable to the order of self or Cornelia S. Pickens, his wife," and charged herself as executrix with the other half. Out of the half with which she thus charged herself she paid claims against her husband's estate, the costs of administration, $1,000 for the gravestone, $50 as a legacy to John C. Pickens, aggregating $3,819.33, leaving of this fund $2,846.42. She placed this balance, together with $1,016.66, which she had received from other securities, with the $6,666.25 which she claimed independently of the will, making a total of $10,529.33. During her lifetime she used all this sum except $3,200, with which she bought sixteen shares of the capital stock of the Citizens National Bank of Hendersonville, at $200 a share, issued in her name.

At the time of his death S. V. Pickens owned sixteen shares of the capital stock of this bank, and Mrs. Pickens as executrix caused these

shares to be transferred from his name to hers on 13 December, 1921. The estate of S. V. Pickens has no other personal property.

Cornelia S. Pickens died 7 January, 1928, leaving a will in which the defendants were named as her executors. They qualified on 10 January, 1928. In her will she devised and bequeathed real and personal property. The plaintiff qualified as administratrix *c. t. a.* of S. V. Pickens on 14 November, 1928, and was appointed commissioner on 19 January, 1929, pursuant to a provision in the fourth item of his will. The fourth and fifth paragraphs of his will are as follows:

"4th. I hereby give and bequeath unto my dear wife, Cornelia S. Pickens, for her natural life all my personal property of whatsoever kind, not specifically and otherwise disposed of in this will, either hereinbefore or hereafter; to be used and disposed of by her as she may see fit during life, but whatever of this said personal property bequest, the proceeds thereof & of the cash hereinafter specifically given her, on hand at her death and the proceeds of the same not disposed of by her before death, shall be collected and sold for cash by a commissioner appointed by the Superior Court of Henderson County without unnecessary delay and after payment of the necessary expenses pay the balance one-half to the heirs of my said present wife and one-half to the heirs of my sisters Rachel Wild and Elizabeth Wild—both dead—½ to each set.

"5th. I also give and bequeath to my dear wife, Cornelia S. Pickens, of the cash on hand and in the banks the sum of eight thousand dollars to include the bal of $1,000 due on the Hurt mortgage and note in which she is named as a party and as a survivor owns it. The cost of stone for grave to be credited on this bequest to her. She my said wife, Cornelia S. Pickens accepts the gifts, bequests &tc. contained in this will with all its conditions in lieu of and in full satisfaction of dower and all other claims by reason of our relation as man and wife not specified."

The plaintiff contends that the bank stock belongs to the estate of S. V. Pickens and the defendants contend that it belongs to the estate of Cornelia S. Pickens. Judge MacRae held that the plaintiff in her capacity as executrix and commissioner is the owner of the thirty-two shares of the capital stock of the Citizens National Bank of Hendersonville and is entitled to recover them from the defendants. The defendants excepted and appealed.

Shipman & Arledge for plaintiff.
G. H. Valentine for defendants.

ADAMS, J. The ultimate question is whether the title to the thirty-two shares of stock in the Citizens National Bank of Hendersonville is in the plaintiff as the representative of S. V. Pickens or in the defend-

ants as the representatives of his wife. The answer depends upon the interpretation of the testator's will and the legal significance of the certificates of deposit.

The bank certified that S. V. Pickens had deposited the money and that it was "payable to the order of self or Cornelia S. Pickens, his wife." The defendants say (1) that in effect the deposits were made in the names of both the husband and the wife, were payable to either, and upon the death of the husband were payable to the wife without regard to any provision in the husband's will; or (2) if this position is unsound, that the word "or" should be construed to mean "and," thereby giving to the wife a one-half interest in all the deposits.

The appellants cite C. S., 230 as supporting their first contention; but this section applies only when the deposit is made "in the names of two persons, payable to either, or payable to either or the survivor." The certificates show that the deposits were made, not in the names of two persons, but in the name of S. V. Pickens only. Of more direct interest to the appellants is the question whether the subsequent clause in the certificates converts the deposits into a gift, in whole or in part, to the depositor's wife. S. V. Pickens having made the deposit in his own name is presumed in the absence of contradictory or inconsistent evidence to be the owner of the money. It remained his unless his wife obtained title to it or to a part of it by trust, gift, or bequest. It is not contended that a trust was created, but that the depositor intended the certificates, treated independently of his will, as a gift *inter vivos* to his wife.

In the cases relating to this subject there is a distinction between those in which the account was opened or placed in the names of the depositor and another and those in which a person other than the original owner was merely authorized to draw on the deposit. Cases discussing the effect of a joint deposit in the names of the original owner and another generally refer to those who open an account on the books of the bank as joint tenants or tenants in common of the fund. An interesting collection of decisions on this subject appears in the annotation subjoined to *Parrish v. Merchants & M. Sav. Bank,* L. R. A., 1917 C, 548, 550. In our case these decisions are not controlling for the reason that the deposit was made in the name of only one person—S. V. Pickens. The second class is illustrated by cases adhering to the principle enunciated in 3 R. C. L., 579: "Where a certificate of deposit is issued payable to the order of the depositor or his wife, it seems that after the depositor's death the wife cannot demand payment of the deposit upon a return of the certificate. The reason for this is that the title to the deposit is in the depositor, and the only right which the wife has to draw out the money is under the authority con-

ferred upon her by her husband, she acting as his agent. Her power being that of an agent merely, it is revoked by the death of her husband."

The principle was upheld many years ago by the Court of Appeals of Maryland in *Murray v. Cannon, Admrx.*, 41 Md., 466. There the entry on the books of the bank and in the book of deposit was as follows: "James Cannon, subject to his order, or to the order of Mary E. Cannon." Mary E. Cannon, the depositor's daughter, who afterwards became the wife of a Mr. Murray, claimed the money on deposit. She had acquired possession of the deposit book during the lifetime of James Cannon, and she contended that the entry in the books was evidence of her title. The Court, disapproving her position, used this language: "To perfect a gift, the delivery of a thing intended to be given is indispensable. 'There must be a parting by the donor with the legal power and dominion over it. If he retains the dominion, if there remains to him a *locus penitentiæ*, . . . there cannot be a perfect and legal donation, and that which is not a good and valid gift in law cannot be made good in equity.' *Patterson's Admr. v. Gittings' Exr.*, 2 G. & J., 217; *Nickerson v. Nickerson*, 28 Md., 327. The money in question was deposited in the Savings Bank to the credit of James Cannon, and so continued up to the time of his death. He retained dominion and control over it by the very terms of the account with the bank, and could at any time have drawn it out, or revoked the power given to Mary E. Cannon to obtain it upon her own order. If she had drawn out any portion of the money, she would have drawn it out as the money of James Cannon, acting in the matter as his agent, and by virtue of a then existing authority derived from him. This agency was revoked by his death, *Carey v. Dennis*, 13 Md., 18, and the bank properly refused to recognize it after that period."

The same conclusion was reached in *Second National Bank of Baltimore v. Wrightson, Ex'r*, 63 Md., 81. The certificate introduced in that case showed that Samuel Stines had deposited in the bank $1,000, payable to the order of himself or Ellen Stines, his wife, on the return of the certificate. It was adjudged that the certificate did not authorize the payment of the money to Ellen Stines after the death of Samuel Stines. The principle has been applied in other cases. *Lufkin v. Lufkin*, 90 Atl. (Me.), 493; *Wayne County and Home Sav. Bank v. Smith*, 160 N. W. (Mich.), 472.

The certificate was not a gift *inter vivos* of the deposit to Cornelia S. Pickens. "To constitute a gift of a bank deposit there must be an intention to give and the consummation of an intention by a delivery of, and a loss of dominion over, the property given." 30 C. J., 701, sec. 297. So far as the record discloses S. V. Pickens never abandoned control of the deposit or parted with the certificates. He appointed his

wife as his agent to withdraw the money on return of the certificate properly endorsed. The agency, which was not exercised in his lifetime, was revoked by his death. It follows that the agency cannot be converted into a tenancy in common by transforming the word "or" into "and," as contended by the appellant. *Smith v. Smith,* 190 N. C., 764, is therefore not in point.

It is contended by the appellants that without regard to the certificates, Mrs. Pickens acquired title to the personal property and the money described in the fourth and fifth paragraphs of the will because her husband bequeathed the property and the money with absolute power of disposition and that such bequest imports absolute ownership. This is denied by the plaintiff, who contends that Mrs. Pickens acquired only a life estate in the personal property, "not specifically and otherwise disposed of in the will." The accepted doctrine is this: "If an estate be given to a person generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case the expressed limitation for life will control the operation of the power, and prevent it from enlarging the estate in fee." 4 Kent Com., 520, cited in *Chewning v. Mason,* 158 N. C., 578. This doctrine has been clearly stated in reference to both real and personal property in several of our decisions, among which are *Troy v. Troy,* 60 N. C., 624; *Chewning v. Mason, supra; Allen v. Smith,* 183 N. C., 222; *Roane v. Robinson,* 189 N. C., 628. See, also, *Roberts v. Saunders,* 192 N. C., 191. In *Long v. Waldraven,* 113 N. C., 337, the following clause in the will of John B. Doub was contested: "It is my will that after the death of my wife my estate shall be equally divided between the heirs of my brothers and sisters with the exception of one-third of my estate which I leave at the disposal of my wife to be left as she may will." The Court held that the testator's widow took a life estate in all the personalty with the power of disposing of one-third of it during her life, and that as she failed to make such disposition the personal property went to the heirs of the testator's brothers and sisters.

The fourth paragraph of testator's will gives to Mrs. Pickens for her natural life all his personal property not otherwise disposed of by preceding or subsequent clauses, to be used and disposed of by her during her life as she saw fit. But there was a direction that the proceeds of the personal property and of the cash referred to in paragraph 5 "not disposed of by her during her life" should be collected and sold for cash by a commissioner appointed by the court. We think it obvious that the testator thereby intended to give to his wife only a life estate in the personal property and in the cash described in paragraphs four and five of the will.

The appellants say in the next place that the power conferred upon Mrs. Pickens to dispose of these articles was exercised by her testamentary disposition of the property. This position is inconsistent with the direction in the fourth paragraph of her husband's will. The direction is that the personal property therein described not disposed of by her before her death shall be sold, and the cash referred to in the fifth paragraph not disposed of by her before her death shall be collected. The exercise of the power by the instrumentality of her will is thus expressly precluded. The judgment is

Affirmed.

M. E. GRUBER, INC., AND M. E. GRUBER v. E. W. EUBANK, TRUSTEE ET AL.

(Filed 22 May, 1929.)

1. Deeds and Conveyances C d—Reservation in deed in this case held too vague to allow parol evidence of identification, and is void.

A reservation in a deed in the chain of title to the *locus in quo*, contained in the description "thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek" is held too vague and indefinite a description to admit of identification by parol evidence, and is not contrary to a covenant in a later deed against encumbrance.

2. Easements A a—Intermittent and permissive use of paths on land does not create easement thereon.

Evidence that paths on a tract of land were intermittently and permissively used by tourists and others is insufficient to create an easement on the lands.

CLARKSON, J., not sitting.

CIVIL ACTION, before *Schenck, J.*, at November Term, 1928, of HENDERSON.

On 15 October, 1836, Charles Baring executed and delivered a deed to Marie Joseph Gabriel Xaviar DeChoisel for a large body of land covering the land in controversy. The said deed shows the following reservation: "Thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek for the use of my Flat Rock settlement and that it may not be directed (diverted) from the same." It is contended that this language created the Jerusalem Trail, situated in some places about 40 yards from the creek and running across plaintiff's land for a distance of approximately one-third of a mile.

The land by mesne conveyances became the property of R. C. Seigling. On 11 January, 1926, R. C. Seigling and wife conveyed to M. E. Gruber a part of said land, containing 112 acres, more or less, without reservation. Gruber executed a deed of trust to the defendant, Eubank, to secure the payment of purchase money notes amounting to approximately $100,000. The entire purchase price was $150,000. The title to the property was investigated and an abstract thereof furnished to Gruber at the time of the purchase. In the meantime Seigling died and his wife, Lucile L. Seigling, qualified as executrix of his will. At the time the first note fell due Gruber procured an extension of time from Mrs. Seigling. Payment not having been made according to contract, the defendant, Eubank, under power contained in the deed of trust, advertised the property for sale. Thereupon the plaintiffs secured a restraining order, alleging in substance that they had agreed to pay $150,000 for said property for the reason that he was desirous of acquiring a private estate which was excluded from highways and traffic, and thus protected from intrusion of outsiders. Plaintiffs further alleged that the language in the deed from Baring to DeChoisel and subsequent conveyances of said land constituted an easement upon their land, which said easement was an encumbrance upon the title and greatly depreciated the value of their property, for that the public had the right to pass across the land.

The evidence tended to show that there was a walkway of some kind known as the Jerusalem Trail, which was located across plaintiff's land on the west side of the creek, and running from the Little River road on the west side of the creek until it strikes Idlewild Drive. At this point the trail forks and one part turns east and runs along said drive, and the other continues in the direction of a church known as St. John's in the Wilderness. This walkway or trail appeared to be forty yards wide and situated about one hundred and twenty feet west of the creek at some points, although at other points it was more than one hundred and twenty feet west of the creek. The trail had been obliterated in some places, and at other places it was fairly plain. There was evidence tending to show that a cow pasture and a hog pasture had been built across this trail, but that there were gates or stiles in the fence many years ago. "In spots the trail is grown up in blackberry sprouts, timber and things like that pretty thick. . . . The trail stops near a wire fence, and you go into a field after it leaves the Gruber land. . . . There is a field all plowed and cultivated part of the way, and there is no indication of a trail. . . . I went on the west side of the creek to locate a 40-yard strip because about forty years ago I saw a stile across the fence, and old people said it was where Jerusalem Trail was." There was evidence that from time to time within the past twenty years people had been seen on the land, and perhaps in some part of this trail

where it had not been obliterated. The field, referred to by the witnesses, was cleared and put into cultivation about sixteen or seventeen years ago. The entire tract was under fence about forty years ago. One witness for plaintiff testified as follows: "There were paths all over that place, and people would travel them pretty generally as they wanted to. They went into the Jerusalem path more than others. It seemed it was a more public way. It was more in the way of travel." Another witness testified: "My first acquaintance with that trail was about four years after the Civil War. Have traveled over that trail and have seen other people travel over it. The people used it when they wanted to. It was a public passway. I saw the Memmingers and Middletons going through there. . . . Bard Middleton owned it when I first knew it. The C. G. Memminger place . . . is right over on the other side of the Little River road. . . . The time I knew of those people going through there was about the time of the Civil War. . . . There has been a fence around the whole place, the Seigling place, for the last thirty or forty years."

Another witness for plaintiff testified he worked on the place from 1907 to 1912, and that he would see people walk through there, and that Mrs. Seigling said to let anybody go through the place if they did not molest anything. He further testified: "There were other paths going through the property in addition to the Jerusalem Trail. People used those trails like that and this Jerusalem Trail They used them when they wanted to make a short cut. . . . There never was much travel through there. The only thing was that people just took advantage of the place and went through when they wanted to go through just like they did any other place. . . . Those plantations are large, and most of the people who walk through there were Southern people. They were just there in the summer time. It was mostly summer people and boarders up here that went there."

Another witness testified: "People generally have been passing through the Jerusalem Trail for twenty-five years at least. . . . There are paths all through that place." Mr. Seigling "told me just to let them go anywhere through those paths as long as they did not interfere with or destroy the shrubbery." Mr. Seigling put the stiles there "for his men only." "Lots of people go through there, and some people go through that other path on the Seigling place."

The evidence further tended to show that the Flat Rock settlement was situated on the east side of the creek and that the line dividing the two tracts of land struck the elbow in the creek, crossing the creek at the elbow. This elbow constituted just forty yards of the creek, and the defendant contended that the language in the deed referred to was intended to reserve this bend in the creek for watering purposes for the

Flat Rock settlement because this elbow was the only portion of the creek east of the dividing line of the two tracts. The defendant further contended that this theory is borne out by the fact that the words in the deed, constituting the alleged reservation, occur immediately after the call for a stake on the west side of the creek, thus emphasizing the intention of the parties to reserve a part of the creek itself rather than a strip of land forty feet wide and one-third of a mile long on the west side of the creek.

At the conclusion of the testimony the trial judge sustained the motion of nonsuit, and the plaintiff appealed.

Arledge, Taylor & Crowell for plaintiffs.

Buist & Buist, Ewbank, Whitmire & Weeks and Rollings & Smathers for defendants.

BROGDEN, J. Two questions are presented by the record:

1. Does the language in the deeds, constituting plaintiff's chain of title, create an easement across the said land known as the Jerusalem Trail?

2. If not, has such easement to said strip of land, known as the Jerusalem Trail, been acquired by prescription?

It must be observed at the outset that no person or group of persons is claiming an easement across plaintiff's land or attempting to assert any right to use that strip of land described in the case as the Jerusalem Trail. The plaintiff has brought this suit against the defendants, alleging that the language in the deed constitutes an easement, which is an encumbrance upon his title, and therefore resulting in a breach of the covenant in the deed from the defendant to the plaintiff, and thus entitling the plaintiff to a rescission of the contract for the purchase of the land or for damages. The language of the deed creating the alleged easement occurs in the description of the property and is as follows: "Thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek for the use of my Flat Rock settlement, and that it may not be directed (diverted) from the same." This language is found in the deed from Baring to DeChoisel and in every deed constituting the chain of title under which Seigling claims, though it is not inserted in the deed from Seigling to the plaintiffs. Baring, at the date of the deed in 1836, owned a large boundary of land. An examination of the description of the property from Baring to DeChoisel discloses that the reservation occurs as a part of the description of the land. It further appears from plats filed in the cause that the line of the land

conveyed by Baring to DeChoisel was entirely on the east side of the creek and only touched the creek at the elbow. This elbow of forty yards, therefore, was the only part of the creek left on the Flat Rock side of the creek. In other words, a person living or owning land on the Flat Rock side of the creek would only touch the creek at the elbow without trespassing upon the DeChoisel land, which is now the land in controversy.

The law recognizes nine methods of creating or establishing easements. Mordecai Law Lectures, Vol. 1, 464-471. However, in the case at bar the easement in controversy arises either from the reservation in the deed or by prescription. An easement, of course, is an interest in land, and, if it is created by deed, either by express grant or by reservation, the description thereof must not be too uncertain, vague and indefinite. *Waugh v. Richardson,* 30 N. C., 470; *McCormick v. Monroe,* 46 N. C., 13; *Patton v. Educational Co.,* 101 N. C., 408, 8 S. E., 140; *S. v. Suttle,* 115 N. C., 784, 20 S. E., 725. See, also, *Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655, and *Bryson v. McCoy,* 194 N. C., 91, 138 S. E., 420; *Coastal Land and Timber Co. v. Eubank,* 196 N. C., 724.

The principles of law relating to easements are clear enough and plain enough, but the chief difficulty arises in construing or interpreting the language contained in the deed. A reservation of "a distance of 40 yards of said creek . . . and that it may not be diverted from the same" is too ambiguous and uncertain to create a public way for one-third of a mile across a tract of land. The identity of such an interest in land would of necesssity rest in conjecture and speculation, and we therefore hold that the language in the deed was not sufficient to identify the easement asserted by the plaintiff.

The second phase of the controversy involves the question as to whether the Jerusalem Trail by virtue of use amounted to a public way across the lands of the plaintiff. There is evidence in the record of the existence of the Jerusalem Trail about forty or forty-five years ago. There is further evidence that within the past ten years people have been seen walking in portions of this trail, and that in former years numbers of people used the walkway for going to church or for other purposes. However, it further appears that forty years ago the entire tract of land was under fence, and that subsequently a cow pasture and a hog pasture enclosed by a wire fence had been constructed across this area, and that while stiles had been erected, they had been built for the exclusive use of employees of the owner. Indeed, the testimony discloses that summer boarders and sightseers were the persons most frequently seen upon the premises in recent years.

Mere user is not sufficient to create such an easement as contended for by the plaintiffs. *Boyden v. Achenbach,* 79 N. C., 539; *Snowden v. Bell,* 159 N. C., 497, 75 S. E., 721; *S. v. Norris,* 174 N. C., 808, 93 S. E., 950; *Nash v. Shute,* 184 N. C., 383, 114 S. E., 470. The legal essentials for creating an easement by prescription are thus stated in 9 R. C. L., 772: "To establish an easement by prescription it must be: first, continued and uninterrupted use or enjoyment; second, identity of the thing enjoyed; third, a claim of right adverse to the owner of the soil, known to and acquiesced in by him." *Draper v. Conner,* 187 N. C., 18, 121 S. E., 29; *Durham v. Wright,* 190 N. C., 568, 130 S. E., 161.

The evidence in the case at bar, viewed in a light most favorable to the plaintiffs, tends to show intermittent and desultory use of portions of that strip of land known as the Jerusalem Trail. There is no suggestion of any claim of right by any person or group of persons. In the last analysis it appears that neighbors, sightseers and summer boarders from time to time walked in this trail at places where it was not enclosed by fence or grown up in bushes and timber or obliterated by cultivation. There is no evidence tending to establish the existence of such an easement, and the judgment of nonsuit was properly entered.

Affirmed.

CLARKSON, J., not sitting.

STATE v. BILL DANIELS.

(Filed 22 May, 1929.)

1. Criminal Law H a—Where time to employ and consult counsel and subpoena witnesses is not demanded by defendant he waives right thereto.

Where a trial of the defendant for violating the prohibition law is had within thirty or forty minutes from the time of his arrest, in the regular course of procedure, and the defendant does not demand time to employ and consult counsel or subpœna witnesses he waives any right thereto, and a sentence in the action will be sustained in law.

2. Criminal Law K d—Sentence prescribed by statute for violation of prohibition law is not cruel or unusual punishment.

A sentence prescribed by statute for the violation of the prohibition law is held not to be cruel or unusual within the meaning of Article I, section 14, of our Constitution.

APPEAL by defendant from *Schenck, J.,* at February Term, 1929, of MADISON. No error.

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

Robert R. Reynolds and W. A. Sullivan for defendant.

PER CURIAM. The defendant was indicted for a breach of the prohibition laws. The State's evidence tended to show that after the defendant's car had been overtaken and stopped by an officer three seats were removed and three cases of whiskey (21 gallons) were found under quilts, and that farther back under the seat were 2½ gallons of liquor in half-gallon fruit jars. The defendant was the driver of the car. Immediately after his arrest he was taken to the courthouse; an indictment was prepared and returned as "a true bill"; the case was then called in less than an hour after the arrest and the defendant pleaded guilty. He made no motion for a continuance or for time to employ and confer with counsel or for a subpœna for witnesses. Time to employ counsel or to get witnesses was not denied the defendant by the court, but was waived by the defendant when he entered his plea and admitted his guilt. In the absence of a motion for a reasonable continuance an exception to the short time intervening between the arrest and the arraignment does not constitute sufficient cause for a new trial.

The third assignment of error is that the sentence was excessive, but as it was authorized by the law it cannot be held to be "cruel or unusual" within the contemplation of Art. I, sec. 14, of the Constitution. *S. v. Manuel,* 20 N. C., 144; *S. v. Pettie,* 80 N. C., 367; *S. v. Farrington,* 141 N. C., 844; *S. v. Dowdy,* 145 N. C., 432.

No error.

SHUFORD PEELER v. UNITED STATES CASUALTY COMPANY.

(Filed 29 May, 1929.)

1. Insurance J d—Condition in accident policy requiring notice to company of accident and claim for damages is material.

Where a policy of automobile accident insurance contains the condition that the insured shall give immediate notice to the insurer of accidents and claims for damages, the condition is material, affording the insurer opportunity to gather the facts for its protection when fresh in the minds of witnesses, etc., and is a condition precedent to the right of recovery by the insured.

2. Same—Breach of condition requiring notice forfeits policy.

The failure by the insured to give the insurer notice of an accident and claim for damages by the person injured required by a condition in the automobile accident policy will make the policy void without an express forfeiture clause in the policy to that effect.

3. Insurance R b—Person injured by insured is in same position in regard to insurer's liability as insured.

One who is injured by the insured in an automobile accident covered by the policy of accident insurance, and sues the insurer under the provisions of the policy providing therefor upon return of execution against the insured unsatisfied, the injured person is in the same position with reference to the insurer's liability as the person insured, and is bound by a provision of the policy requiring the insured to give notice of accidents and claims for damages, and where the insured has forfeited the policy by a breach of this condition, the person injured may not recover thereon.

APPEAL by defendant from *Stack, J.*, at February Term, 1929, of MECKLENBURG. Reversed.

In 1926 a collision occurred between the plaintiff's car and one owned by F. K. Graham. Graham brought suit against the plaintiff and the plaintiff answered, denying liability and setting up a cross-action against Graham. At the December Term, 1927, of the Superior Court of Mecklenburg County the plaintiff recovered a judgment against F. K. Graham in the sum of $525 as damages to the plaintiff's automobile caused by the collision. An execution was issued on this judgment and was returned unsatisfied. At the time of the collision Graham had a policy or contract of insurance issued by the defendant, known as "The Automobile Public Liability and Property Damage Insurance Policy." The plaintiff was not a party to the contract. It is admitted that the defendant never had written notice of the collision and knew nothing about it until the trial between the plaintiff and Graham had begun, and then disclaimed liability for the reason that Graham had failed to give the notice required by the policy. The amount of the policy is in excess of the plaintiff's judgment against Graham. The collision of the plaintiff's car with Graham's occurred on 1 May, 1926. Graham brought suit against the plaintiff on 25 September, 1926, and the plaintiff set up a cross-action and recovered judgment against him at December Term, 1927, as above stated. The present action was brought 16 April, 1928.

The verdict was as follows:

What amount, if any, is the plaintiff entitled to recover against the defendant? Answer: $525, with interest thereon from 15 December, 1927, and the further sum of $57.25 costs in action of "Graham *v.* Peeler."

Judgment for plaintiff and appeal by the defendant upon error assigned.

J. D. McCall for plaintiff.

J. Lawrence Jones for defendant.

ADAMS, J. The defendant issued its policy insuring F. K. Graham as respects legal liability arising or resulting from any claim made upon him for damages in consequence of an accident occurring by reason of his ownership, maintenance, or use of an automobile. The policy contains the following provisions:

"Item 3. The company will defend, in the name and on behalf of the assured, all claims or suits for damages for which the assured is alleged to be legally liable and will pay within the limits covered by this policy, any final judgment rendered against said assured for damages, together with the taxed court costs and accrued interest and such other expenses as may have been incurred with the company's written consent.

"Condition C. Upon the occurrence of an accident for which insurance is provided herein written notice must be given to the company by the assured as soon as practicable with the fullest particulars available. If a claim is made on account of such accident or if a suit is brought thereon, all information and every summons, process or pleading must be immediately transmitted to the company. The assured shall not voluntarily assume any liability nor incur any expense other than for immediate surgical relief nor settle any claim except at the assured's own cost, nor interfere in any negotiation for settlement nor in any legal proceedings, but whenever requested by the company and at the company's expense the assured shall aid in information and evidence and the attendance of witnesses and shall coöperate with the company (excepting in a pecuniary way) in all matters which the company deems necessary in any investigation, defense or appeal under this policy.

"Condition D. In the event of the bankruptcy or insolvency of the assured, the company shall not be released from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency an execution against this assured is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured or by such other person against the company under the terms of this policy for the amount of the judgment in said action, not exceeding the amount of this policy."

The trial judge held as a matter of law that Graham's failure to give the defendant written notice of the accident could not affect the plaintiff's right of recovery, and instructed the jury if they believed the evidence to answer the issue for the plaintiff. To this instruction the defendant excepted.

The appeal presents two questions: (1) Under the terms of the policy could F. K. Graham, the assured, have maintained an action against the

defendant for damages caused by the collision without giving the written notice provided for in Condition C? (2) If not, can an action against the defendant be maintained by the plaintiff for damages to his car resulting from the collision?

These questions have been considered and answered in a number of authoritative decisions. A policy issued by the defendant containing the provision under consideration in the present case was construed by the Court of Appeals of Ohio in *U. S. Casualty Co. v. Breese,* 153 N. E. (Ohio), 206. The material facts in that case and in this are substantially the same: a motor bus came into collision with an automobile driven by Martha Breese resulting in damage to her person and to her car. She recovered judgment against the operator of the bus (Zurawski) and issued an execution which was returned unsatisfied. Zurawski had previously secured liability insurance of the United States Casualty Company, which was in force at the time of the alleged injury. Not having secured satisfaction of her judgment she brought suit against the Casualty Company, who pleaded as a defense the failure of the assured to give the written notice required in the contract of insurance. On appeal from the lower court the defense was sustained, the Court saying: "Condition B (Condition C, *supra)* becomes, then, an important part, and, indeed, the essence of the contract existing between the Casualty Company and Zurawski, and whatever rights the injured party, Martha Breese, may have, can only exist under and by virtue of the obligations cast upon the company by that policy, and can only be enforced in accordance with its limitations. In the absence of the policy she would have, of course, no right of recovery as against the company, and in view of the existence of the policy she has such right, and such right only, against the company, as is provided by the policy. The policy, in unequivocal terms, provides, as an essential condition of recovery, that the assured shall give immediate written notice to the company of an accident and shall forward to the company every process, pleading, and paper relating to the suit. These requirements are averred not to have been complied with by the assured. Similar language in liability insurance policies has been construed in decisions of various courts. Our Supreme Court had such a policy under consideration in *Traveler's Insurance Co. v. Myers & Co.,* 62 Ohio St., 529, 57 N. E., 458, 49 L. R. A., 760. In that case the corresponding stipulation of the policy read as follows: 'Immediate written notice shall be given this company of any accident and of all alleged injuries, together with copies of all statements made by employees, and all other information in possession or knowledge of the insured in any way relating to such accident or liability therefor.'

"In construing that provision, the Supreme Court, speaking through *Davis, J.*, used the following language: 'It is obvious that this stipulation is of the essence of the contract in insurance of this kind. It is not merely a stipulation as to the form of bringing to the notice of the insurer the fact of a loss, as in policies of fire and life insurance.'

"The Court, in further consideration of the provision, gave the reasons for the necessity of such a requirement as follows: 'In insurance of this character it is a matter of the first importance to the insurer, who may be forced to become the real defendant in a lawsuit against the insured employer, to be speedily informed of all the facts and witnesses concerning a possible litigation. In a very little time the facts may in a great measure fade out of memory, or become distorted, witnesses may go beyond reach, physical conditions may change, and, more dangerous than all, fraud and cupidity may have had opportunity to perfect their work. Therefore this stipulation is vital to the contract.'

"This decision as to the construction of such a provision in a policy of liability insurance was followed in *Employers' Liability Assurance Corp. v. Roehm,* 99 Ohio St., 343, 124 N. E., 223, 7 A. L. R., 182, where the condition was pronounced to be of the essence of the contract. In the face of these direct holdings of the Supreme Court, we do not feel at liberty to give any other construction to the terms of Condition B in the policy in the case at bar. A similar decision was rendered in the case of *Jefferson Realty Co. v. Employers' Liability Assurance Corp.,* 149 Ky., 741, the Court saying: "In the course of the opinion, on pages 747 and 748 (149 S. W., 1011), that it was wholly immaterial whether or not the company was prejudiced by the delay, and that a reasonable compliance with the conditions of the contract relating to notice was indispensable to fix liability. To the same effect is *Phœnix Cotton Oil Co. v. Royal Indemnity Co.,* 140 Tenn., 438, 205 S. W., 128. The Supreme Judicial Court of Massachusetts, in *Lorando v. Gethro,* 228 Mass., 181, 117 N. E., 185, 1 A. L. R., 1374, reached a similar conclusion."

In a case subsequently considered the Court of Appeals of Ohio adhered to the principle stated in *Breese's case (Stacey v. Fidelity and Casualty Co.,* 152 N. E., 794), and the decision was affirmed on appeal to the Supreme Court. *S. c.,* 151 N. E., 718.

The same conclusion was announced in *London, etc., Accident Co. v. Siwy,* 35 Ind. Appellate Court, 340; *Travelers' Ins. Co. v. Scott,* 218 S. W. (Tex.), 53; *McCarthy v. Rendle,* 230 Mass., 35; *Dennis Sheen Transfer v. Ga. Cas. Co.,* 113 So., 165.

In *Weatherwax v. Royal Indemnity Co.,* 165 N. E., 293, the Court of Appeals of New York said that the rule is settled that a judgment creditor enforcing the policy of a right to recover damages against an

insurance company after the return of an unsatisfied execution against the insured debtor, stands in the shoes of the insured, and forfeits the insurance if there has been a breach of its conditions, citing *Coleman v. New Amsterdam Casualty Co.*, 247 N. Y., 271, 160 N. E., 367.

The provision requiring written notice is a condition precedent to the assured's right to recover damages, although it contains no express forfeiture clause. *London, etc., Accident Co. v. Siwy, supra.* So in *Foster v. The Fidelity & Cas. Co. of New York*, 99 Wis., 447, it is said: "The policy provides that immediate written notice must be given to the company of any accident and injury for which a claim is to be made, with full particulars thereof. This was a condition precedent to a recovery." And in *Underwood Veneer Co. v. London Guaranty & Accident Co.*, 100 Wis., 378, the reason is given as follows: "The reason for requiring such notice is obvious. It was to enable the defendant to investigate the facts and circumstances of the accident while they were fresh in mind, with the view of settling the loss in case it should be so advised, and, in case of a contest, to be prepared to defend the same as stipulated in the policy. Accordingly the plaintiff was thereby expressly precluded from settling any claim or incurring any expense, without the consent of the defendant, except in case of absolute necessity. These things made it important for the defendant to be notified immediately, not only of the occurrence of the accident, but also that a claim for damages had been made by the injured person on account of the accident. The words "and also," in the conditions quoted, pretty clearly indicate that such notice of the occurrence of the accident was to be followed by a further or additional notice of any claim made for damages, and each such notice was to be given immediately as therein required." See, also, *McCarthy v. Rendle, supra,* 38.

These decisions preclude the notion that the policy constitutes an independent contract between the plaintiff and the defendant, similar to contracts for fire insurance having the standard mortgage clause expressly authorized by statute for the protection of mortgagees. C. S., 6420; *Bank v. Ins. Co.*, 187 N. C., 97; *Everhart v. Ins. Co.*, 194 N. C., 494. The principle applicable in the case before us is more nearly assimilated to the principle stated in *Welch v. Wiggins,* 196 N. C., 546, in which it was held that under the clause there construed the mortgagees could not recover because the mortgagor was barred. It would be extravagant to hold that the plaintiff in this action, who is not a party to the contract between the defendant and Graham, acquired rights under the policy which are superior to Graham's and that the defendant is liable to him although it is not liable to the party with whom the contract was made. One who seeks to take advantage of a contract made for his benefit—if in any view the contract of insurance can be construed

as made for the plaintiff's benefit—must take it subject to all legal defenses, such as the nonperformance of conditions. 13 C. J., 699, sec. 799. As the assured failed to comply with the contract, and as the plaintiff has no rights superior to those of the assured, the plaintiff cannot maintain his action. The motion for nonsuit should have been allowed. The judgment must, therefore, be

Reversed.

JEFFREY F. STANBACK AND ROE ELLA WOODARD v. CITIZENS NATIONAL BANK OF RALEIGH, TRUSTEE.

(Filed 29 May, 1929.)

1. Trusts D a—Trustor may revoke voluntary trust of personal property.

A trust estate in personalty created by the donor in consideration of one dollar and natural love and affection is a voluntary trust and may be revoked by the donor of the trust under the provisions of C. S., 996, as amended.

2. Same—Power of revocation not affected by contingent interests under trust.

Where a voluntary trust is created in the stock of a bank for the life of the donor or until he reach the age of fifty years, and at the termination to his issue or in the absence of issue to his next of kin under the statute of distributions, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the trust may be revoked by the donor under the provisions of C. S., 996.

3. Statutes B d—Retroactive statute not affecting vested interests is Constitutional.

An *ex post facto* statute prohibited by the State Constitution, Art. I, sec. 32, relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by C. S., 996, is not objectionable as falling within the Constitutional inhibition.

APPEAL by defendant from *Midyette, J.*, at April Term, 1929, of WAKE. Affirmed.

Robert N. Simms and R. Gordon Finney for Jeffrey F. Stanback.
H. G. Connor, Jr., for Roe Ella Woodard.
Smith & Joyner for defendant.

ADAMS, J. This is a controversy without action, in which the plaintiffs seek to revoke a trust under C. S., 996, as amended by the act of 1929. Jeffrey F. Stanback is the son of Annice R. Stanback, deceased, and the nephew of his coplaintiff, Roe Ella Woodard. Annice R. Stanback left a will, by which, after bequeathing certain personal property and shares of stock, she devised the residue of her estate to the defendant as trustee for the uses and trusts declared and set forth in her will. The defendant is to manage and control the trust estate, to collect the income therefrom, and to pay the net income to Jeffrey F. Stanback. The trust is to terminate when Jeffrey F. Stanback arrives at the age of fifty years, or at his death if he does not reach that age. When the trust comes to an end the whole interest therein is to vest in Jeffrey F. Stanback if living; but if he dies under the age of fifty years the trust estate shall go to his issue, if any, *per stirpes,* and if there is no issue then to his next of kin under the statute of distributions. The trustee is directed, when the trust ceases, to divide and deliver the personal property and to convey the real estate, to the beneficiaries named in the will.

On 31 December, 1927, Mrs. Woodard, one of the plaintiffs, voluntarily and without value, but in consideration of her love for Jeffrey F. Stanback, executed a written instrument appointing the defendant a trustee to hold 260 shares of the capital stock of the defendant, owned by her and represented by certificate No. 705, upon the terms and conditions set up and declared in the will of Mrs. Annice R. Stanback. The instrument was signed and the trust accepted by the defendant. On 27 March, 1929, Mrs. Woodard signed and delivered to the defendant a written communication purporting to revoke the trust created on 31 December, 1927, so far as it affected or concerned the issue or the next of kin of Jeffrey F. Stanback; and at the same date Mrs. Woodard and Jeffrey F. Stanback signed and delivered to the defendant a written communication purporting jointly to revoke the former trust, and requested that the certificate for the 260 shares of stock be surrendered and that in lieu thereof two certificates of one hundred and thirty shares each be issued—one certificate to be delivered to Jeffrey F. Stanback as owner and the other to be held by the defendant in accordance with the terms of the trust. This communication was accompanied by a written instrument signed by Mrs. Woodard purporting to appoint the defendant a trustee of 130 shares of the capital stock of the defendant for uses and trusts substantially identical with those declared in the will of Mrs. Stanback. The defendant denied Mrs. Woodard's power to revoke the trust first created and insisted that the contingent interest therein could not be extinguished and that in order to protect this interest the trust must be preserved.

The trial judge held that the trust created by the instrument dated 31 December, 1927, had been revoked and the trustee discharged. He adjudged that the defendant surrender the certificate for the 260 shares of stock and issue two certificates of 130 shares each, one to be delivered to Jeffrey F. Stanback as owner, and the other to be held by the defendant upon the trusts declared in the instrument dated 27 March, 1929. Accordingly, judgment was rendered for the plaintiffs and the defendant appealed.

The maker's right to revoke a grant of future interests to persons not *in esse* was restricted by C. S., 996, to voluntary conveyances of some future interest in real estate. By an act ratified 19 March, 1929, the General Assembly amended this statute by adding the following: "The grantor, maker or trustor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons *in esse* with a future contingent interest to some person or persons not *in esse* or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not *in esse* or not determined by a proper instrument to that effect: *Provided,* that in the event the instrument creating such estate has been recorded, then the deed of revocation of such estate shall be likewise recorded before it becomes effective."

Two questions are presented: 1. Did the amended statute authorize Mrs. Woodard to revoke the trust she had created as to all interests except those of Jeffrey F. Stanback? This involves the two subordinate questions whether (a) the trust was voluntary and whether (b) it limited future contingent interests to some person or persons not *in esse* or not determined. 2. Was the statute enacted in breach of the Constitution?

There can be no serious doubt that the trust was voluntary within the meaning of the statute. Indeed, it seems to have been so regarded by the parties themselves, for in the agreed statement of facts it is said that the paper creating the trust was executed by Mrs. Woodard "without any valuable consideration and voluntarily." It recites a consideration of one dollar and the grantor's love and affection for her nephew; but it recites also the grantor's desire to make a gift of the property. The recited consideration is not "valuable," that is, not "founded in motives of justice"; but it is "good"—founded on a motive of generosity and therefore merely voluntary or gratuitous and without valuable consideration. 2 Bl., 297. It is perfectly evident that the trustor received no consideration for the "gift"—the recital of the inconse-

quential sum of one dollar being a mere matter of customary form. *Allen v. Overton,* 94 So., 477; *Hopkins v. White,* 128 Pac., 780; *Oswald v. Nehls,* 84 N. E., 619; *Gentry v. Field,* 45 S. W., 286. See concurring opinion of *Ruffin, C. J.,* in *O'Daniel v. Crawford,* 15 N. C., 208.

All the interests except those of Jeffrey F. Stanback are both future and contingent. He has no children. If he does not become the absolute owner of the trust estate, the title will vest in his issue, if any, and, if there is no issue, in such of his next of kin as may be entitled thereto under the statute of distributions in force at the time of his death. These contingent interests, therefore, are embraced in the terms of the statute.

The trust was declared in 1927; the amendment became effective in March, 1929. The appellant insists that the statute is invalid because retroactive and destructive of interests created anterior to its enactment. C. S., 996, before it was amended by the act of 1929, did not purport to be retroactive; the subject-matter was the right to revoke a voluntary conveyance of some future interest in land conveyed or limited to a person not *in esse.* In *Roe v. Journegan,* 175 N. C., 261, it was held that section 996 did not affect deeds executed before its enactment. That was an action to recover land. The plaintiffs claimed title under a deed executed by their grandfather to his son in 1881; the defendant claimed under a deed from the same grantor to the same grantee made in 1886, and under a deed from the grantee to the defendant. The first deed conveyed title to the son during his natural life; if he should have any children, then to them, if not, the land was to revert; if his wife survived him she was to have a life estate. The wife died without issue; the son, her surviving husband, married again and died leaving children. The second deed was in fee simple. The real controversy was as to the delivery of the first deed; but it was decided that if this deed had been delivered, the plaintiffs, although not *in esse* at the time, were the owners of the land by reason of the conveyance of a life estate to their father with a contingent remainder, and that the deed of 1886 could not affect their title. It had been executed prior to the enactment of section 996 and the title, having passed, could not be recalled.

This case is not decisive of the question before us. As originally enacted, section 996 applied only to voluntary conveyances; as amended it includes the creation of voluntary trusts in real or personal property, not only for the benefit of the grantor, maker or trustor, and of persons not *in esse,* but for the benefit of persons determinable upon the happening of a future event. Furthermore, as amended, it applies to trusts heretofore created as well as to such as may be created hereafter.

The amended statute has no reference to crimes and is therefore not *ex post facto.* Constitution, Art. I, sec. 32. *Tabor v. Ward,* 83 N. C., 291; *Calder v. Bull,* 3 Dallas, 386, 1 Law Ed., 648. But there is no provision in the State or Federal Constitution which prohibits the passage of retroactive laws, as distinguished from those that are *ex post facto,* unless they are such as impair the obligation of contracts or disturb rights. *Tabor v. Ward, supra; S. v. Bond,* 49 N. C., 9; *S. v. Bell,* 61 N. C., 76; *Hinton v. Hinton, ibid.,* 410. We do not see how the statute disturbs any vested rights. The term "vested rights" relates to property rights, and "a mere expectancy of future benefit, or a contingent interest in property founded on anticipated continuance of existing laws does not constitute a vested right. Contingent rights arising prior to the enactment of a statute, and inchoate rights which have not been acted on are subject to legislative control." 12 C. J., 955. "The power that authorizes or proposes to give may always revoke before an interest is perfected in the donee." *Anderson v. Wilkins,* 142 N. C., 154. The judgment is

Affirmed.

FRICK COMPANY ET AL. V. D. G. SHELTON ET AL.

(Filed 29 May, 1929.)

Damages F b—Measure of damages for breach of warranty in sales contract.

Where the buyer, damaged by the fraud of the seller in the sale of machinery, elects to keep the machinery and recoup the damages in the seller's action for the purchase price, the measure of damages, in the absence of proof of special loss brought home to the knowledge of the seller, is the difference between the value of the machinery as warranted and its value as delivered, and an instruction for the recovery of further damages, consisting of the cost of supplying a deficiency, is reversible error in the absence of evidence that such was done.

APPEAL by plaintiff from *Moore, J.,* at September-October Term, 1928, of CLAY.

Civil action to recover on several promissory notes.

The plaintiff sold the defendants a Russell Engine, No. 16988, and certain mill equipment, and took in exchange therefor a Case Engine, No. 23202, and notes aggregating $800, secured by mortgage or deed of trust on said Russell Engine and other machinery.

Default having been made in the payment of said notes, plaintiff sues to recover the amount due thereon and to foreclose mortgage or deed of trust.

Defendants answered, denied liability and set up counterclaim for damages, alleging false and fraudulent representations on the part of plaintiff's agents in the sale of the Russell Engine.

From a verdict and judgment in favor of defendants, the plaintiff appeals, assigning errors.

Dillard & Hill and Thomas J. Hill for plaintiffs.
J. B. Grady and Moody & Moody for defendants.

STACY, C. J. The validity of the trial is assailed by numerous exceptions and assignments of error, but we shall not consider them *seriatim,* as it is necessary to award a new trial for error in the charge on the issue of damages.

Speaking to this issue, the court instructed the jury that if the defendants had been defrauded in the purchase of the Russell Engine, as they allege they were, the measure of damages "would be the difference in the value of the article represented and the article delivered, . . . plus the expense of what it would have cost to bring another engine and put it up."

There was no evidence that another engine was "brought and put up" in place of the Russell Engine, as the defendants continued to use the engine purchased from plaintiff after the discovery of the fraud, hence the cost of installing another engine in its stead, under the circumstances here disclosed, would seem to be an improper item in the admeasurement of the defendants' damages. *Robertson v. Halton,* 156 N. C., 215, 72 S. E., 316; *Marsh v. McPherson,* 105 U. S., 709.

A person who is defrauded in the purchase of an article of personal property has an election of remedies. *Van Gilder v. Bullen,* 159 N. C., 291, 74 S. E., 1059. One is, he may choose to retain the benefits of the contract, confirm its validity, and still recover damages for the fraud by which he was induced to make it, or he may recoup any damages which he has sustained if the opposite party sue him for money due on the contract, or other failure to perform it. *Pryor v. Foster,* 130 N. Y., 171.

When the injured party elects to affirm the contract and brings an action for deceit to recover such damages as the fraud has occasioned him, or sets up such damages by way of recoupment or counterclaim when sued upon the contract by the other party, in the absence of proof of special loss brought home to the knowledge of the vendor, the measure of damages is the difference between the value of the article as warranted and the value of the article as delivered. *Marsh v. McPherson, supra; Guano Co. v. Livestock Co.,* 168 N. C., 442, 84 S. E., 774.

True, this difference, under certain fact situations, may consist in the actual cost of supplying the deficiency, such as making repairs, removing liens, or whatever is necessary to make the article delivered equal in value to the article sold. But where nothing of the kind is done, or no effort is made to supply the deficiency, the difference, we apprehend, is to be ascertained by subtracting the value of the article as delivered from what its value would have been had it been as warranted, and this should not be augmented by other expense, *i. e.*, the cost of installing new machinery, which, perhaps, under a given state of facts, might have been considered as one of the items of difference, but was not incurred in the case at hand. *Robertson v. Halton, supra.*

For the error as indicated a new trial must be awarded; and it is so ordered.

New trial.

A. L. NEWBERRY ET AL. v. J. W. DRAUGHON ET AL.

(Filed 29 May, 1929.)

Mortgages H b—Foreclosure may not be enjoined on ground of usury.

An usurious charge of interest does not affect the validity of a mortgage, and an injunction against foreclosure will not be granted on the ground of usury.

APPEAL by defendants, R. L. Godwin, J. W. Draughon, and C. L. Wilson, from *Daniels, J.*, at November Term, 1928, of HARNETT.

Civil action for breach of warranty and to restrain foreclosure of mortgage and have the same removed as cloud on plaintiffs' title.

On 14 February, 1920, the plaintiffs purchased a lot of land from the defendants, J. W. Draughon and wife, Jaunita Draughon, and C. L. Wilson and wife, Ethel Wilson, taking deed therefor with full covenants of warranty, etc. This lot, previously owned by R. L. Godwin, had been mortgaged by him to secure his note of $1,500 given to Sallie Purdie. It is alleged by the defendants that the mortgage in question is not a valid encumbrance because it was given to secure a note bearing usurious interest, and that the same should be canceled of record. The mortgagee seeks to foreclose. The plaintiffs ask for injunctive relief and to have the mortgage canceled as a cloud on their title.

The court ruled that the mortgage was a valid encumbrance to the extent of the unpaid principal of the note plus interest at the legal rate, and ordered the mortgage foreclosed if the balance due on the note was not paid. The defendants, R. L. Godwin, J. W. Draughon, and C. L. Wilson, appeal, assigning error.

Smith & McLeod and Dye & Clark for plaintiffs.
I. R. Williams and J. C. Clifford for defendants.

PER CURIAM. The judgment must be affirmed on authority of *Miller v. Dunn,* 188 N. C., 397, 124 S. E., 746; *Waters v. Garris,* 188 N. C., 305, 124 S. E., 334, and *Briggs v. Bank, ante,* 120.

Affirmed.

J. R. LOWERY AND WIFE, S. C. LOWERY, v. GOLDSBORO LUMBER COMPANY.

(Filed 29 May, 1929.)

Deeds and Conveyances F a—Party may re-enter lands of grantor in timber deed to remove timber on other lands when right is given by deed.

Under a deed conveying such right the grantee of standing timber may reënter and construct and operate a tramway on the land of the grantor for the purpose of removing timber he had acquired from owners of other lands.

APPEAL by plaintiffs from *Daniels, J.,* at April Term, 1929, of JONES. Affirmed.

Controversy without action (C. S., 626), to determine the right of defendant to reënter upon a right of way over and across the land of plaintiff in Jones County, N. C., and to construct thereon a tramroad for the purpose of removing timber owned by defendant from lands other than the land of plaintiffs.

Upon consideration of the facts agreed and of the provisions of the deed from plaintiffs to defendant, it was ordered and adjudged that the defendant has the right to reënter upon said right of way and to construct thereon and use a tramroad for the purpose of removing timber from the lands of any and all persons.

From this judgment plaintiffs appealed to the Supreme Court.

McK. Carmichael for plaintiffs.
J. K. Warren and Warren & Warren for defendant.

PER CURIAM. Upon consideration of plaintiffs' assignments of error based on their exception to the judgment of the Superior Court, we conclude that same cannot be sustained.

The judgment is supported by the provisions of the deed from plaintiffs to defendant, dated 1 March, 1911.

After cutting and removing the timber from the land described in the deed, within the time stipulated therein, defendant took up and removed from the right of way which it located on said land, the tramroad which it had constructed for removing said timber. Under the judgment it has the right to reënter upon said right of way and to reconstruct thereon a tramroad to be used by it to remove timber from the lands of other persons who have conveyed same to defendant. This is in accordance with the provisions of plaintiffs' deed to defendant. The judgment is

Affirmed.

D. G. NOLAND v. CITY OF ASHEVILLE.

(Filed 29 May, 1929.)

Municipal Corporations G d—Statutory time limit for notice of appeal from street assessments is mandatory.

Where notice of appeal from the levying of assessments for street improvements had not been given by the property owner objecting thereto within the statutory time limit for the giving of such notice, the entry on the books of the city commissioners, made after the expiration of the statutory time limit, that the owner had appealed therefrom is not a waiver of the requirements of the statute in this respect.

APPEAL by plaintiff from *Sink, Special Judge,* at September Special Term, 1928, of BUNCOMBE. Affirmed.

Marcus Erwin for plaintiff.
George Pennell for defendant.

PER CURIAM. This was a motion to dismiss an appeal alleged to have been taken by the plaintiff from a final order of the defendant, a municipal corporation, assessing damages and benefits to property owned by the plaintiff resulting from the improvement of one of the streets of the city. The final order was made on 19 June, 1926, and the plaintiff's notice of appeal was given on 28 July, 1926. In the charter of the defendant it is provided that any owner of premises who is dissatisfied with the damages or with the amount of special benefits assessed against his property, or with any item in the report of the jury, may appeal to the next term of the Superior Court "by serving upon the adverse party a written notice of such appeal within ten days after said board of commissioners shall have so passed upon said report, but not afterwards." Private Laws 1923, ch. 16, sec. 297.

On 28 July, 1926, the board of commissioners of the defendant met in regular session and made this entry upon their minutes: "The appeal of D. G. Noland from the report of the jury assessing benefits and damages on account of the proposed widening of Vance Street was presented to the board, and on motion ordered filed and the clerk instructed to prepare and file the necessary papers in the office of the clerk of Superior Court."

The appellant contends that this is a waiver of the defendant's right to insist upon the ten-day limitation of the statute. The appellee contends that the statute is mandatory as to the time limit; that the commissioners are representatives, not of themselves as individuals, but of the whole city, and that the time within which an appeal may be taken was definitely fixed for the protection of all the citizens. Our opinion is that the statute prescribes a specific time within which an appellant from assessments in proceedings of this kind must give notice of appeal, and that the entry on the minutes of the commissioners did not have the effect of enlarging the time. The question of the right to apply to the Superior Court in proper cases for a writ to bring up an appeal after the time limited when the appellant is not in fault is not presented.

Affirmed.

T. J. FERGUSON, W. J. McCLURE, AND J. S. CONNOR, COUNTY COMMISSIONERS OF SWAIN COUNTY, AND S. R. PATTERSON, SHERIFF OF SWAIN COUNTY, v. W. C. MARTIN.

(Filed 12 June, 1929.)

1. Sheriffs A b—In this case held, sheriff was on salary basis and mandamus would lie to compel him to surrender tax books to his successor.

Where an act which says in its caption that its purpose is to regulate salaries, etc., repeals all former laws, and provides that the sheriff of a certain county should receive for his services as sheriff the fees of his office, and for his services as tax collector he should receive a certain sum per annum, payable monthly: *Held*, in the collection of taxes the sheriff was on a salary basis, and under the provisions of chapter 213, section 7, Public Laws 1927, he is required to turn over to his successor the tax books upon the termination of his term of office, and mandamus will lie to compel him to do so.

2. Sheriffs B a — Distinction between salary and fee basis of compensation.

The payment by the county for the services of a tax collector upon a salary or wage basis differs from that of a fee or commission basis in that in the former the payment for such services depends upon a period of time of service in such capacity, and in the latter, upon the particular acts of collection or value of the services rendered.

FERGUSON *v.* MARTIN.

APPEAL by defendant from *McElroy, J.*, at March Term, 1929, of SWAIN. Affirmed.

The judgment of the court below is as follows: "This cause coming on to be heard at this, the March Term, 1929, of the Superior Court of Swain County before his Honor, P. A. McElroy, judge presiding, and the same being heard upon the plaintiff's motion for a mandamus to require the defendant to surrender and turn over the tax list, receipt books and other records and documents relative to the collection of 1929 taxes for Swain County, North Carolina, whereupon, upon consideration of the verified complaint and answer filed herein, and the several statutes and other proofs offered by the respective parties, the court finds the following facts, to wit:

1. That the defendant, W. C. Martin, was duly elected sheriff of Swain County at the regular November election, 1926, for a period of two years ending the first Monday in December, 1928, and that he served and acted as such sheriff until the first Monday in December, 1928, when he was succeeded in the office of the sheriff of said county by the plaintiff, S. R. Patterson, who was in like manner duly elected to said office on the 6th day of November, 1928.

2. That the defendant, W. C. Martin, received the tax list and books of said county for the year 1927 and served in said capacity, and that on the ..... day of November, 1928, the board of commissioners of Swain County again delivered to the defendant, W. C. Martin, the list and tax books for the year 1928, and that the said defendant thereupon entered upon his duties as such tax collector, and that he still has in his possession the said tax list and receipt books for the taxes of said county of Swain for the year 1928, and duly filed his bond therefor, which bond was accepted and approved by the commissioners of said county.

3. That the plaintiff, S. R. Patterson, duly filed a bond with commissioners of said county as tax collector of Swain County for the year 1928, which bond was accepted and approved by the board of commissioners of said county.

4. That on 22 November, 1928, the plaintiff, board of county commissioners of Swain County, caused to be served on the defendant, W. C. Martin, by the plaintiff, S. R. Patterson, the present sheriff of Swain County, a notice or demand therein requiring the defendant, W. C. Martin, to surrender and turn over to the said commissioners the tax list, receipt books and other records and documents pertaining to the office of such tax collector of Swain County, and therewith file a statement of the amount of taxes collected by the said W. C. Martin between said date and the time said tax lists were so delivered to him. That

the said W. C. Martin refused to so turn over and surrender said list, tax records and documents, and still holds the same in his possession, as aforesaid, and still refuses to deliver and surrender the same to the plaintiffs.

5. That the said W. C. Martin was paid by the commissioners of said county for the collection of the taxes for 1927, as provided by law, the sum of $3,250, but has not been paid the full sum of $3,250 for the taxes of 1928; that his term of office as such tax collector expired on the first Monday in December, 1928.

It is, therefore, on motion of Moody & Moody, and Gentry Hall, attorneys for the plaintiffs, considered, adjudged and decreed by the court that the plaintiff, S. R. Patterson, is entitled to receive from the defendant, W. C. Martin, the tax lists, receipt books and other records and documents now in his possession relating to the taxes of said county for the year 1928, and to collect the remainder of said taxes, as required by law, and to receive the emoluments therefor, as provided by law, and it is ordered that said W. C. Martin be and is hereby required to turn over and deliver to the plaintiffs the aforesaid lists, books and documents, and to report in writing to the plaintiffs, commissioners of said county, the correct amount of taxes of 1928 already collected by him.

It is further ordered and adjudged by the court that the plaintiffs have and recover of the defendant their costs in this action incurred, and that the defendant pay all the costs of this action."

To the court below signing the above judgment, defendant excepted, assigned error and appealed to the Supreme Court.

Moody & Hall for plaintiffs.
Alley & Alley, Edwards & Leatherwood for defendant.

CLARKSON, J. The single question presented by this appeal is whether the defendant was collecting the taxes in Swain County on a *salary* or *fee and commission* basis. We think he was collecting same on a *salary basis*. The determination of this controversy involves the construction of certain statutes.

Public-Local Laws 1919, ch. 134, sec. 8, in part: "Said sheriff and tax collector shall deduct from the full amount of said taxes so collected all commissions which are now or may hereafter be provided by law, out of which commission he shall retain the sum of eighteen hundred dollars per annum as full compensation for his services as tax collector."

Public-Local Laws 1921, ch. 422, sec. 1, in part: "*Provided,* that the total compensation of the sheriff shall not exceed the sum of thirty-two hundred dollars per annum."

Public-Local Laws 1923, ch. 163, in part: "Be amended by striking out the words 'thirty-two hundred' in line eight of said section and inserting in lieu thereof the words 'three thousand.'"

Public-Local Laws 1925, ch. 329, caption of act, is as follows: *"An act to regulate the salaries of the officers of Swain County."* Section 1. "That the compensation of the officers of Swain County shall be as follows: . . . The sheriff shall receive for his services as sheriff, the fees of his office, *and for his services as tax collector he shall receive three thousand two hundred and fifty dollars per annum, payable in equal monthly installments;* . . . Sec. 2. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed."

Public Laws 1927, ch. 213, sec. 7: "If any sheriff, or tax collector, to whom the tax list and receipt books shall be delivered on the first Monday in October, shall fail to succeed himself as such officer on the first Monday in December of any year, he shall make a full and complete settlement of such taxes as he may have collected on or before the first Monday in December, at which his term of office may expire, and the tax list and receipt books shall be delivered to his successor, who shall in his settlement be credited with the amount for which settlement was made with such officer whose term expired: *Provided, however,* that if the outgoing sheriff, or tax collector, shall have received the tax list and receipt books to collect the taxes due thereon, upon fees and commissions based upon the collections made, it shall be his duty, and he shall be charged with the collection of the taxes due for such year, and shall be charged with all the duties and responsibilities with reference to reports and other settlements, and subject to the same penalties, imposed by this act, and shall conduct the land sales and execute the certificates of sale for the same. If the officer whose term expires on the first Monday in December of any year and who does not succeed himself as such officer, shall not have received the tax books for the then tax year, the officer succeeding to such office shall give the required bond and be charged with the collection of the balance of the taxes for the then tax year, as if he had received the tax books on the first Monday in October, less, however, the taxes collected by the specially appointed tax collector."

It will be noted that the Public-Local act of 1925, *supra,* the caption says, "An act to regulate the salaries," etc., and the services as tax collector is fixed at $3,250 per annum, payable in equal monthly installments. This act repeals all laws and clauses of laws in conflict. Then the Public Laws of 1927, sec. 7, provides, in substance, a fair interpretation from the entire section and proviso, that if he is on a salary basis and fails to succeed himself, on the first Monday in December he shall make a full settlement, etc., and the tax list, etc., *shall* be delivered to

his successor in office; and if he is collecting upon a basis of fees and commissions he is not required so to do. The provision seems to be broad enough to cover the counties on a *salary* or *fee and commission basis.*

The meaning of *Salary:* "The recompense or consideration paid, or stipulated to be paid, to a person at regular intervals for services; fixed regular wages, as by the year, quarter or month." Webster's New International Dictionary, p. 1871. "The word *salary* may be defined generally as a fixed annual or periodical payment for services, depending upon the *time* and not upon the amount of services rendered." 24 A. & E. Enc. of Law, 2 ed., p. 1015, 16 and 17. Black's Law Dict., 2 ed., "Salary," p. 1052 and cases cited.

The term *fees* "is distinguished from wages or salary in that it refers to compensation for particular acts, whereas, wages or salary refers rather to compensation for work during a definite period of time." 25 C. J., p. 1010.

We do not think *Commissioners v. Bain,* 173 N. C., p. 377, is applicable. See *Pender County v. King, ante,* 50. We are dealing here with a statute that is mandatory—the statute speaks in language in which we think there is no ambiguity. The judgment below is

Affirmed.

G. E. BROWN v. E. L. OSTEEN AND WIFE, ELLA M. OSTEEN.

(Filed 12 June, 1929.)

1. Bills and Notes D a—Provision in mortgage for acceleration affects only foreclosure and not notes secured thereby in which no provision is made.

Where there is no provision for acceleration in a series of notes secured by a mortgage on lands, but the mortgage itself provides that a failure to pay any of the notes or interest when due shall mature all the indebtedness thereby secured: *Held,* the provisions for acceleration appearing only in the mortgage affects only the right to foreclose the mortgage and does not affect the notes, and when action is taken before the maturity of some of the notes, as to them no recovery can be had.

2. Election of Remedies A—Upon discovery of fraud the injured party is put to his election to disaffirm or ratify contract.

Where fraud is alleged in the transaction wherein a mortgage is given on lands involving the assumption thereof by a grantee of the equity of redemption, and there is evidence tending to show that the defendant by his acts and conduct with knowledge of the alleged fraud received the benefits: *Held,* he was put to his election within a reasonable time after he discovered the fraud or should have done so in the exercise of

reasonable diligence, to disaffirm his contract, and where he has not done so, and has received the benefits under the contract he may not successfully maintain his suit to cancel the contract, and ordinarily this is not open to him unless he is in a position to put the plaintiff in *statu quo*.

APPEAL by defendants from *Schenck, J.*, and a jury, at November Term, 1928, of HENDERSON. Modified and affirmed.

The plaintiff instituted this action against the defendants for the recovery of $2,166.66 and interest, the indebtedness represented by four notes or bonds under seal, dated Hendersonville, N. C., 24 May, 1926; one note due at 6 months for $541.66; one note due at 12 months for $541.66; one note due at 18 months for $541.66, and one note due at 24 months for $541.68, with interest after date at 6 per cent payable semiannually. All the notes or bonds with the exception as to when they become due, are like the first, which is as follows:

"$541.66. Hendersonville, N. C., 24 May, 1926.

Six months after date, without grace, we promise to pay to G. E. Brown..... or order, five hundred forty-one and 66/100..... dollars. For value received, payable at the office of the First Bank & Trust Co., Hendersonville, N. C. With interest after date at 6 per cent, payable semiannually. Protest, presentment and notice of dishonor or extension waived by all parties to this note.

(Signed) E. L. OSTEEN (Seal)
(Signed) ELLA M. OSTEEN (Seal)

No.....
Due....."

On 24 May, 1926, the plaintiff executed and delivered to defendants a deed to three lots 28, 29 and 30, in the White addition to "Mountain Home," on the property a house was built by plaintiff which he contended cost him $3,297.79. The defendants, to secure the purchase price, to wit, the four notes or bonds above set forth, executed and delivered to plaintiff a mortgage on said lots. The deed and mortgage were duly recorded in the office of the register of deeds for Henderson County.

The mortgage had this provision: "A failure to pay any part of the interest, or any note or any part thereof, when due, shall mature all the indebtedness secured by the mortgage." This action was instituted 14 July, 1927, when only two of the notes were due.

The defendants set up as a defense actionable fraud and tendered a deed back to plaintiff for the property. The plaintiff's reply was that the contract was ratified after knowledge on the part of the defendants of the actionable fraud. The undisputed evidence on this aspect was as

follows: Deed duly executed by defendants on 4 September, 1926, for lots 29 and 30 to Carl West. The said West, as a part of the consideration of the deed, assumed the payment of the following indebtedness as recited in the deed: "It is agreed as a part of the consideration for this conveyance that the party of the second part assumes and agrees to pay when due that deed in trust upon the within described property from G. E. Brown and wife, Mary C. Brown, to W. C. Meekins, trustee, which deed of trust is dated 24 March, 1926, securing notes as follows:

1 note for $416.67 dated 24 March, 1926, due 1 year from date.
1 note for $416.67 dated 24 March, 1926, due 2 years from date.
1 note for $541.66 dated 24 May, 1926, due 6 months from date.
1 note for $541.66 dated 24 May, 1926, due 12 months from date.
1 note for $541.66 dated 24 May, 1926, due 18 months from date.
1 note for $541.66 dated 24 May, 1926, due 24 months from date.

The last four notes made payable to G. E. Brown and wife, Mary C. Brown, payable at the First Bank and Trust Company, Hendersonville, N. C."

Defendants kept one lot, 28, and in addition to the assumption of the indebtedness by Carl West got from him two lots in Florida and one lot in Buncombe County, West Asheville. No cash was passed in this transaction. West sold the property to a Mr. Crabb, and defendants purchased the property back from Crabb and paid him $50.00. The property was rented by defendants, a sign "For Rent" was put on the property. Defendants collected $40.00 a month for three months. Defendants had work done on the house, and were offered $5.00 a month for the house without furniture, and rented it furnished. They had the woodwork to do over and had the plumbing fixed.

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

"1. Did the defendants, E. L. Osteen and Ella M. Osteen execute to the plaintiff, G. E. Brown, the four several notes as alleged in the complaint? Answer: Yes.

"2. Has any payment been made on said notes by the said defendants, or either of them? Answer: No.

"3. Was the execution and delivery of said notes procured by false and fraudulent representations of the plaintiff, G. E. Brown, or his agent, as alleged in the answer? Answer: Yes.

"4. Did the defendants, with knowledge of the false and fraudulent representations of the plaintiff, ratify the execution and delivery of said notes, as alleged in the reply? Answer: Yes.

"5. What amount, if any, are the defendants, E. L. Osteen and wife Ella M. Osteen, indebted to the plaintiff, G. E. Brown? Answer: $2,166.66 with interest.

"6. Did the plaintiff, G. E. Brown, procure the payment of the $500, as a part of the purchase price of the land described in the complaint, by false and fraudulent representations, made by the plaintiff, G. E. Brown, or his agent, as alleged in the answer? Answer: .....

"7. In what amount, if any, is the plaintiff, G. E. Brown, indebted to the defendants, E. L. Osteen and Ella M. Osteen? Answer: ....."

The judgment of the court below was as follows: "This cause coming on to be heard before the undersigned judge of the Superior Court and a jury, at November Term, 1928, and issues having been submitted to the jury and answered as appear in the record. It is therefore, considered, ordered and adjudged that the plaintiff have and recover of the defendants and each of them the sum of two thousand one hundred and sixty-six and 66/100 dollars ($2,166.66), with interest thereon from and after 24 May, 1926, until paid and the costs to be taxed by the clerk."

The defendants made numerous exceptions and assignments of error and appealed to the Supreme Court.

W. C. Meekins for plaintiff.
Ray & Redden and Blythe & Sheppard for defendants.

CLARKSON, J. In *Meadows Co. v. Bryan,* 195 N. C., at p. 401, the law is stated as follows: "There is no provision in the notes executed by E. W. Bryan and payable to Merrill Bryan, by the terms of which the maturity of the notes, not due according to their tenor, is accelerated upon default in the payment of any one of said notes; the provision for the acceleration of the maturity of said notes is contained in the mortgage, securing the same. This provision is applicable, therefore, only to the foreclosure of such mortgage, under the power of sale, or by civil action." *Walter v. Kilpatrick,* 191 N. C., 458.

As to the notes or bonds not due when this action was instituted, plaintiff's attorney frankly admits that the judgment should be modified, and we so hold.

The fourth issue is as follows: "Did the defendants, with knowledge of the false and fraudulent representations of the plaintiff, ratify the execution and delivery of the said notes, as alleged in the reply?" The defendants assign error as to the charge of the court below on this issue. We cannot so hold.

We have read with care the charge of the court below on this issue, both before and after the jury came into court and requested the court

to recharge the law on this particular issue. Taking the charge as a whole and not disconnectedly, we think the court below clearly and fully charged the law as repeatedly set forth in the decisions of this Court. On this issue, after giving the contentions fairly to both sides of the controversy, the court charged, in part: "Now, gentlemen of the jury, our courts have said, as late as the 191st Report, which was issued in the year 1926, and the court charges you that this is the law: 'In order to rescind, however, the party injured must act promptly and within a reasonable time of the discovery of the fraud, or after he should have discovered the fraud 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 the injured party is not allowed to rescind where he is not in a position to put the other party in *statu quo* by restoring the consideration passed. Furthermore, if after discovering the fraud the injured party voluntarily does some act in confirmation (recognition) of the contract, his power to rescind is then at an end.' The court has read to you from the case of *McNair v. Finance Co.,* Book 191, at bottom page 718 of the N. C., Report." *May v. Loomis,* 140 N. C., at p. 359.

The exceptions and assignments of error are not in accordance with *Rawls v. Lupton,* 193 N. C., 428, but notwithstanding this, we have considered the material ones.

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

Modified and affirmed.

C. E. CATHEY, ADMINISTRATOR OF WILLIAM GRAHAM CATHEY, v. THE CITY OF CHARLOTTE AND SOUTHERN BELL TELEPHONE COMPANY.

(Filed 12 June, 1929.)

1. Removal of Causes C b — Allegations of complaint will determine whether cause of action is stated against resident defendant.

Upon a petition of the nonresident defendant for removal of the cause to the Federal Court for trial on the grounds of diversity of citizenship and separable controversy, the allegations of the complaint will alone be considered as to whether a joint tort is alleged, and where the allegations are sufficient and the resident defendant recognizes the jurisdiction of the State court by obtaining an extension of the time to answer, the petition for removal will be denied.

2. Same—In this case held, complaint alleged joint tort of resident and nonresident defendants, and petition for removal should be denied.

Allegations in the complaint in an action for wrongful death that the plaintiff's intestate was an employee of a city and was injured by the

joint negligence of the city and the nonresident telephone company in connection with removing, by order of the city, its wire, used in its police and fire alarm system, from a pole erected by the nonresident telephone company under authority of an ordinance requiring that sound poles be used, and that the injury resulted from defects in the pole causing it to break and throw plaintiff's intestate to the ground: *Held*, a cause of action against both defendants as joint *tort-feasors* is stated, and the petition of the nonresident defendant for removal of the cause to the Federal Court for trial should be denied.

3. Same—Nonresident defendant may not raise question of nonliability of the resident defendant because of its being municipal corporation.

Where a city and a nonresident telephone company are sued in the State Court a joint tort causing the death of the plaintiff's intestate, and the city does not file a demurrer but obtains an extension of time in which to answer, the nonresident defendant cannot raise the question by its petition for removal of the cause to the Federal Court on the ground that the action is separable, whether or not the city was liable for that its employee was injured in the exercise of the city's governmental functions.

4. Municipal Corporations E a—Municipal corporation is not liable for negligent injury to its employee in exercise of governmental functions.

A city is not liable in damages for negligence causing injury or death to its employee while performing his duty as such in connection with removing a wire on a pole used by the city in connection with its police and fire alarm system.

APPEAL by plaintiff from *Sink, Special Judge,* at March Term, 1929, of MECKLENBURG. Reversed.

This is an action to recover damages for the wrongful death of plaintiff's intestate, caused, as alleged in the complaint, by the joint and concurrent negligence of defendants.

Plaintiff is a citizen of the State of North Carolina; he instituted this action in the Superior Court of Mecklenburg County as administrator of his son, William Graham Cathey, who at the date of his death was a citizen of the State of North Carolina, and a resident of Mecklenburg County.

The defendant, the city of Charlotte, is a municipal corporation, organized and existing under the laws of the State of North Carolina.

The defendant, Southern Bell Telephone Company, is a corporation, organized under the laws of the State of New York, with its principal office in said state, and engaged in business in the State of North Carolina, as authorized by its charter.

The value or amount in controversy in this action, which is of a civil nature, exceeds the sum of $3,000, exclusive of interest and costs.

From judgment that the action be removed from the Superior Court of Mecklenburg County to the District Court of the United States for

the Western District of North Carolina, Charlotte Division, for trial, in accordance with the prayer of the petition, duly filed by the defendant, Southern Bell Telephone Company, the plaintiff appealed to the Supreme Court.

John M. Robinson and Hunter M. Jones for plaintiff.
T. C. Guthrie for defendant.

CONNOR, J. It appears on the face of the complaint that on 1 September, 1902, an ordinance was duly adopted by the city of Charlotte, by which permission was granted to the Southern Bell Telephone Company to erect, maintain and operate lines of telephone and telegraph, including the necessary poles, etc., upon, along, and over the streets of the city of Charlotte, provided that all poles erected and maintained by said company in said city should be sound, strong, neat and symmetrical. In consideration of the passage of said ordinance, the said Telephone Company agreed to provide one cross-arm on each pole, when requested so to do by the city of Charlotte, for the free use of its police and fire alarm system.

Some time prior to 8 January, 1929, in accordance with the provisions of the said ordinance, the Southern Bell Telephone Company erected and installed one of its poles in the city of Charlotte, near the corner of East Fourth Street and Caswell Road. The city of Charlotte, thereafter, under the provisions of said ordinance, and with the knowledge, consent and approval of the Telephone Company, placed one of its electric wires on said pole. This wire was a part of the apparatus used by the said city in its police and fire alarm system.

On 8 January, 1929, pursuant to the request of the Telephone Company that it remove said wire from the said pole, the city of Charlotte ordered and directed plaintiff's intestate, who was at that time an employee of the said city, to climb the said pole, and to remove the said wire therefrom. Plaintiff's intestate climbed the said pole, as he was ordered and directed to do by the city; while he was at work removing said wire, the said pole broke and fell, hurling him to the ground with such force and violence as to cause injuries which resulted in his death.

It is alleged in the complaint that the death of plaintiff's intestate was caused by the joint and concurrent negligence of defendants, as specifically set out therein, and that as the result of his wrongful death, plaintiff as his administrator, has been damaged in the sum of $75,000. Each of the allegations in the complaint involves an allegation that there were defects in said pole, at the time it was erected and installed by the Telephone Company, or at the time plaintiff's intestate was ordered and directed by the city of Charlotte to climb the pole, and to remove the wire

therefrom, at the request of the Telephone Company. Prior to the institution of this action, plaintiff presented to the city of Charlotte his claim for damages, as he was required to do by the statute, and by a provision in the charter of said city, and demanded payment of said claim. The city of Charlotte refused and neglected to pay said claim, and thereafter plaintiff instituted this action against both the defendants.

In apt time, the defendant, Southern Bell Telephone Company, filed its petition, pursuant to the provisions of the act of Congress, for the removal of the action from the Superior Court of Mecklenburg County to the District Court of the United States for the Western District of North Carolina, Charlotte Division, for trial, upon the sole ground that upon the allegations of the complaint, the defendant, the city of Charlotte, is not liable, in law, to the plaintiff in this action, and that, therefore, the cause of action alleged in the complaint is against the Southern Bell Telephone Company, alone. The defendant, the city of Charlotte, has filed no demurrer or answer to the complaint; it has, however, applied for and obtained an order extending the time within which it is required to file pleadings. From the judgment affirming the order of the clerk of the Superior Court of Mecklenburg County, and ordering and directing that the action be removed for trial, in accordance with the prayer of the petition, plaintiff appealed to this Court.

It appears from the allegations of the complaint that the wire which plaintiff's intestate was ordered and directed by the defendant, the city of Charlotte, to remove from the pole, which had been erected and maintained by the defendant, Southern Bell Telephone Company, under the provisions of the ordinance of the city of Charlotte, was a part of the apparatus used by the city of Charlotte for its police and fire alarm system. In the erection and maintenance of its police and fire alarm system, the city of Charlotte, as a municipal corporation, was engaged in the exercise of a governmental function. *McIlhenney v. Wilmington,* 127 N. C., 146, 37 S. E., 187, *Peterson v. Wilmington,* 130 N. C., 76, 40 S. E., 853. It is the general rule in this as well as in other jurisdictions that municipal corporations when engaged in the exercise of powers and in the performance of duties conferred and enjoined upon them for the public benefit, may not be held liable for torts and wrongs by which their employees or others sustain injuries, resulting in damages, unless made liable by statute. *Parks-Belk Co. v. Concord,* 194 N. C., 134, 138 S. E. 599; *Price v. Trustees,* 172 N. C., 84, 89 S. E., 1066. In *Scales v. Winston-Salem,* 189 N. C., 469, 127 S. E., 543, it is said in the opinion written by *Adams, J.*: "The nonliability of a municipal corporation for injury caused by negligence in the exercise of its governmental functions may be illustrated by cases in which it is held that a city is not liable for a policeman's assault

with excessive force, or for the suspension of a town ordinance indirectly resulting in damage to property, or for injury to an employee while in the service of the fire department, or for failure to pass ordinances for the public good, or for the negligent burning of trash and garbage, or for personal injury caused by the negligent operation of a truck by an employee in the service of the sanitary department of a city." See cases cited in the opinion. In accordance with this principle it was held in that case that the defendant, a municipal corporation was not liable to an employee for damages resulting from injuries caused by the negligent construction of a furnace as a part of an incinerator constructed and used by the defendant for the purpose of burning trash and refuse collected within the corporate limits of the defendant city. A judgment overruling a demurrer to the complaint, on the ground that it appeared from the allegations thereof that the construction and operation of the incinerator was in the exercise of a governmental function, was reversed, on defendant's appeal to this Court.

This principle is so well settled by authoritative decisions of this Court, and by decisions of courts of other jurisdictions, that in the absence of its abrogation or modification by statute, it cannot be questioned. Whether it should be abrogated or modified in this State, in view of changed conditions, enlarging the functions of municipal corporations, must be determined by the General Assembly. The principle, however, is not determinative of the question presented by this appeal. The city of Charlotte has not demurred to the complaint. Whether or not the complaint is subject to its demurrer, upon the ground that it is not liable to the plaintiff upon the facts alleged therein, is not now presented for decision. The nonresident defendant, Southern Bell Telephone Company, cannot raise the question, by its petition for the removal of the action from the State court to the Federal court, for trial, on the ground that the action is separable, as to whether the resident defendant, the city of Charlotte, is liable, upon the allegations of the complaint to the plaintiff in this action.

"A directed verdict, without the plaintiff's assent in favor of a resident defendant whose presence has heretofore prevented a removal for a separable controversy does not operate to make the case then removable; nor is that effect produced by a ruling of the court that, as to the resident defendant, there is not sufficient evidence to warrant a verdict, and sustaining a demurrer to the evidence, nor by a judgment dismissing the action as against the resident defendant, and though such judgment is affirmed by an intermediate court; nor by the taking of an involuntary nonsuit by the plaintiff as to the resident defendant, with a view not to abandon prosecution of the suit, but to test the correctness

of the ruling by appeal. Only a voluntary dismissal by the plaintiff as to the resident defendant puts the latter out of the case." 23 R. C. L., 682. See cases cited.

"The Federal Supreme Court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts, which might have been brought against all or against any of the defendants, that separate answers by the several defendants sued on joint causes of action, may present different questions for determination, but they do not necessarily divide the suit into separate controversies. The cause of action is the subject-matter of the controversy and that is for all purposes of the suit whatever the plaintiff declares it to be in pleading. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. Each party defends for himself, but until his defense is made out, the case stands against him and the rights of all must be governed accordingly. 23 R. C. L., 679. See cases cited.

There is error in the judgment ordering and directing the removal of the action from the State Court to the Federal Court, for trial. The judgment is

Reversed.

C. D. BARBOUR v. THE COUNTY OF WAKE AND DR. O. L. RAY, L. Y. BALLENTINE, SAM T. BENNETT, D. H. POPE, AND W. L. WIGGS, AS MEMBERS OF THE BOARD OF COMMISSIONERS OF THE COUNTY OF WAKE.

(Filed 12 June, 1929.)

1. Taxation A a—Bonds for maintenance of highways are for necessary expense and do not require submission to voters.

Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of the State Constitution, Art. VII, sec. 7, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county.

2. Same—Bonds issued to refund other bonds are for special purpose and do not fall within Constitutional limitation on tax rate.

Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the Legislature: *Held*, the bonds later authorized by the Legislature and issued by the county to refund the indebtedness to the general county

fund are for a special purpose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution. Art. V, sec. 6.

3. Same—County commissioners may borrow from general fund to preserve county credit and issue refunding bonds under valid Legislative authorization.

The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, Constitution, Art. VII, sec. 2, have the authority by proper resolution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction.

4. Statutes A c—Act of Legislature ratifying act of county commissioners, which it could have authorized, not objectionable as retroactive.

A statute passed to preserve the credit of a certain county in enabling it to meet the payment of its bonds when due, authorizing the issuance of refunding bonds and ratifying the act of the county commissioners in borrowing from the general county fund pending the authorization and issuance of the refunding bonds, is not objectionable as a retroactive statute under the facts of this case.

APPEAL by plaintiff from *Lyon, J.,* 26 April, 1929. From WAKE. Affirmed.

Controversy without action. *Facts:* Prior to the adoption of the County Finance Act by the General Assembly on 7 March, 1927, the county of Wake had incurred indebtedness for the purpose of construction and reconstruction of highways and bridges in said county, of $195,000, and for maintenance of highways and bridges of $5,000.

On 1 January, 1929, there became due $28,000 of bonds of said county $8,000, issued on 1 January, 1899; $20,000 issued 1 January, 1909, pursuant to act of the General Assembly, for the payment of which no sinking funds were authorized or created. The board of commissioners of said county, being forbidden by what is known as the Harris Act, ch. 509, Public-Local Laws of 1925, to issue any bonds without a vote of the people, could not refund the same under the provisions of the County Finance Act, and to save the credit of the county pending the early sitting of the General Assembly, there being in the county general fund sufficient funds, already allocated to other purposes, but which could temporarily be used for this purpose, by resolution, borrowed from the general county fund the said $28,000, and took up said bonds and directed "that the said bonds be held by the treasurer of said county as security for said loan, to be later retired by refunding bonds."

By an act of the General Assembly of 1929, to wit, chapter 112 of the Public-Local Laws of said session, ratified 1 March, 1929, the board of commissioners of the county of Wake were expressly authorized:

1. By section 1(a) to issue bonds of the said county for indebtedness of said county incurred "Prior to the passage of the County Finance Act for the special purpose of building, rebuilding, and maintaining the public roads and bridges of the county of Wake."

2. By section 1(c) to issue bonds of the said county for indebtedness of said county incurred, "on 1 January, 1929, in retiring $8,000 of bonds of said county of Wake issued 1 January, 1899, and $20,000 of bonds issued on 1 January, 1909, no provision for the payment of either of said issues having been made, and paid when due, out of moneys advanced from the general fund of the county of Wake for the year 1928, said fund having theretofore been allocated to the county budget."

The facts in connection with the aforesaid indebtedness are set out in the preamble of said act, and by section 1(e), "All such outstanding indebtedness incurred by said county for said purposes is hereby legalized, validated and declared to be for a special purpose." There is no question as to the passage of the act having been according to constitutional requirements.

Pursuant to, and in accordance with, the terms of said act, the board of commissioners of the said county of Wake duly passed a resolution providing for the issuance of said bonds; that part of said resolution, pertinent hereto, as relates to the bonds herein sought to be restrained, as to the issuance of the $200,000 of bonds, appears in section 1 of said resolution, section 2 of said resolution, section 11 of said resolution, and in the third paragraph of the amended resolution, and as to the $28,000 of bonds appears in section 1 of said resolution, section 4 of said resolution, section 11 of said resolution and in the third paragraph of the amended resolution.

On the .... day of ....., 1929, this action to restrain the issuance of the said bonds was begun, the plaintiff and defendants agreeing on the facts and submitting a case agreed. His Honor, C. C. Lyon, judge, holding the courts of the Seventh Judicial District, refused to restrain their issuance. Plaintiff appealed to the Supreme Court and assigned the following errors:

"1. For that the court erred in not holding that the issuance of the $200,000 of bonds is unlawful and should be enjoined.

2. For that the court erred in not holding that the issuance of the $28,000 of refunding bonds will be unlawful and should be enjoined.

3. For that the court erred in signing judgment as set out in the record."

J. C. Little for plaintiff.
P. J. Olive and John W. Hinsdale for defendants.

CLARKSON, J. The plaintiff assigned error as follows: "1. For that the court erred in not holding that the issuance of the $200,000 of bonds is unlawful and should be enjoined." We cannot so hold.

Constitution of N. C., Art. VII, sec. 7, is as follows: "No county, city, town or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein."

It has been held in this jurisdiction that the construction and repair of bridges and roads are necessary expenses. To contract a debt for such purposes, a vote of the majority of the qualified voters of a county is not a prerequisite. *Herring v. Dixon,* 122 N. C., 420; *Crocker v. Moore,* 140 N. C., 432; *Hendersonville v. Jordan,* 150 N. C., 35; *Commissioners of Yancey v. Road Commissioners,* 165 N. C., 632; *Moose v. Commissioners of Alexander,* 172 N. C., 419; *Woodall v. Highway Commission,* 176 N. C., 377; *Parvin v. Commissioners of Beaufort,* 177 N. C., 508; *Guire v. Commissioners of Caldwell,* 177 N. C., 516; *Davis v. Lenoir,* 178 N. C., 668.

Constitution of N. C., Art. V, sec. 6 (N. C. Code, 1927, anno.) is as follows: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by article nine, section three, of the Constitution: *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property."

In *R. R. v. Reid,* 187 N. C., at p. 324, it is said: "While the construction and maintenance of the county home and the building and repairing of bridges may be considered a part of the ordinary expenses of the county, to be defrayed out of the general county revenue when sufficient for these purposes, still a tax levied under a special or general act for the specific and exclusive purpose of constructing, maintaining or repairing courthouses, jails, county homes, highways, or bridges is deemed to be levied for a special purpose, . . . *Brodnax v. Groom,* 64 N. C., 244; *Jones v. Commissioners,* 107 N. C., 248; *Williams v. Commissioners,* 119 N. C., 520; *Herring v. Dixon, supra; R. R. v. Commissioners,* 148 N. C., 220, 240; *Jackson v. Commissioners,* 171 N. C., 379, 382; *Moose v. Commissioners,* 172 N. C., 419, 428; *Parvin v. Com-*

missioners, 177 N. C., 508; *R. R. v. McArtan,* 185 N. C., 201." *Commissioners v. Assell,* 194 N. C., 412; *Owens v. Wake County,* 195 N. C., 132; *Commissioners v. Assell,* 195 N. C., 719; *R. R. v. Cherokee County,* 195 N. C., 756; *Mayo v. Commissioners of Beaufort,* 196 N. C., 15.

Plaintiff assigns as error: "2. For that the court erred in not holding that the issuance of the $28,000 of refunding bonds will be unlawful and should be enjoined." We cannot so hold.

On 1 January, 1929, there became due $28,000 of bonds of Wake County, $8,000 issued 1 January, 1899, and $20,000 issued 1 January, 1909. No provision had been made for the payment of these valid and outstanding bonds of the county. It was important that the credit of the county be maintained. The board of commissioners of Wake County, by resolution, borrowed from the general county fund the $28,000 and took up said bonds, and the resolution in regard to the transaction was to the effect "that the said bonds be held by the treasurer of said county as security for said loan, to be later retired by refunding bonds." To meet an emergency like the one in question, we can find nothing to criticize.

Constitution of N. C., 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."

We know of no statute, and none was called to our attention, prohibiting the doing of what was done in the present case. It was a temporary loan to meet a pressing emergency to save the county's credit. It was afterwards approved by Legislative enactment. In reference to the indebtedness, the preamble of the act of the General Assembly of 1929 is as follows: "All such outstanding indebtedness incurred by said county for said purposes is hereby legalized, validated and declared to be for a special purpose."

As was said in *Board of Education v. Commissioners,* 183 N. C., at p. 302: "Subject to certain exceptions, the general rule is that the Legislature may validate restrospectively any proceeding it might have authorized in advance." *Construction Co. v. Brockenbrough,* 187 N. C., at p. 77; *Storm v. Wrightsville Beach,* 189 N. C., at p. 683; *Holton v. Mocksville,* 189 N. C., 144; *Commissioners v. Assell,* 194 N. C., at p. 418. The judgment of the court below is

Affirmed.

JANE AUSTIN, ADMINISTRATRIX OF THE ESTATE OF REUBEN AUSTIN, DECEASED, *v.* SOUTHERN RAILWAY COMPANY, AND DILLY MYERS.

(Filed 12 June, 1929.)

1. Master and Servant E a—Liability of railroad for injury to employee engaged in interstate commerce is governed by Federal decisions.

The liability of a railroad company to its employee for injuries sustained by him while engaged in interstate commerce is governed by the Federal Employer's Liablity Act and the applicable principles of the common law as applied by the Federal Courts.

2. Master and Servant E b—Plaintiff must show that defendant's violation of Federal statute was proximate cause of injury.

Held, in order for a recovery under the Federal Employers' Liability Act there must appear under the evidence that the defendant was guilty of some negligence or the violation of a Federal statute which proximately caused the injury in suit.

3. Same—Evidence of defendant's negligence insufficient to be submitted to jury in this case.

Where the evidence tends only to show that the plaintiff's intestate was employed by the defendant as a track inspector, and that he was found one morning, after a severe storm during the night, near the track under circumstances tending to show that he had been struck by one of the defendant's trains, with further evidence that he had been continuously at work for a length of time in excess of that allowed by the Federal Statute, without evidence as to how the injury occurred: *Held*, the evidence raises conflicting inferences in favor of both parties and falls within the field of conjecture, and, the burden being on the plaintiff to establish the negligence of the defendant and the causal connection between it and the injury, defendant's motion as of nonsuit should have been granted.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Sink, Special Judge,* at November Special Term, 1928, of BUNCOMBE. Affirmed.

When the case was called for trial plaintiff took a voluntary nonsuit as to the defendant Myers, and the action was prosecuted only against the Southern Railway Company.

Geo. M. Pritchard for plaintiff.
Thos. S. Rollins for defendant.

ADAMS, J. The plaintiff's intestate lived with his mother near the depot at Alexander, a station on the defendant's line in Buncombe County. He had been in the regular service of the defendant as a section hand for more than three years, and in its intermittent service for five

or six years. He was about twenty years of age. On Saturday night, 3 December, 1927, the weather was foul: rain, snow, and sleet imperiled the track and the operation of trains. The intestate was engaged as one of the defendant's section crew in the inspection of the roadbed, a part of his service being to walk the track and to look for slides. The limit of his "walk" was about a half-mile from the station. During the night several trains passed, four going west and five going east. The defendant was engaged and the deceased was employed in interstate commerce. At ten o'clock in the night his brother saw him walking the track near the depot. His mother saw him a few minutes after four on Sunday morning. Afterwards two trains passed, one going down, the other up the river. The dead body was found between six and seven o'clock in the morning about twelve feet below the point of the switch, the head about ten inches from the crossties. Blood and a part of the skull were found at the point of the switch and the lanterns he used about five feet outside the iron rail. There was a cut on the right side of the head, and it was afterwards noticed that the right arm and the right knee had been injured.

The plaintiff's right to recover damages is dependent upon the Federal Employers' Liability Act and the applicable principles of the common law as interpreted by the Federal courts. *Southern Ry. Co. v. Gray,* 241 U. S., 333, 60 Law Ed., 1030. This act provides that every common carrier by railroad while engaging in interstate commerce shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for 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 equipment. 45 U. S. C. A., 92, sec. 51. Negligence of the carrier, or of its officers, agents, or employees, or defective or insufficient equipment due to its negligence is the basis of its liability. Therefore, before a recovery can be had it must be shown by direct or circumstantial evidence that the carrier was negligent. *Ill. Cent. R. Co. v. Skaggs,* 240 U. S., 66, 60 Law Ed., 528. On this point there is a failure of proof. No one saw the accident. There is no evidence as to the circumstances under which the death occurred—no sufficient evidence as to the intestate's position, no evidence of the defendant's actionable negligence. There is evidence that death was caused by the impact of the train, but this is not enough to make actionable negligence: negligence is not presumed from the mere fact that the intestate was killed. *Lamb v. Boyles,* 192 N. C., 542; *Isley v. Bridge Co.,* 141 N. C., 220; *So. Ry. Co. v. Gray, supra.* In reference to

negligence and proximate cause the evidence leads into the broad field of conjecture or speculation; from it different minds may draw different inferences, all imaginative, none substantial. "When the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict in opposition to it, it may withdraw the case from the consideration of the jury and direct a verdict." *Elliott v. R. R.*, 150 U. S., 245, 37 Law Ed., 1068.

The appellant says that the defendant compelled the deceased to work in violation of the statute limiting the hours of service. It is made unlawful for common carriers by railroad engaged in interstate commerce to require or permit any employee to be or remain on duty for a longer period than sixteen consecutive hours. At the end of this period the employee shall be relieved and not required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and if he has been on duty sixteen hours in the aggregate in any twenty-four hour period he shall not be required or permitted to continue or again go on duty without having had at least eight consecutive hours off duty. 45 U. S. C. A., 546, sec. 61, 554, sec. 62.

There is evidence that the deceased was required to work in breach of this statute. But this requirement did not make the defendant unconditionally liable in damages. A necessary element of liability is some causal relation between the employee's working overtime and the injury he receives. In disapproving the conclusion that the act of a carrier in extending an employee's service beyond the statutory limit was negligence *per se*, to which the death of the deceased was held to be attributable as a matter of law, the Supreme Court of the United States explained the scope and meaning of the statute in *S. Louis I. M. & S. R. Co. v. McWhirter*, 229 U. S., 265, 57 Law Ed., 1179. *Chief Justice White* said: "In giving to the statute the construction above stated, we think error was committed. The hours-of-service act was approved 4 March, 1907, and is entitled, 'An act to promote the safety of employees and travelers upon railroads by limiting the hours of service of employees thereon.' Ch. 2939, 34 Stat. at L., 1415, U. S. Comp. Stat. Supp., 1911, p. 1321. We are unable to discover in the text of the statute any support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers, which the view taken of the act by the court below imposes. We say this because, although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employees to work beyond the statutory time to liability for all accidents happening during such period, without reference to whether the accident was attributable to the act of working overtime. And we think that where no such liability is expressed in the

statute, it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that, where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage."

As the evidence fails to disclose the circumstances of the accident, we find no ground upon which to rest the theory that the intestate's working over the statutory time was the proximate cause of his death.

We are referred by the appellant to *Great Northern Ry. Co. v. Couture*, 14 Quebec K. B., 316, and *Republic Iron & Steel Co. v. Ohler*, 68 N. E. (Ind.), 901, in which it was held that a master may be liable in damages for injury sustained by a servant who has been compelled to work continuously for an undue number of hours; but in these cases the circumstances attending the accident were disclosed and the causal relation between the servant's overwork and the injury was established by the evidence. They are therefore not in point here. The judgment is

Affirmed.

M. M. MORRISON, J. G. MORRISON, AND LELIA A. MORRISON, v. SOUTHERN STATES FINANCE COMPANY, INC., ET AL.

(Filed 12 June, 1929.)

1. Evidence I b—Introduction in evidence of books of corporation not error under the facts of this case.

Where a finance company is sued for fraudulent representations of its financial condition in procuring a sale of its shares of stock to the plaintiff, exceptions to the introduction of some of its books relative to the inquiry and used by both parties in the examination and cross-examination of the secretary of the company as a witness will not be sustained as error.

2. Evidence F c—Introduction in evidence of pleadings as admissions of parties not error in this case.

Under the facts of this case: *Held*, exceptions to the introduction in evidence of the pleadings as admissions of the parties are untenable under the decision of *Weston v. Typewriter Co.*, 183 N. C., 1, and other cases cited.

3. Evidence I c—Admission of insufficiently identified letters in evidence is error.

Upon the issue of fraudulent representations inducing the plaintiff to subscribe for stock in a corporation, letters of general circularization, purporting to have been signed by the corporation's president and received by the plaintiff, having a material relation to the determination of the issue, are improperly introduced in evidence upon the trial when not further identified as issued by the company, but where the subject-matter of the letters is proved by competent evidence the error is harmless.

4. Evidence H a—Where a conspiracy is not alleged conversation of codefendants is erroneously admitted in evidence.

Where a conspiracy to defraud the plaintiff is not alleged in a suit against the corporation and certain of its officers for fraudulently inducing the plaintiff to subscribe for stock in the corporation, conversations of some of the defendants in the absence of the others are erroneously admitted in evidence as to them.

5. Corporations D h—In action against corporation for fraudulently inducing purchase of stock plaintiff must show that corporation was involved.

Where a corporation and some of its officers are sued to cancel certain shares of stock issued to the plaintiffs for fraudulent representations alleged as an inducement to purchase them, there must be sufficient evidence that the corporation was implicated in the transaction to hold it liable thereon.

CIVIL ACTION, before *Oglesby, J.*, at October Term, 1928, of CABARRUS.

The plaintiffs alleged that the defendant, Southern Finance Company, was a foreign corporation engaged in business in Charlotte, North Carolina, and that the individual defendants were officers and directors of said corporation, Walker being president; Ashcraft, vice-president; Rhyne, vice-president; and Cherry, secretary and treasurer, and that said defendant, through its active officials, placed upon the market a large quantity of preferred and common stock for the purpose of sale, and employed agents and salesmen to solicit and sell said stock, and that one of said salesmen was J. A. Flournoy.

Plaintiff further alleged that in January and February, 1924, said Flournoy sold to plaintiffs, who were partners, two hundred shares of said stock, and thereafter on 14 April, 1924, sold to said plaintiffs one hundred and fifty shares of said stock at the price of ten dollars per share. It was further alleged that in making said sale the said agent, Flournoy, made false and fraudulent representations, which the plaintiffs relied upon, with respect to the financial condition of the Southern States Finance Company.

A nonsuit was taken as to the plaintiff, Lelia A. Morrison, leaving in controversy the purchase of one hundred and ninety shares for $1,900 in January, 1924, and one hundred and fifty shares for $1,500 in April, 1924.

Nineteen issues were submitted to the jury.

The jury, by its verdict, found that false representations had been made by said salesman, and that the individual defendants participated therein and ratified such representations. However, in response to the eleventh issue the jury found that the plaintiffs did not purchase the one hundred and fifty shares on 1 April, 1924, from the defendant, Southern Finance Company.

From judgment rendered both parties appealed.

Caldwell & Caldwell, R. Lee Wright and H. B. Adams for plaintiffs.

Hartsell & Hartsell and Armfield, Sherrin & Barnhardt for defendants.

BROGDEN, J. The defendants assigned one hundred and sixty-two errors, and the plaintiffs seventy-three.

As the late *Justice Allen* once remarked: It is highly improbable that a trial judge could make two hundred and thirty-five errors in one game.

One group of errors deals with the identification of the corporate records. These exceptions are without substantial merit, for the reason that Mr. Cherry, the secretary and treasurer of the corporation, was offered as a witness by the defendants, and he identified the books and records, although he indicated that certain of the records were not present at the trial. However, the records were used by both parties in examining and cross-examining witnesses.

Another group of exceptions is addressed to admissions offered from the pleadings. These exceptions cannot be sustained. *Weston v. Typewriter Co.*, 183 N. C., 1, 110 S. E., 581; *Sears-Roebuck & Co. v. Banking Co.*, 191 N. C., 500, 132 S. E., 468; *Malcolm v. Cotton Mills*, 191 N. C., 727, 133 S. E., 7.

Another group of exceptions involves the introduction in evidence of certain circulars and letters addressed to the stockholders of the Southern States Finance Company and to individual stockholders, purporting to be signed by the president of the Southern States Finance Company. One of the plaintiffs testified, with respect to the letters, as follows: "My wife, brother and I received those letters through the mail. I can't testify the date we got it." Plaintiffs introduced ten letters, marked Exhibit T. Individual defendants objected. The objection was overruled, and the letters, without further proof of identification, were admitted in evidence. These letters and circulars contained representations to the effect that the company was in good financial condition and free from debt, and therefore had a material bearing upon the allegations of the complaint. The admission of the letters was error. *Trust Co. v. Store Co.*, 193 N. C., 122, 136 S. E., 289; *Bank v. Brickhouse*, 193 N. C., 231, 136 S. E., 636.

There is no allegation in the complaint charging a conspiracy, and no issue of conspiracy was submitted to the jury.

Certain exceptions were taken by the defendants to the admission of conversations between plaintiffs and others and certain of the individual defendants, when other individual defendants were not present. This evidence was incompetent as against the individual defendants not present at such conversations. *Edwards v. Finance Co.*, 196 N. C., 462.

There are other exceptions to the charge given by the trial judge to the jury, but these appear to be without merit.

There are other exceptions as to the competency of evidence warranting serious consideration, but as a new trial must be awarded to the defendants for the errors specified, we deem it inadvisable to discuss them at this time.

PLAINTIFFS' APPEAL.

The jury found in respect to the eleventh issue that the plaintiffs did not buy one hundred and fifty shares of stock in April, 1924, from the Southern States Finance Company. The evidence discloses that L. W. Tucker, Martin Tucker and Mrs. L. C. Tucker owned a large block of stock of the defendant Southern States Finance Company. They brought suit against the company and this stock was delivered by them to Mr. Hulin Davis, their attorney.

The evidence further disclosed that J. H. Flournoy came to the office of Mr. Davis and bought five hundred shares of this stock, paying therefor $2.50 a share. The purchase price was paid in New York Exchange or by cashier's check. Thereafter Flournoy took the stock to his attorney, Mr. Paul C. Whitlock, of Charlotte, who made demand on the Southern States Finance Company to transfer the stock to the plaintiffs upon the books of the corporation. This was done. A carbon copy of a letter from Mr. Paul C. Whitlock to the Southern States Finance Company was admitted in evidence over the objection of plaintiffs. This was error, as there was no notice to produce the original. *Chair Co. v. Crawford,* 193 N. C., 531, 137 S. E., 577.

However, in the cross-examination of Mr. Whitlock he testified that he had the stock transferred in person, but preferred that there be a record of the demand, and for that reason sent the letter offered in evidence. Thus the introduction of the letter was manifestly harmless.

There is no evidence that Flournoy bought the Tucker stock as agent of the Southern States Finance Company or paid for it with funds belonging to said company, or that said company ever had any information with respect thereto.

Upon this state of the record the judge would have been justified in giving a peremptory instruction upon this aspect of the case.

We hold therefore that the defendants are entitled to a new trial upon their appeal and that the judgment with respect to the appeal of the plaintiffs is

Affirmed.

POE & BENFIELD v. J. N. GILL.

(Filed 12 June, 1929.)

Contracts F b—Prior breach of contract by one party precludes his recovery for subsequent breach by other party who may recover on counterclaim therefor.

Where the purchaser of standing timber has knowledge of the right of his vendor's mortgagee to stop him from cutting timber on the *locus in quo* until a certain amount had been paid the mortgagee, and enters upon the land and cuts and manufactures timber under a provision that he pay therefor when sold, and there is evidence that he has not paid accordingly, and some time thereafter the mortgagee exercises his right to stop the cutting, and soon thereafter the vendor satisfies him and acquires the right to have the purchaser continue under his contract of sale of the timber, which the purchaser does not do: *Held*, the purchaser's action for damages for breach of contract is not upon warranty or covenant of peaceful enjoyment of the right of cutting timber, etc., and an instruction that the vendor's breach in the respect stated would prevent his recovery upon his counterclaim for the purchaser's breach is reversible error.

APPEAL by defendant from *Schenck, J.*, at September Term, 1928, of MCDOWELL. New trial.

Action to recover of defendant damages for breach of contract. Defendant denied that he had breached the contract and alleged that plaintiffs had failed to perform said contract, on their part, and thereby caused him to suffer damages for which he demanded judgment against plaintiffs.

The issues submitted to the jury were answered as follows:

1. Did the defendant, J. N. Gill, breach his contract with the plaintiffs, Poe & Benfield, as alleged in the complaint? Answer: Yes.

2. If so, what amount are the plaintiffs, Poe & Benfield, entitled to recover of the defendant, Dr. J. N. Gill? Answer: $5,250.

3. Did the plaintiffs, Poe & Benfield, breach their contract with the defendant, Dr. J. N. Gill, as alleged in the answer? Answer: .....

4. If so, what amount is the defendant, Dr. J. N. Gill, entitled to recover of the plaintiffs, Poe & Benfield? Answer: .....

Under the instructions of the court, the jury having answered the first issue, "Yes," did not answer the 3rd and 4th issues.

From judgment on the verdict, defendant appealed to the Supreme Court.

Winborne & Proctor and W. T. Morgan for plaintiffs.

Hudgins, Watson & Washburn and Pou & Pou for defendant.

CONNOR, J. On 25 August, 1926, plaintiffs and defendant entered into a contract, in writing, by which defendant agreed to sell and convey to plaintiffs, "a certain tract of timber in McDowell County, North Carolina, same being on the lands known as the R. L. Greenlee land, and being near the Greenlee railway station on the Southern Railroad, and containing approximately one million feet of timber." Plaintiffs agreed to pay to defendant as the purchase price for said timber $7.00 per thousand feet.

The plaintiffs agreed to log and saw said timber, and to sell the lumber manufactured therefrom; they agreed to pay for said lumber when the same was sold, the money to be paid to defendant or to be deposited to his credit in a bank at Marion, N. C., from time to time as the lumber was sold.

At the date of said contract there was outstanding a mortgage on said timber and on the land on which it was located. This mortgage had been executed by defendant to R. L. Greenlee, from whom defendant had purchased the land, to secure the balance due by defendant to said Greenlee on the purchase price for said land. It was understood and agreed by and between defendant and the mortgagee that no timber should be cut and removed from said land, until the sum of $5,000 had been paid on the indebtedness secured by the mortgage. Plaintiffs alleged that defendant had agreed to procure the release of the timber from the mortgage, so that plaintiffs might cut and remove the same.

After the execution of the contract between plaintiffs and defendant, plaintiffs began to cut and manufacture said timber into lumber. Plaintiffs sold the said lumber from time to time, but failed to pay for same in accordance with the contract. They continued their operations until some time in the spring of 1927, when they ceased to cut and manufacture said timber into lumber. They allege that they were forced to cease their operations under the contract, because defendant had failed to pay to Greenlee the sum of $5,000, and that defendant ordered and directed them to cease said operations for that reason. This allegation is denied by defendant; he alleged that plaintiffs had failed to comply with their contract to pay for said timber as the lumber manufactured therefrom was sold. There was evidence tending to show that Greenlee, the mortgagee, waived his right to restrain defendant and plaintiffs from cutting and removing said timber, notwithstanding defendant had not paid him the sum of $5,000, until about 15 March, 1927, when he notified both defendant and plaintiffs that they must cease to cut and remove timber from said land, until defendant had paid him the sum of $5,000. There was evidence tending to show that defendant notified plaintiffs that they must cease their operations under the contract until he had satisfied Greenlee, and that plaintiffs thereupon did cease their

said operations. In a short time thereafter defendant satisfied Greenlee, who thereupon withdrew further objection to the cutting and removing of said timber. Plaintiffs, however, did not renew their operations. There is no evidence tending to show that plaintiffs offered, thereafter, to continue to log and saw said timber, and to manufacture the same into lumber. There was a settlement between plaintiffs and defendant in June, 1927, for the amount due by plaintiffs to defendant on the purchase price of timber cut and removed from the land prior to the date when plaintiffs ceased their operations under the contract.

The court instructed the jury that if plaintiffs "were caused to stop either by Gill or Greenlee, who had a right to stop them, then that would be a breach of the contract on the part of Gill; if either Gill or Greenlee stopped the operations of plaintiffs, Poe & Benfield, that would constitute a breach of the contract, and that is the breach of the contract alleged in the complaint."

This instruction was error; this is not an action to recover damages for breach of covenant of title or of quiet enjoyment, but for the breach of his contract by defendant, J. N. Gill, in failing to procure the release of the timber from the mortgage which he had executed to Greenlee, thereby causing plaintiffs damage. Plaintiffs entered into the contract with defendant, with knowledge both actual and constructive, of the outstanding mortgage to Greenlee, and of his right as mortgagee to restrain them from cutting and removing the timber. The exercise of this right by Greenlee was not a breach by defendant of his contract with plaintiffs. There was evidence tending to show that defendant ordered plaintiffs to stop cutting the timber, not because of any objection on the part of Greenlee, but because plaintiffs had failed to pay for the timber as the lumber manufactured therefrom was sold.

There was evidence tending to show that plaintiffs had failed to comply with the contract, on their part, in that they had failed to pay for the timber as the lumber manufactured therefrom was sold, and that by reason of this default on their part, defendant had been unable to pay to Greenlee the sum of $5,000; and thereby procure the release of the timber from the mortgage. There was evidence, also tending to show that plaintiffs had failed to comply with the contract, in other respects, prior to the time when they ceased operations thereunder. In the absence of allegation and proof that plaintiffs had complied, at least substantially, with the terms of the contract, or that they were ready, willing and able to do so, they are not entitled to recover of defendant in this action. *Seed Co. v. Jennette Bros.*, 195 N. C., 173, 141 S. E., 542; *Edgerton v. Taylor*, 184 N. C., 571, 115 S. E., 156; *Owens v. Wright*, 161 N. C., 127, 76 S. E., 735; *Builders Supply Co. v. Roofing Co.*, 160 N. C., 443, 76 S. E., 498.

There are other assignments of error on defendant's appeal in this case, which do not require consideration, as there must be a new trial, for the error in the instruction to the jury as indicated.

New trial.

OLLIE H. TULL v. HARVEY & SON COMPANY.

(Filed 12 June, 1929.)

1. **Cancellation of Instruments A b—Fraud not presumed from deed from mortgagor to mortgagee when property conveyed not embraced in mortgage.**

   In order for fraud to be presumed from the mortgagee's obtaining a deed from the mortgagor the deed must be a conveyance of the mortgaged premises, and the presumption does not apply when the mortgage is upon a distinct and separate tract owned by the husband of the mortgagor.

2. **Same—Where fraud is not presumed in an action for cancellation of deed it must be particularly alleged.**

   Where the presumption of fraud does not apply to a deed given by a mortgagor to the mortgagee on lands not embraced in the mortgage, the mortgagor in her action to set aside the deed must allege in her complaint facts with such particularity as to show the fraud upon which the action is based, and in the absence of sufficient allegations in this respect a demurrer thereto is properly sustained.

3. **Pleadings D a—Where demurrer is good as to one cause of action and bad to the other, retention of good cause for trial is proper.**

   Where allegations in a complaint are insufficient to state a cause of action to set aside a deed for fraud, but sufficient to state a cause of action against the grantee therein for failing to account for the purchase price, a demurrer to the complaint is properly sustained on the first cause of action, and overruled as to the second, and the trial court properly retains the second cause for trial, and may permit the plaintiff to amend her complaint as to the second cause in proper instances.

CIVIL ACTION, before *Grady, J.*, at Chambers, 21 November, 1928.

The plaintiff alleged that she was the owner of a tract of land in Lenoir County, containing 125 acres and known as the Highway tract, and that her husband was the owner of a tract of land in said county known as the Tower Hill tract; that on 18 January, 1919, the plaintiff and her husband executed and delivered to R. C. Strong, trustee for Henry Strong, a deed of trust on the Highway tract to secure an indebtedness of $5,000, and thereafter on 18 April, 1922, plaintiff and her husband executed and delivered to F. E. Wallace, trustee, for the National Bank of Kinston, a mortgage on said Highway tract to secure an indebtedness of $1,750.

Plaintiff further alleged that the following deeds of trust were executed by her and her husband on the Tower Hill tract, to wit:

(a) 24 July, 1919, to secure an indebtedness of $10,000 to the Farm Loan Bank of Columbia, South Carolina.

(b) 29 January, 1920, to secure an indebtedness of $2,000 to the National Bank of Kinston.

(c) 15 April, 1921, to secure an indebtedness of $5,259 due the defendant.

(d) 24 November, 1922, to secure an indebtedness of $1,846 due the defendant.

Thereafter on 2 February, 1923, the plaintiff and her husband executed and delivered to the defendant a deed for the said Highway tract belonging to the plaintiff for the sum of $12,000.

Plaintiff further alleged that the defendant secured a deed for her said "Highway tract" by means of fraud and coercion, for that "the defendant took undue advantage of the fact that the lands of both the plaintiff and her husband were encumbered by deeds of trust and mortgages as hereinbefore recited, unlawfully to induce, impel and coerce the plaintiff to execute to the defendant the said paper-writing, in form a deed, for her said Highway tract of land. And further, that during the fall of 1922 the defendant began to threaten and did threaten plaintiff and her husband with the foreclosure of the deed of trust on the Tower Hill tract," and "moved by such threats . . . the plaintiff and her husband decided to surrender Tower Hill farm to the defendant." Whereupon the "defendant dissuaded the husband of plaintiff from so surrendering said Tower Hill farm, and by fraudulent inducements and promises which deceived the plaintiff, caused a change of purpose of her said husband and the plaintiff to surrender Tower Hill and secure from the plaintiff and her husband by representations and assurances, which, as plaintiff believes and alleges, were fraudulent and never intended to be performed, the execution to the defendant of the paper-writing, in form a deed, for the Highway farm."

Plaintiff further alleged that the defendant had failed to account for the purchase price of said property and that said defendant had wrongfully and unlawfully misapplied said purchase price.

Upon these allegations the plaintiff asks:

(a) That the deed for the Highway tract be set aside and that she be permitted to redeem said land upon payment of the amount of the indebtedness thereon.

(b) And for such other relief as she might be entitled to.

The defendant filed a demurrer upon the ground that the complaint contained no allegation of fraud sufficient to constitute a cause of action.

The trial judge entered the following judgment:

"The defendant demurred to the complaint upon the ground that the complaint does not state facts sufficient to constitute a cause of action based upon fraud and misrepresentation; and, upon an inspection of the complaint, the court is of the opinion that no cause of action is alleged in respect to the charge of fraud, and the demurrer is sustained in that respect; but the court is of the opinion that a cause of action is sufficiently stated for money had and received, and in that respect the demurrer is overruled.

"Wherefore, it is now adjudged that the cause of action declared upon in respect to fraud and false representations be and the same is hereby dismissed, and the plaintiff is declared to be not entitled to recover in that respect.

"It is further adjudged that the plaintiff be permitted to amend the complaint so as to definitely set forth the facts in respect to the moneys had by the defendant from the purchase of the lands described in the complaint and known as the Highway tract, and the defendant will be permitted to answer said amended complaint within twenty days after service of a copy thereof on counsel."

From the foregoing judgment the plaintiff appealed.

Rouse & Rouse for plaintiff.

F. E. Wallace and Cowper, Whitaker & Allen for defendant.

BROGDEN, J. The record discloses that the defendant held no mortgage upon the Highway tract owned by the plaintiff. Therefore the relationship of mortgagor and mortgagee does not apply. The fact that the grantee in a deed holds a mortgage executed by the grantor on other property does not raise the presumption of fraud. *Hart v. Cannon,* 133 N. C., 10, 45 S. E., 351. Therefore, as there was no presumption of fraud arising from the relationship of the parties, it was necessary for the plaintiff to allege the specific facts, circumstances and acts constituting the fraud complained of. The principle of law is tersely expressed in *Colt v. Kimball,* 190 N. C., 169, 129 S. E., 406, as follows: "It is accepted in this jurisdiction that the facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged." *Foy v. Stephens,* 168 N. C., 438, 84 S. E., 758; *Nash v. Hospital,* 180 N. C., 59, 104 S. E., 33. The complaint in the case at bar does not comply with the principle of law so announced.

The plaintiff, however, alleges that the defendant has not accounted to her for the purchase price of her tract of land, and she is entitled to be heard on this cause of action.

Affirmed.

IN THE MATTER OF THE LAST WILL AND TESTAMENT OF SUSAN B. SHEMWELL, DECEASED.

(Filed 12 June, 1929.)

Wills C d—Evidence that will was in handwriting of testator held sufficient, and held further, found among valuable papers.

Evidence that a paper-writing was in the handwriting of the deceased, signed by her, and found among her valuable papers is sufficient to be submitted to the jury on the issue of *devisavit vel non*, and *held further*, under the facts of this case the paper-writing, being found in a box in which she kept papers of value, evidently regarded as valuable by her, and evidencing her intent that the paper-writing operate as her will, was found among her valuable papers within the meaning of C. S., 4144(2), and evidence that her husband also kept certain valuable papers of his own in the same box does not vary the result.

APPEAL by the caveators from *Sink, Special Judge,* at November Special Term, 1928, of BUNCOMBE. No error.

Proceedings for the probate in solemn form of a paper-writing propounded as the holograph will of Susan B. Shemwell, deceased, by her son, named therein as one of the executors of the deceased.

The issue submitted to the jury was answered as follows:

"Is the paper-writing propounded by Fitzhugh Harmon for probate, and consisting of five separate sheets (marked Propounder's Exhibits 1, 2, 3, 4 and 5) and every part thereof, the last will and testament of Susan B. Shemwell, deceased? Answer: Yes."

In accordance with the verdict, it was ordered, adjudged and decreed that said paper-writing and every part thereof is the last will and testament of the said Susan B. Shemwell. From the judgment, the caveator appealed to the Supreme Court.

W. A. Sullivan for propounder.
Rollins & Smathers for caveator.

CONNOR, J. Susan B. Shemwell died in Asheville, on 19 February, 1924. She left surviving her husband, Baxter Shemwell, and three children, two of whom are the children of a former marriage.

On 20 February, 1924, a paper-writing purporting to be the last will and testament of Susan B. Shemwell, dated at Asheville on 31 May, 1920, was offered for probate and was probated in common form by the clerk of the Superior Court of Buncombe County, as the last will and testament of the deceased.

IN THE MATTER OF WILL OF SHEMWELL.

On 2 March, 1924, a caveat was filed to said probate by Everett B. Shemwell, son of deceased, appearing by his guardian, Baxter Shemwell. The cause was thereupon transferred to the Superior Court of Buncombe County for trial. Citations were duly issued and served upon all persons named in said alleged will as devisees and legatees. The proceedings came on for trial at November Special Term, 1928, of the Superior Court of Buncombe County, when the issue set out in the record was submitted to and answered by the jury. From judgment on the verdict, the caveator appealed to this Court.

At the trial, the propounder offered the paper-writing for probate as the holograph will of the deceased. Three witnesses testified that they verily believed that said paper-writing and every part thereof is in the handwriting of Susan B. Shemwell, and that her name subscribed thereto is also in her handwriting. These witnesses first testified that they had known Mrs. Susan B. Shemwell for many years and had often seen her write. There was the usual conflict in the testimony of the expert witnesses, offered by both the caveator and the propounder, one testifying that in his opinion the paper-writing was not in the handwriting of Mrs. Shemwell, and the other testifying that in his opinion it was in her handwriting. Both the expert witnesses based their opinion upon a comparison of the handwriting of the alleged will with handwriting proved to the satisfaction of the judge to be the genuine handwriting of Mrs. Shemwell. C. S., 1784. There was evidence from which the jury could find that the alleged will and every part thereof, including the name of the deceased subscribed thereto, is in her handwriting.

There was also evidence from which the jury could find that the paper-writing, which is in the handwriting of the deceased, with her name subscribed thereto, was found, after her death, among her valuable papers and effects, as required by the statute. C. S., 4144, subsec. 2. The evidence tended to show that the paper-writing was found in a small box, which had been in the possession of deceased for many years, and which was regarded by the members of her family, as her private box. In this box were papers and jewelry. Included among the papers were deeds, letters and stock certificates. Some of these papers were claimed by her husband as his property; they were delivered to him. Other papers and the jewelry in the box belonged to deceased. There was evidence tending to show that the paper-writing was found among such papers and effects of the deceased as show that she considered it as a paper of value, one deliberately made and to be preserved, and intended by her to have effect as her will. This was a sufficient compliance with the provision of the statute. *In re Will of Groce,* 196 N. C., 373, and cases there cited.

There was no error in the refusal of the court to instruct the jury, as requested by the caveator, to answer the issue, "No." The evidence was properly submitted to the jury, under instructions which are free from error. The judgment is affirmed. There is

No error.

IN RE THE ADMINISTRATION OF THE ESTATE OF THOMAS B. WALLACE, DECEASED.

(Filed 12 June, 1929.)

1. **Descent and Distribution B b—Statute legitimizing child upon marriage of parents is retroactive and gives such child right to inherit.**

   The provisions of C. S., 279, are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment.

2. **Same—Statute legitimizing child strictly construed.**

   C. S., 279, declaring legitimate a child born out of wedlock whose reputed father subsequently marries his mother is strictly construed as being in derogation of the common law.

3. **Same — Statute legitimizing child does not give it right to inherit through deceased parents.**

   The provisions of C. S., 279, legitimizing a child born out of wedlock when his reputed father subsequently marries his mother for the purpose of inheritance from its father and mother does not extend to such inheritance from his maternal uncle dying intestate after the death of his mother through whom he claims as next of kin.

4. **Descent and Distribution B c—Where niece is one of the next of kin of intestate and survives him, her husband is entitled to distribution.**

   The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, C. S., 137(5), as also the husband of a deceased niece who was living at the death of the intestate, under the facts of this case.

APPEAL by respondent, Oscar Wallace, from *Stack, J.*, at April Term, 1929, of MECKLENBURG. Affirmed.

This is a proceeding instituted by the administrator of Thomas B. Wallace, deceased, for a final accounting and settlement of his estate.

The proceeding was begun by petition filed by said administrator against all persons interested in the due administration of the estate, and was heard by the judge of the Superior Court, in term time. C. S., 152.

After the payment of all claims against the estate, there is now in the hands of the petitioner, as administrator of Thomas B. Wallace, for distribution among the persons entitled thereto, the sum of $1,899.95.

From judgment that respondent, Oscar Wallace, is not entitled to any part of said sum, the said respondent appealed to the Supreme Court.

Stewart, McRae & Bobbitt for C. B. Cross, as administrator and as one of the next of kin of Thomas B. Wallace, deceased.

Fred C. Hunter for the children of D. B. Cross, deceased, as next of kin of Thomas B. Wallace, deceased.

G. T. Carswell and Joe W. Ervin for respondent.

CONNOR, J. Thomas B. Wallace died intestate on or about 1 July, 1927. At the date of his death, he was a resident of Mecklenburg County, North Carolina. The petitioner in this proceeding, C. B. Cross, was duly appointed by the clerk of the Superior Court of Mecklenburg County as administrator of the deceased. He has paid all the claims against said estate, and now has in hand for distribution among the persons entitled thereto, the sum of $1,899.50. All persons interested in the due administration of the estate of the said Thomas B. Wallace, have been made parties to this proceeding, which was instituted by the administrator pursuant to the provisions of C. S., 152.

The deceased, Thomas B. Wallace, left no widow or issue surviving him. He left one half-brother, C. B. Cross, and two nephews and one niece, the children of a half-brother, D. B. Cross, who predeceased him. His niece has since died intestate and without issue, leaving surviving her husband. The surviving brother and the children of the deceased brother, living at his death, were entitled to share in the distribution of his personal estate, as his next of kin; C. S., 137, subsec. 5. The husband of the deceased niece, who was living at the death of Thomas B. Wallace, is now entitled to the share in said estate of his deceased wife. C. S., 7.

The deceased, Thomas B. Wallace, had one sister, Bessie Wallace, who died intestate in 1914, leaving surviving one son, Oscar Wallace. At the date of his birth, in 1889, the said Bessie Wallace, was unmarried. The said Oscar Wallace was a bastard child. In 1895, the said Bessie Wallace was married to Charley Edwards.

Oscar Wallace alleged and offered evidence tending to show that Charley Edwards, with whom his mother intermarried, subsequent to his birth, was his reputed father. He contended that from the date of said marriage he has been and is now legitimate in all respects, and that he is, therefore, one of the next of kin of his maternal uncle, Thomas B. Wallace, deceased, and entitled to share with C. B. Cross, and

the children of D. B. Cross, deceased, in the distribution of the sum of money now in the hands of the petitioner.

The court was of opinion, that, as a matter of law, conceding that Charley Edwards was the reputed father of Oscar Wallace, as he alleged and offered to prove, and that under the provisions of C. S., 279, Oscar Wallace was legitimate from and after the date of the marriage of his mother to Charley Edwards, and therefore entitled to all the rights in and to the estate, real and personal, of his father and mother, that he would have had had he been born in lawful wedlock, the said Oscar Wallace is not one of the next of kin of Thomas B. Wallace, deceased, and is therefore not entitled to a share in the sum of money now in the hands of his administrator.

From judgment in accordance with this opinion, the respondent, Oscar Wallace, appealed to this Court, contending that there was error in the judgment.

To sustain his contention that at the death of Thomas B. Wallace, he was the legitimate son of Bessie Wallace, the sister of the deceased, and, therefore, one of his next of kin, the appellant, Oscar Wallace, relies upon the provisions of C. S., 279, which is as follows:

"When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate and entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock." (1917, ch. 219, sec. 1.)

This statute was enacted in 1917, subsequent to the marriage of Bessie Wallace, mother of Oscar Wallace, to Charley Edwards, in 1895, and also subsequent to her death in 1914; it was, however, in full force and effect at the death of Thomas B. Wallace in 1927. In *Stewart v. Stewart,* 195 N. C., 476, 142 S. E., 577, we said that the statute, by its express language, is retroactive as well as prospective. We held that a child born out of wedlock, whose mother had intermarried with his reputed father, prior to the enactment of the statute, was the heir of his father, who had died subsequent to its enactment.

The decision in *Stewart v. Stewart,* however, is not determinative of the question presented by this appeal, which is: Does a child born out of wedlock, who by virtue of the statute becomes legitimate upon the subsequent marriage of his mother to his reputed father, and therefore entitled to all the rights in and to the estate, real and personal, of its father and mother, that it would have had had it been born in lawful wedlock, also become an heir and one of the next of kin of a brother or sister of its father or mother, who has died without issue, subsequent to the death of the father or mother?

The answer to this question requires a construction of the statute. While it is provided that the child shall "in all respects be deemed and held to be legitimate," the result of the change in the status of the child, brought about by the marriage of its mother to its reputed father, is declared to be that it "shall be entitled to all the rights in and to the estate, real and personal, of its father and mother, that it would have had, had it been born in lawful wedlock." The statute provides for no other or further result; being in derogation of the common law, it should be construed strictly. We therefore hold that there is no error in the judgment. It is

Affirmed.

CLYDE V. RHODES AND BROADUS RHODES V. NEW YORK LIFE INSURANCE COMPANY.

(Filed 12 June, 1929.)

Removal of Causes A a—Statutory restraint on right to removal unconstitutional and void.

A nonresident insurance company has the right to remove a suit brought against it from the State to the Federal Court under the Federal removal statute, and the State statute, C. S., 6295, providing that upon its attempt to do so the insurance commissioner shall revoke its right to do business in this State is unconstitutional in this respect, and the right to removal obtains notwithstanding that under the statute the company has filed an application to do business in the State waiving its right to removal.

CIVIL ACTION, before *McElroy, J.*, at April Term, 1929, of JACKSON.

Plaintiffs alleged that on 9 October, 1928, the defendant executed and delivered to Jessie C. Rhodes a life insurance policy in which the plaintiffs were named as beneficiaries; that said policy contained a provision that if the insured should die as the result of accidental means and within ninety days after receiving such injury, the defendant would pay to the plaintiffs double the face value of said policy, to wit, $10,000.

It was further alleged that on 5 November, 1928, while said policy was in force, the insured, while handling a pistol, "permitted the same to be accidentally discharged, and by reason thereof caused the death of said Jessie C. Rhodes," the insured.

Thereupon the plaintiffs instituted this action against the defendant to recover the sum of $10,000.

In apt time the defendant filed a petition for removal to the Federal Court, alleging that the defendant was a nonresident of the State of North Carolina.

The plaintiffs filed a reply to the petition for removal, alleging in substance that on 8 April, 1901, the defendant had filed an application to transact business in the State of North Carolina, in which said application the following language appeared: "And said company hereby agrees that suits commenced in the State courts of North Carolina against it shall not be removed by the acts of said company into the United States Circuit or District courts, and that said company will not institute any action or suit in equity in the United States Court against any citizen of North Carolina, growing out of or in any way connected with any policy issued by said company."

The clerk of the Superior Court of Jackson County denied the motion to remove the cause to the Federal Court, and upon appeal to the judge of the Superior Court the order of the clerk was reversed, and the cause removed from the Superior Court of Jackson County to the District Court of the United States for the Western District of North Carolina, from which order of removal the plaintiffs appealed.

A. S. Patterson and Morgan, Ward & Stamey for plaintiffs.
Manly, Hendren & Womble and S. J. Black for defendant.

BROGDEN, J. Is a foreign life insurance company, permitted to transact business in North Carolina by complying with the insurance law, precluded by C. S., 6295, from filing a petition for removal in a pending suit?

On 8 April, 1901, the defendant filed an application to transact business in the State of North Carolina in accordance with the insurance law then in force. The application stated: "And said company hereby agrees that suits commenced in the State courts of North Carolina against it shall not be removed by the acts of said company into the United States Circuit or District courts," etc. This language in the application was designed to comply with the provisions of the statute. C. S., 6295, provides that if any foreign life insurance company shall undertake to remove a pending suit to the Federal Court that the Insurance Commissioner shall revoke the authority to transact business in this State. The statute was construed in the case of *Insurance Co. v. Commissioner*, 144 N. C., 442, 57 S. E., 120, and held constitutional. The decision was planted squarely upon the authority of *Insurance Co. v. Prewitt*, 202 U. S., 246, 50 L. Ed., 1013. However, the *Prewitt case* was expressly overruled in *Terral v. Burke Construction Co.*, 257 U. S., 529, 66 L. Ed., 352. *Chief Justice Taft*, writing for the Court, said: "The principle established by the more recent decisions of this Court is that a state may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the state, exact from it a waiver

of the exercise of such right, whether waived in advance or not. The principle does not depend for its application on the character of the business the corporation does, whether state or interstate, although that has been suggested as a distinction in some cases. It rests on the ground that the Federal Constitution confers upon citizens of one state the right to resort to Federal Courts in another; that state action, whether legislative or executive, necessarily calculated to curtail the free exercise of right thus secured, is void because the sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law." *Fidelity & Deposit Co., v. Tafoya,* 270 U. S., 426, 70 L. Ed., 664; *Frost v. R. R. Commission,* 271 U. S., 583, 70 L. Ed., 1101; *Hanover Fire Ins. Co. v. Carr,* 272 U. S., 494, 21 A. L. R., 188.

It is clear therefore that the removal provisions of C. S., 6295, is unconstitutional and void. Hence the defendant had a right to remove the case, and the judgment of the Superior Court is

Affirmed.

F. R. HEMPHILL v. STANDARD OIL COMPANY.

(Filed 12 June, 1929.)

1. Master and Servant C c—In this case held, evidence of master's negligence in failing to furnish reasonable help held insufficient.

Upon evidence tending to show only that the defendant's driver of its truck was sent to defendant's filling station to load a heavy pump on the truck, and that usually there was sufficient help, but that on this occasion, without the knowledge of the employer, there was no help, and without using the available method of communicating the fact by telephone to the employer, the plaintiff assumed to load the pump without help: *Held,* the evidence is insufficient upon which the plaintiff could recover damages for the consequent injury upon the ground that the defendant had failed in its duty to supply sufficient help, and defendant's motion for judgment as of nonsuit should have been allowed.

2. Master and Servant C b—Evidence of master's negligence in failing to provide sufficient heat in office where plaintiff was required to work held insufficient.

Where the plaintiff demands judgment for the defendant's failure to have properly heated a small office in which he was sometimes required to work at night, and the plaintiff had furnished an oil stove and oil to heat the office, and the defendant continued his employment without complaint to or knowledge of the employer of the insufficiency, the evidence is insufficient to sustain a verdict adverse to the defendant upon the issues of negligence, contributory negligence and assumption of risks, and defendant's motion as of nonsuit should have been allowed.

HEMPHILL *v.* OIL COMPANY.

APPEAL by defendant from *Lyon, Emergency Judge,* at October Term, 1928, of BURKE. Reversed.

Action to recover damages for personal injuries alleged to have been sustained by plaintiff, while at work as an employee of defendant.

Plaintiff alleged in his complaint that the proximate cause of the injuries which he sustained was the failure and neglect of defendant (1) to furnish him necessary, proper and sufficient help and assistance to do and perform the work required of him, and (2) to provide for proper and sufficient heat in the office when plaintiff was required to work at night. These allegations were denied by defendant, who relied further upon its pleas that plaintiff had by his own negligence contributed to his injuries, if any, and that he had voluntarily assumed the risk of such injuries when he accepted employment by defendant.

Issues submitted to the jury were answered as follows:

1. Was the plaintiff, Ralph Hemphill, injured by the negligence of the defendant, Standard Oil Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff, Ralph Hemphill, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

3. Did the plaintiff, Ralph Hemphill, voluntarily assume the risk as alleged in the answer? Answer: No.

4. What damages, if any, is the plaintiff, Ralph Hemphill, entitled to recover of the defendant, Standard Oil Company? Answer: $2,500.

From judgment in accordance with the verdict defendant appealed to the Supreme Court.

Avery & Patton and John M. Mull for plaintiff.
S. J. Ervin and S. J. Ervin, Jr., for defendant.

CONNOR, J. Upon consideration of the evidence offered at the trial of this action, as set out in the case on appeal, we are of the opinion that there was error in the refusal of the trial court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence. C. S., 567. There was no evidence tending to show that defendant was negligent as alleged in the complaint, but conceding that there was such evidence, all the evidence tends to show that plaintiff, by his own negligence, contributed to the injuries which he testified that he has sustained, and that plaintiff, when he accepted employment by defendant, assumed the risk of such injuries. Defendant's motion should have been allowed, and the action dismissed.

Plaintiff was employed by defendant as a truck-driver, and helper. He was about 20 years of age, and in good physical condition, at the time he was employed. On the occasion when he contends that he was

injured, plaintiff had been ordered and directed by his superior to take his truck to a filling station, near Hickory, N. C., and to bring from the filling station to Hickory, a pump, which he testified weighed between 800 and 1,000 pounds. When plaintiff arrived at the filling station there was no one there to load the pump on the truck, or to aid him to do so. There was usually a sufficient number of men, employees at the station, to load a pump such as plaintiff had been ordered and directed to bring on his truck to Hickory, whose duty it was to load, or help load the pump. Plaintiff had been instructed by his superior on previous occasions to call on these men for help.

When plaintiff arrived at the filling station, and found no one there to aid him, he waited for thirty minutes for help. There was telephone connection between the station and the office of plaintiff's superior, under whose orders he was acting. Plaintiff did not telephone to his superior, or otherwise inform him that there was no one at the station to help him load the pump on the truck. He undertook to load the pump alone and without assistance. He testified that as a result of his lifting the heavy pump, and loading it on the truck, he strained his back and neck. He did not suffer from his injuries until that night. He continued to work for defendant for several months, without complaint to his superior or to the defendant, and then voluntarily left the defendant's employment.

Some time in June, 1928, plaintiff was ordered and directed by defendant to go to Newton, N. C., as an assistant to defendant's agent at that place. While working for defendant at Newton from June to December, plaintiff was required to work in a small office, sometimes at night. During the winter defendant provided a small oil stove for heating this office. Oil and matches were provided by defendant. Plaintiff testified that the office was sometimes cold and that he suffered severe colds because the office was not sufficiently heated by the oil stove. There was no evidence that plaintiff at any time made complaint to defendant or to his superior that the office was not comfortable, or that the oil stove was not adequate for the purpose of heating the office on cold days and nights.

The principles which control the decision of the question presented by this appeal are stated and discussed by *Brogden, J.*, in *Jarvis v. Cotton Mills,* 194 N. C., 687, 140 S. E., 602. Upon the facts which all the evidence in this case tends to show, defendant is not liable to plaintiff, and the judgment must be

Reversed.

MYRTLE A. McDANIEL v. TRENT MILLS, INC.

(Filed 12 June, 1929.)

1. **Husband and Wife B c—Wife may recover moneys expended by her by reason of negligent injury to husband in her action against tort-feasor.**

A wife may recover from one who has negligently injured her husband such moneys as she has been required to pay from her separate estate by reason of his sickness or incapacity so caused, but she may not recover for nursing him, or loss of consortium, or mental anguish, or loss of support and maintenance, or for damages he or his personal representative might recover in an action against the *tort-feasor*.

2. **Pleadings D e—Demurrer admits allegations of complaint.**

A demurrer to a complaint on the grounds that a cause of action is not stated therein merely tests its sufficiency to allege a good cause of action, and admits the truth of its allegations for the purposes of the demurrer.

CONNOR, J., dissents.

APPEAL by defendant from *Daniels, J.*, at Chambers, New Bern, N. C., 15 February, 1929. From JONES.

Civil action, brought by plaintiff, wife of C. S. McDaniel, in her own right, to recover damages alleged to have been sustained by her as a proximate result of the negligence of the defendant in inflicting serious and permanent injuries upon her husband while he was engaged in the discharge of his duties as an employee of the defendant.

Plaintiff alleges that she was living with her husband at the time of his injury; that she has continued to live with him ever since; and that in consequence of the defendant's negligence, which caused serious and permanent injury to her husband, she has suffered damages as follows: (1) Heavy expenses incurred and paid by her, made necessary by her husband's injuries; (2) services performed in nursing and caring for him; (3) loss of support and maintenance; (4) loss of consortium; (5) mental anguish.

A demurrer was interposed by the defendant upon the ground that the complaint does not state facts sufficient to constitute a cause of action, and that in reality no cause of action exists in favor of the plaintiff and against the defendant.

From a judgment overruling the demurrer the defendant appeals, assigning error.

McKinnon Carmichael and Warren & Warren for plaintiff.

J. Laurence Jones and Guion & Guion for defendant.

STACY, C. J. The appeal presents the single question as to whether a wife, who is living with her husband, can maintain an action, in her own right, for damages of any kind, alleged to have been sustained by her, on account of serious and permanent injuries negligently inflicted upon her husband by a third party. We think so. *Hinnant v. Power Co.*, 189 N. C., 120, 126 S. E., 307; *Hipp v. Dupont,* 182 N. C., 9, 108 S. E., 318.

But she can recover nothing in her own right which her husband could recover or which his personal representatives could recover in case his death resulted from the injury. *Hipp v. Dupont, supra.*

Nor can she recover for services performed by her in nursing and caring for her husband *(Chicago, etc., Transit Co. v. Moore,* 259 Fed., 490); or for loss of consortium or mental anguish *(Hinnant v. Power Co., supra);* or for loss of support and maintenance *(Craig v. Lumber Co.,* 189 N. C., 137, 126 S. E., 312).

But when a wife, living with her husband, has been impelled, through the natural and ordinary considerations of family life, to expend money out of her own personal estate, as a proximate result of a negligent injury inflicted upon her husband by a third person, and for which neither he nor his personal representatives can recover, as plaintiff alleges in the instant case, we see no valid reason for holding, as against a demurrer, that the complaint does not state facts sufficient to constitute a cause of action in plaintiff's favor and against the *tort-feasor. Hipp v. Dupont, supra.* The family in its integrity has been the foundation, as well as the bulwark, of American institutions from the beginning of our history. In fact, it is the very cradle of civilization, with the future welfare of the commonwealth dependent, in large measure, upon the success of its administration. Hence, when a wife, under such impulsion and in obedience to its command, comes to the aid of her husband with the expenditure of her separate funds, she is not to be regarded as a volunteer, but as one acting within her conjugal rights, and it is but meet that, under such circumstances, the wrongdoer, who has forced her to part with her means, should respond in damages to the extent of the reasonable obligations thus assumed and paid by her as a direct result of his tortious acts.

While the common-law principle of unity of husband and wife and the modern doctrine of complete duality of personalities may clash somewhat in yielding to this result, still, we think, the conclusion is supported by the logic of life, if not by the logic of syllogism; and it should be remembered that law is bigger than logic, life is bigger than law, and the function of judicial decision is to state, as near as possible, in terms of law, the meaning of life in action. This middle course, as it

may be called, is perhaps a hybrid between the old and the new doctrines just mentioned, or a mixture of the two, but, if so, it comes from holding fast to that which is good in the old and pressing forward to that which is helpful in the new, a practice heretofore commended by an authority on domestic relations, a great lawyer, and one of the apostles.

We are not now concerned with whether the plaintiff can make good her allegations with proof. The case is here on demurrer, the office of which is to test the sufficiency of the complaint, admitting, for the purpose, the truth of the allegations of fact contained therein. *Brick Co. v. Gentry,* 191 N. C., 636, 132 S. E., 800; *Justice v. Sherard, ante,* 237.

Affirmed.

CONNOR, J., dissents.

FRANK COXE v. JAMES C. DILLARD, JOSEPH A. JOHNSON, AND W. B. TROY.

(Filed 12 June, 1929.)

1. Pleadings D a—In this case held, cause of action was stated against all parties defendant.

A complaint alleging that the plaintiff at the request and for the convenience of the defendants made a deed to a certain tract of land to one of them for the benefit of them all in which the grantee assumes the obligation of a prior mortgage for them all, and that the grantee defendant subsequently conveyed to the other defendants upon like condition their proportionate share, specifying the interest of each, states a cause of action as to each, and a demurrer thereto, on the grounds of misjoinder of parties and causes of action and that it fails to allege a cause of action, admits the truth of the allegations, and is properly overruled.

2. Frauds, Statute of A a—Where parties assume debt on lands deeded to another for them, they have a pecuniary interest therein and the Statute does not apply.

Where a grantor makes deed to one of the defendants for the benefit of the others, at their request and for their convenience, and a prior mortgage debt is assumed by the grantee therein, who later makes a deed to the other defendants in which the prior mortgage was assumed by them: *Held,* in the original grantor's action on the mortgage debt to recover against the defendants for whose benefit the grantee defendant took title, the statute of frauds does not apply since each of the defendants had a pecuniary interest in the transaction. C. S., 987.

3. Deeds and Conveyances C f—Grantee in deed is bound by covenants therein although he does not sign or execute the deed.

The grantee in a deed containing covenants and stipulations purporting to bind him becomes bound for their performance even though he does not execute the deed, and where a grantee of lands assumes a prior mortgage thereon he is bound thereby without signing the deed.

CIVIL ACTION, before *Schenck, J.*, at February Term, 1929, of BUNCOMBE.

Plaintiff alleged that J. W. Keys owned a tract of land in the city of Asheville and sold a one-half-undivided interest therein to him prior to 14 December, 1925, and that in order to secure the balance of the purchase price, plaintiff executed and delivered to said Keys his promissory notes aggregating $10,250, and securing said notes by a mortgage upon the land; that the sum of $3,750 has been paid on said indebtedness, leaving a balance due of $6,500.

Plaintiff further alleged that on 26 February, 1926, he sold his undivided interest in said land to L. E. Sorrell, W. L. Harrell, J. C. Dillard, Joseph A. Johnson and W. B. Troy, "and for the purpose of convenience to the parties purchasing the same and at their request the deed to said property was made to L. E. Sorrell," etc. Sorrell executed and delivered to the plaintiff three promissory notes aggregating $20,700, "and as a part of the consideration the said above-named parties assumed and agreed to pay the sum of $6,500 then owing to the said J. W. Keys and wife," etc. That on the same day, to wit, 26 February, 1926, Sorrell executed and delivered a deed to the said W. L. Harrell, J. C. Dillard, Joseph A. Johnson and W. B. Troy, in which said deed the following provisions appeared:

(a) "The above-described property being conveyed hereby to the parties of the second part in the following proportional interests: To W. L. Harrell one-ninth; Joseph A. Johnson two-ninths; J. C. Dillard two-ninths, and W. B. Troy two-ninths."

(b) "Except the sum of $27,200, which said indebtedness the parties of the second part hereby agree and assume and agree to pay in proportion to their said interest in said land and premises above set forth."

It will be observed that the said sum of $27,200 included the $6,500 indebtedness due Keys and the $20,700 due plaintiff.

Plaintiff further alleged that the defendants failed to pay the indebtedness due Keys. Whereupon Keys advertised the property and sold it at public auction, the plaintiff becoming the purchaser thereof for the sum of $1,000. Whereupon plaintiff prayed judgment against the defendants upon the notes amounting to $20,700 executed and delivered to him and the deficiency upon the Keys notes, the whole aggregating $27,816. The defendants, Dillard and Johnson, demurred to the com-

plaint upon the ground that there was a misjoinder of parties and causes of action, and that the complaint did not state facts sufficient to constitute a cause of action.

The trial judge overruled the demurrer and the defendants appealed.

Lee, Ford & Coxe for plaintiff.
Joseph W. Little for defendants.

BROGDEN, J. The plaintiff alleged that the land was sold to the defendants, but that the deed was made to L. E. Sorrell for their convenience and at their request. The demurrer admits this allegation. Hence Sorrell was merely holding the title to the land for the use and benefit of the defendants.

Plaintiff further alleged that Sorrell conveyed the property to the defendants by a deed containing a covenant according to the terms of which the defendants agreed to pay the indebtedness described in the complaint. The demurrer admits this allegation.

Upon this state of the record the trial judge was fully justified in overruling the demurrer.

Defendants, however, insist that the notes in controversy were signed not by them, but by Sorrell and plaintiff, Coxe, and that therefore they cannot be held upon an oral promise to answer for the debt or default of another under the provisions of C. S., 987.

This position cannot be maintained for two reasons:

First, it appears from the complaint that the land was purchased by Sorrell for the use and benefit of defendants. Hence the defendants had a personal and pecuniary interest in the transaction, and the statute of fraud would not apply. *Dale v. Lumber Co.*, 152 N. C., 651, 68 S. E., 134; *Peele v. Powell*, 156 N. C., 554; 73 S. E., 234; *Powell v. Lumber Co.*, 168 N. C., 632, 84 S. E., 1032; *Springs v. Cole*, 171 N. C., 418, 88 S. E., 721; *Kelly Handle Co. v. Crawford Plumbing Co.*, 171 N. C., 495, 88 S. E., 514. See, also, *Keller v. Parrish*, 196 N. C., 733, and *Justice v. Sherard, ante*, 237.

Second, it further appears that the defendants received a deed for their proportional interests in the land in which said deed it was agreed that they would assume and pay off the indebtedness described in the complaint. The grantee in a deed containing covenants and stipulations purporting to bind him becomes bound for their performance even though he does not execute the deed. *Peel v. Peel*, 196 N. C., 782.

Affirmed.

IN RE WILL OF JOHN E. CASEY.

(Filed 12 June, 1929.)

Wills D h—Evidence in this case on question of mental capacity held competent.

Upon the trial of the issues of *devisavit vel non* it is competent for the disinherited child of the testator to testify as to her financial condition, the fact of disinheritance, and affectionate relationship between her and the testator upon the question of the mental capacity of the testator.

CIVIL ACTION, before *McElroy, J.*, at October Term, 1928, of BUNCOMBE.

The evidence tended to show that on 6 May, 1922, John E. Casey executed a last will and testament devising all of his property to his widow for life, and after her death one-third thereof to Mollie Harris, one-third to his granddaughter, Ella Reed, and one-third to his great-granddaughter, Annie Morrow, and his great-grandson, Broadhurst Morrow. The testator died on 25 November, 1925.

The caveators are Emma Connor, the only living daughter of the testator, and J. R. Dotson, grandson, and Minnie Gregory, great-granddaughter of the deceased. Emma Connor, daughter of the deceased, received one dollar under the will of her father, and the other caveator, Minnie Gregory, received one dollar, and the caveator, Dotson, received nothing.

Appropriate issues were submitted to the jury and answered in favor of the propounders.

From judgment upon the verdict caveators appealed, assigning error.

Galloway & Galloway and R. N. Wells for caveators.
Marcus Erwin and Anderson & Howell for propounders.

BROGDEN, J. Emma Connor, one of the caveators, and the only living child of the testator, was asked the following questions:

1. "What property have you now?"

2. "Did you get anything by the last will and testament of John E. Casey?"

3. "How did your father treat you with reference to his treatment of your other sister while you were young?"

The witness answered the first question "None"; the second question "No"; and the third question, "I never had any trouble with my father."

All of these questions were objected to by the propounders and the answers of the witness were stricken out, and the caveators excepted and

assigned the ruling of the court as error. These exceptions constitute exceptions 1, 2 and 3, and present three questions of law, to wit:

1. Is the financial condition of a child excluded from the will of the father competent upon the issue of mental capacity?

The law answers this question in the affirmative. *In re Staub's Will,* 172 N. C., 138, 90 S. E., 119; *In re Hinton's Will,* 180 N. C., 206, 104 S. E., 341; *In re Stephen's Will,* 189 N. C., 267, 126 S. E., 738.

Such evidence is also competent upon the issue of undue influence. *In re Creecy,* 190 N. C., 301, 129 S. E., 822.

2. Is the disinheritance of a child competent evidence upon the question of mental capacity?

The law answers this question in the affirmative. *In re Hinton's Will,* 180 N. C., 206, 104 S. E., 341.

3. Is evidence of kindly and affectionate relationship between the testator and the members of his family competent upon the issue of mental capacity?

The law answers this question in the affirmative. *Bost v. Bost,* 87 N. C., 477; *In re Burns' Will,* 121 N. C., 336, 28 S. E., 519.

Therefore the exclusion of testimony was error, and the caveators are entitled to a

New trial.

SADIE AND HOWARD PIERCE, BY THEIR NEXT FRIEND, R. C. SCHULKEN, v. ARCHIE T. PIERCE AND ROYAL INDEMNITY COMPANY.

(Filed 12 June, 1929.)

Guardian and Ward C a—Guardian not liable for loss to estate of ward when he has exercised good faith and due diligence.

The liability of a guardian and the surety on his bond for a loss to the estate of the ward caused by the failure of a bank in which the guardian kept deposits of the estate, does not attach when it is found that the guardian exercised good faith and due diligence, and the refusal of the trial court to substantially submit this issue to the jury under the evidence in this case is reversible error.

APPEAL by defendant, Royal Indemnity Company, from *Cranmer, J.,* at November Term, 1928, of COLUMBUS. New trial.

Action to recover of a guardian and the surety on his bond the amount due his wards.

The issues submitted to the jury were answered as follows:

1. What amount, if any, are plaintiffs entitled to recover of the defendants? Answer: $206.30, with interest.

2. What amount, if any, is the Royal Indemnity Company entitled to recover of Archie T. Pierce? Answer: $206.30, with interest.

From judgment on the verdict, the defendant, Royal Indemnity Company, appealed to the Supreme Court.

Greer & Bennett for plaintiffs.
Isaac C. Wright for defendant company.

CONNOR, J. On 5 November, 1923, the defendant, Archie T. Pierce, was appointed by the clerk of the Superior Court of Columbus County, North Carolina, guardian of the plaintiffs, his infant children. As such guardian, he filed a bond, in the form required by statute (C. S., 2162), which the defendant, Royal Indemnity Company, had executed as surety. C. S., 339. The penalty of said bond is $750. The bond was approved by the clerk, and the defendant, Archie T. Pierce, as guardian of plaintiffs thereafter received the sum of $333.33, in cash, which he deposited in the Bank of Columbus, of Whiteville, N. C.

There was an agreement between the guardian and his surety that said deposit should be under their joint control, and that checks on said deposit should be approved and countersigned by an agent of the surety. Checks were drawn on said deposit, from time to time, for amounts properly expended by the guardian for his wards. Accounts filed by the guardian, from time to time, showing that the money due the plaintiffs by their guardian was deposited in said Bank of Columbus, were audited, approved and recorded by the clerk of the Superior Court.

On 31 January, 1927, the Bank of Columbus was adjudged insolvent. It has ceased to do business. Its assets are not sufficient for the payment in full of its liabilities.

On 7 March, 1927, the defendant, Archie T. Pierce, guardian of plaintiffs, filed an account with the clerk of the court, showing that the balance in his hands due his wards, on said date, was $257.31. He reported to the clerk that he was unable to replace the amount which he had lost by the insolvency of the Bank of Columbus, and prayed that he be released from liability to his wards. His prayer was refused by the clerk, who, however, made an order, discharging the said Archie T. Pierce as guardian of the plaintiffs. Thereafter, this action was begun by plaintiffs, appearing by their duly appointed next friend, to recover of defendants the amount due them.

At the trial, defendant, Royal Indemnity Company, tendered an issue as follows:

"4. Did the defendant, Archie T. Pierce, exercise reasonable diligence and good faith in the handling of the guardianship funds?"

The court declined to submit this issue, and said defendant duly excepted. Its assignment of error based on this exception is sustained. The issue arises upon the pleadings; there was evidence tending to support the defense relied upon by the surety. The refusal to submit this issue was error, for which the appellant is entitled to a new trial. In *Sheets v. Tobacco Co.*, 195 N. C., 149, 141 S. E., 355, we said: "Good faith and due diligence on the part of the guardian, however, will protect the guardian and the sureties on his bond, from liability for losses."

If, upon the new trial, the issue tendered by defendant, Royal Indemnity Company, be answered in the affirmative, the plaintiffs will not be entitled to recover in this action. There are other assignments of error on this appeal which need not be considered at this time as there must be a

New trial.

STATE v. BAXTER STANSBERRY.

(Filed 12 June, 1929.)

1. **Appeal and Error E g—Record conclusive on appeal.**

On appeal the Supreme Court is bound by the record as it is sent up.

2. **Criminal Law I g—Instructions on aspect of case not supported by evidence held reversible error.**

Evidence which tends only to show that a male person over eighteen years of age met the prosecuting witness on her way to a spring near a school she was attending, and that he caught her by the arms for a moment and then released her, using no improper language, and that she was then afraid to continue her way to the spring because she did not know "who all was over there" without testimony that the defendant caused her not to go to the spring is insufficient to support an instruction that if, under the circumstances, the prosecuting witness left the place where she had a right to be, or did not go to the spring by reason of the defendant's putting her in fear, the defendant would be guilty under the provisions of C. S., 4215, is reversible error, and a new trial will be awarded.

APPEAL by defendant from *Moore, J.*, at November Term, 1928, of CHEROKEE.

Criminal prosecution tried upon an indictment charging that the defendant did, on 5 November, 1928, with force and arms, assault, beat and wound one Beula Kilpatrick, a female, the defendant being, at the time, a male person over eighteen years of age. C. S., 4215.

It is not right clear from the record as to what took place in this case. But it seems that in August, 1928, four young girls, Annie Lee

Davis, her sister, Alice Davis, Polly Woody and the prosecuting witness, Beula Kilpatrick, all students at Marble, N. C., and each about fifteen years of age, were on their way to a spring, not far distant from the school, when they met four young men, Jud Stansberry, W. G. Griggs, Forest Abernathy and the defendant, Baxter Stansberry. The boys were apparently known to the girls; they had seen them before. It seems that the Davis girls and Griggs live within a half mile of each other.

The substance of Beula Kilpatrick's testimony is, that while they "were all around there, all together, standing in the trail that leads to the spring, Baxter Stansberry caught hold of my arm. I told him to turn me loose. He did not turn me loose when I told him to. I jerked loose and ran back to the schoolhouse. I was afraid to go to the spring because I didn't know who all was over there. He didn't say anything at all out of the way to me, not a word. When he took hold of me I stood still. The others had gone on but they were not out of my sight. Annie Lee Davis got back to the schoolhouse when I did."

The trial court instructed the jury, among other things, that if the prosecuting witness "left the place where she had a right to be, or did not go to the spring by reason of his putting her in fear, or she was put in fear by reason of the defendant's conduct, that would be an assault, and if you so find beyond a reasonable doubt, it would be your duty to convict the defendant." Exception.

Verdict: "Guilty of the charge."

Judgment: Two years on the roads.

Defendant appeals, assigning errors.

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

J. D. Mallonee and Moody & Moody for defendant.

STACY, C. J. The trial court evidently had more facts before it than appear in the agreed case on appeal. But we are bound by the record as it is sent up. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6.

Conceding that the evidence may be sufficient to carry the case to the jury on the theory of an assault and battery (*S. v. Hemphill,* 162 N. C., 632, 78 S. E., 167), still we think the trial court erred in submitting it on the assumption that sufficient show of force or threat of violence had been offered by the defendant to put the prosecutrix in fear and thereby cause her to leave from where she was, or to desist from going to the spring. She does not say that the defendant's conduct was the cause of her leaving or going back to the schoolhouse. Nor does she say that she was put in fear by him. On the other hand, she says she was

afraid to go to the spring because she did not know "who all was over there." The defendant said nothing, not a word, out of the way to the prosecuting witness. *S. v. Daniel,* 136 N. C., 571, 48 S. E., 544.

On the record as presented, the defendant is entitled to have the judgment vacated and a new trial awarded. It is so ordered.

New trial.

STATE v. WILBURN GRIGGS.

(Filed 12 June, 1929.)

1. Appeal and Error E g—Record conclusive on appeal.

On appeal the Supreme Court is bound by the record as it is sent up.

2. Criminal Law I g—Instruction in this case held reversible error as expression of opinion by the court.

An instruction upon a vital question at issue on the trial of an assault of a male person over eighteen years of age upon a female, C. S., 4215, which assumes the fact at issue is reversible error.

APPEAL by defendant from *Moore, J.,* at November Term, 1928, of CHEROKEE.

Criminal prosecution tried upon an indictment charging that the defendant did, on 5 November, 1928, with force and arms, assault, beat and wound one Annie Lee Davis, a female, the defendant being, at the time, a male person over eighteen years of age. C. S., 4215.

This is a companion case to *S. v. Baxter Stansberry, ante,* 350, as the two cases grow out of the same general surroundings, though there is more evidence of an assault in the present case than in the other one.

Here, the prosecuting witness testified that the defendant caught her around the waist, called her "little blue eyes," and carried her down the hill thirty or forty feet. This was denied in *toto* by the defendant, who said that he was on his way with Forest Abernathy to look at a house, which Abernathy's father had purchased, and to lock it up, when they met the girls on the way to the spring.

The following excerpt, taken from the charge, constitutes one of the defendant's exceptive assignments of error:

"There is no evidence anywhere, gentlemen, that they went on to the house to look at it or to lock it up, but they stopped near the spring, and then these girls came along and they all got to talking there, but none of the other cases are before you now, gentlemen, but the defendant Griggs who took the little girl off as I have described to you into the woods." Exception No. 2.

Verdict: "Guilty of the charge as to Wilburn Griggs."
Judgment: Two years on the roads.
Defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
J. D. Mallonee and Moody & Moody for defendant.

STACY, C. J. It would appear that the instruction which constitutes the defendant's second exceptive assignment of error, above set out, contains an inadvertent expression of opinion, prohibited by C. S., 564, to the effect that the defendant had taken the little girl off into the woods, when this was the crucial point in the case and strongly denied by the defendant. *S. v. Hart,* 186 N. C., 582, 120 S. E., 345; *Speed v. Perry,* 167 N. C., 122, 83 S. E., 176. The error is just one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Allen,* 190 N. C., 498, 130 S. E., 163; *S. v. Kline,* 190 N. C., 177, 129 S. E., 417. Indeed, the case on appeal was not settled by the judge, and it is possible that the charge, as reported, is not as given, but we are bound by the record. *S. v. Harbert,* 185 N. C., 760, 118 S. E., 6; *S. v. Wheeler,* 185 N. C., 670, 116 S. E., 413; *Cogdill v. Hardwood Co.,* 194 N. C., 745, 140 S. E., 732.

For the error as indicated, a new trial must be awarded, and it is so ordered.

New trial.

C. H. HAMILTON, COMMISSIONER, v. R. H. HENDERSON.

(Filed 12 June, 1929.)

Parties B b—Heirs of grantor of deed providing for reversion are necessary parties in action by grantee's heir to enforce contract of sale thereof.

An estate for life conveyed by deed upon conditions affecting a reversion cannot be judicially determined when the heirs at law of the deceased grantor having a possible interest therein are not made parties, and when this defect of parties appears on the record the Supreme Court will remand the case in order that they may be joined.

CIVIL ACTION, before *Harding, J.,* at November Term, 1928, of MECKLENBURG.

On 14 November, 1884, R. M. Armour and wife conveyed a certain tract of land to Stanford Holdsclaw and wife. After describing the land

so conveyed the following language occurs in the deed: "To have and to hold the aforesaid lot with all the appurtenances thereto belonging, including the right of dower of the said L. C. Armour *(feme covert)* to the said Stanford Holdsclaw and wife during their natural life and the parties of the second part hereby agree not to dispose of said lot to any one except the parties of the first part, or by their consent or their heirs' consent.

And it is further agreed that at the decease of the parties of the second part that the title of said lot shall revert to the parties of the first part, their heirs, executors and assigns, they paying a fair price for the same.

In witness whereof, the parties of both parts have hereunto set their hands and seals, this 14 November, 1884." R. M. Armour, L. C. Armour, Stanford Holdsclaw, Hannah Holdsclaw.

L. C. Armour, wife of one of the grantors, died in 1891, and R. M. Armour, the other grantor, died in July, 1913. Stanford Holdsclaw died in 1913, and thereafter his wife, Hannah Holdsclaw, died intestate, leaving two sons, to wit, Walter Johnson and Will Houser. Walter Johnson died intestate in 1918, leaving a widow, Ida Johnson, and the following children, to wit: Walter Johnson, Parks Johnson, Willie May Johnson, Harry Lee Johnson and Bernard Johnson. Will Houser died in 1923, intestate, leaving a widow but no child or the representative of any child.

It was admitted that the land had been "in the adverse, open and non-disputed possession of the heirs at law of Hannah Holdsclaw since ..... October, 1913."

The above named heirs at law of Walter Johnson and his widow filed a petition in the Superior Court for the sale of said land for division, and the plaintiff Hamilton was appointed commissioner to make the sale. The sale was made on 4 July, 1927, and the defendant Henderson became the last and highest bidder for the land. When the plaintiff tendered a deed for said property to the defendant he declined to accept the deed and pay the purchase money upon the ground that said deed could not and did not convey a good title. The trial judge decreed that "Hannah Holdsclaw had only a life estate in the land described in the deed, and that at the death of said defendants, Holdsclaw and wife, Hannah Holdsclaw, the property reverted to R. M. Armour or his heirs at law, "they paying a fair price for the same," from which judgment the plaintiff appealed.

Z. V. Turlington for plaintiff.
No counsel for defendant.

BROGDEN, J. It appears that the heirs at law of the grantors have not been made parties to this action, and therefore their rights, if any, cannot be determined unless they are brought into court and afforded an opportunity to assert any claim they may have. The cause is remanded to the end that the heirs at law of the grantors may be duly made parties to the proceeding.

Remanded.

ED CHAMBERS SMITH v. ARTHUR E. DICKS.

(Filed 12 June, 1929.)

1. Corporations K d—Upon expiration of charter of corporation assets thereof do not escheat.

Upon the expiration of the charter of a corporation the directors thereof hold the assets as trustees, first for the creditors, and secondarily for the stockholders in good standing at the time of the expiration of the charter, C. S., 1193, 1194, 1198, and there is no escheat as against the rights of stockholders under the provisions of C. S., 5784.

2. Same—Stockholders at time of expiration of charter of corporation are entitled to pro rata part of corporate assets.

Where an incorporated social club has continued for more than three years after the expiration of its charter to operate as though the charter had not expired, the members or stockholders in good standing at the time of the expiration of the charter are entitled in equity to a pro rata share in the assets of the corporation to the exclusion of members taken in after its expiration, with the right to sell and convey the same, where the rights of creditors are not involved.

3. Same—Nonresident members of social corporation, excluded from control or ownership of corporate property, are not entitled to share in corporate assets upon dissolution.

Where the constitution and by-laws of an incorporated social club clearly provide that its property should be owned and controlled by its resident membership to the exclusion of nonresident members, such nonresident members, taken in at greatly reduced membership dues, are not entitled to share in the assets of the corporation upon the expiration of its charter.

APPEAL by defendant from *Nunn, J.*, at Chambers, 29 April, 1929, of WAKE. Affirmed.

Submission of controversy without action. Agreed case:

"1. The above named, Ed Chambers Smith, is now and was at the times hereinafter mentioned, a citizen and resident of the county of Wake and State of North Carolina.

"2. That the above named, Arthur E. Dicks, is a citizen and resident of the county of Wake, and State of North Carolina.

"3. That on 18 August, 1885, the Capital Club of the city of Raleigh was organized, and incorporated for literary and social purposes, and obtained a charter under the laws of the State of North Carolina, and in pursuance of said purposes maintained a club for its members, governed by a constitution and by-laws adopted by said Capital Club of the city of Raleigh, and that a copy of said charter, constitution and by-laws is hereto attached marked Exhibits A, B and C, respectively. (For a decision of the case it is unnecessary to include the exhibits in this opinion.)

"4. That the said Capital Club of the city of Raleigh was chartered for a period of thirty years from 18 August, 1885.

"5. That on ..... June, 1902, the Capital Club of the city of Raleigh acquired by purchase a certain lot of land in the city of Raleigh, N. C., at the northeast intersection of Martin and Salisbury streets, and erected thereon a club house, said tract or lot of land being more particularly described as follows:

" 'Situate in the city of Raleigh, N. C., and beginning at the southwest corner of Lot No. 115, it being the northeast corner of intersection of Salisbury and Martin streets; running thence north along the east line of Salisbury Street about 70 feet to the southwest corner of the lot formerly owned by B. M. Moore; running thence east parallel with Martin Street about 70 feet to the lot formerly owned by the Coley heirs, and now owned by Mrs. F. P. Tucker; running thence south parallel with Salisbury Street 70 feet to the line of Martin Street; thence west along the north line of Martin Street, about 70 feet, to the beginning, together with all buildings and appurtenances thereto belonging.'

"6. That the charter of the Capital Club of the city of Raleigh expired by limitation on 18 August, 1915, at which time there were 168 resident members of said club and about 40 nonresident members; that the fact of the expiration of the charter was not discovered by the club until sometime in 1922; that in the meantime those who were members of the corporation at the time of the expiration of the charter, being ignorant of the fact that the charter had expired, continued to operate a club in said building, until some time in 1922, when it was discovered that the charter had expired and thereupon, on 7 April, 1922, a charter was obtained from the office of the Secretary of State, incorporating the Capital Club of the city of Raleigh, Inc., the then resident members of the club being the incorporators. That during the time between the expiration of the charter of the old corporation and the

incorporation of the Capital Club of Raleigh, Inc., the old members who operated the club, associated with themselves certain new members by election and between the date of 18 August, 1915, and 18 August, 1918, approximately 30 additional members were so admitted, making the membership 198 resident members on 18 August, 1918. That no conveyance of any interest in the property was made by any old member to any new member.

"7. That no effort was made to wind up the affairs of the corporation within three years from the date of the expiration of the charter, none of its officers and members being aware of the fact that the charter had expired. Those who were members of the corporation continued the operation of the club, and associated new members with them by election just as if the charter had not expired.

"8. That there were no debts of the corporation at the time of the expiration of its charter on 18 August, 1915, or at the end of three years from that date, except current operating expenses and a mortgage indebtedness which is embraced in a deed of trust made on said property by the Capital Club of the city of Raleigh, N. C. That all current operating expenses have been paid.

"9. That sections 6 and 7 of the charter of the Capital Club of the city of Raleigh (the old corporation), which charter was in force up until its expiration in August, 1915, are in words and figures as follows, to wit:

"'(6) The number, qualification, privileges, and method of election of members shall be fixed by the by-laws of the corporation; provided, that no person shall ever be admitted as a member of the corporation except upon the payment of twenty-five dollars ($25.00) as an entrance fee; which entrance fee may be increased or decreased as to persons admitted to membership after the date of incorporation, to such sum as the by-laws may prescribe. Any person may voluntarily cease to be a member of the corporation whenever he sees fit to withdraw therefrom; and any member may be expelled, and may forfeit his membership, under such rules and regulations as may be fixed by the by-laws.

"'(7) No member shall have the right to sell or transfer his membership or his rights or privileges as such, or to substitute another person as a member in his place; and any person ceasing to be a member, whether voluntarily or by expulsion, or by death, shall forfeit all rights and privileges of membership and all rights and claim in and to the property of the corporation, and all his interest in such property shall vest in the corporation absolutely.'

"10. That under and by virtue of the provisions of sections 6 and 7 of the charter set forth in section 12 thereof, article 4 of the Consti-

tution in sections 1, 2 and 3 regulates the status of resident and nonresident members, said sections 1, 2 and 3 being in words and figures as follows, to wit:

"'Section 1. Members shall be classed as resident, nonresident and honorary.

"'Sec. 2. Resident members are such as reside or have a place of business in Raleigh Township. They are subject to dues and assessments and have a right to vote and hold office.

"'Sec. 3. Nonresident members are such as reside out of, and have no place of business in Raleigh Township. They are not subject to assessments and are not entitled to vote or hold office.'

"11. That said sections were in force at the time of the expiration of the charter of the Capital Club of the city of Raleigh.

"Sec. 10A.—Section 2 of Article VI provides 'persons elected nonresident members shall pay annually ten dollars in advance, and shall be exempt from all other dues.

"12. That plaintiff was a resident member of the Capital Club of the city of Raleigh in good standing on 18 August, 1915, and by virtue thereof claims that he is the owner of a 1/168th undivided interest in fee in the property described in section five hereof.

"13. That plaintiff and defendant have entered into a written contract whereby plaintiff has contracted to sell and defendant has contracted to buy at the price of $250 the undivided interest of plaintiff in the lands described in said paragraph 5, provided that interest amounts to a 1/168th undivided interest in fee, as claimed by plaintiff, but defendant now refuses to comply with his contract on the grounds that plaintiff is not the owner of said interest claimed and therefore cannot comply with his contract to convey.

Plaintiff contends: That upon the expiration of the charter on 18 August, 1915, all resident members in good standing immediately became tenants in common of the club real estate and other property, and that he as such member became the owner in fee simple, subject to the then outstanding mortgage of a 1/168th undivided interest therein.

Defendant contends:

"(1) That upon the expiration of the charter of the Capital Club of the city of Raleigh upon 18 August, 1915, the entire property of said club escheated to the University of North Carolina.

"(2) That the persons who became members of the club within three years after the expiration of the charter on 18 August, 1915, have the same rights in the club property as those who were members at the time of the expiration of the charter.

"(3) That the nonresident members who were members of the club in good standing at the date of the expiration of the charter and those who became members of the club within three years after the expiration of the charter are entitled to the same rights in the club property as the resident members.

"(4) That plaintiff is not entitled to a 1/168th undivided interest in fee in said property, subject to outstanding mortgage indebtedness."

The court rendered the following judgment: "This cause coming on to be heard and being heard at Chambers, before his Honor, R. A. Nunn, judge, of the Superior Court, upon the agreed case herein and after hearing the argument of counsel for the plaintiff and defendant, and after consideration of the facts set forth in the agreed case and the exhibits attached thereto: It is ordered, adjudged and decreed:

"1. That upon the expiration of the charter of the Capital Club of the city of Raleigh on 18 August, 1915, the resident members in good standing at that time became tenants in common of the property of said corporation, subject to whatever debts it might owe at the date of the expiration of the charter.

"2. That those persons who became members of the club within three years after the expiration of the said charter have no interest as tenants in common in the property of the Capital Club of the city of Raleigh.

"3. That the nonresident members who were members of the club at the date of the expiration of the charter and those who may have joined since that time have no interest as tenants in common in the property of the Capital Club of the city of Raleigh.

"4. That the plaintiff, Ed Chambers Smith, is seized and possessed of an undivided 1/168th interest in fee in the property of the Capital Club of the city of Raleigh, and has the right to convey said interest in fee, and upon conveyance to the defendant is entitled to recover of the defendant the sum of $250 and the costs of this proceeding."

The defendant excepted and assigned error to the court below signing the judgment, and appealed to the Supreme Court.

John W. Hinsdale for plaintiff.
Paul F. Smith for defendant.

CLARKSON, J. We think there is no merit in the assignment of error to the court below signing the judgment set forth in the record. The charter of the Capital Club of the city of Raleigh, expired by limitation, on 18 August, 1915. At the time of the expiration of its charter it owned a valuable piece of real estate in the city of Raleigh at the northeast corner of Martin and Salisbury streets, upon which was situated the club building.

On 18 August, 1915, there were one hundred and sixty-eight resident members, one of whom was plaintiff, and forty nonresident members in good standing. No effort was made to liquidate and distribute the assets of the corporation within three years from the date of the expiration of its charter, the said corporation continuing to operate under the provisions of its charter, constitution and by-laws, as though its corporate existence had never ceased, until 7 April, 1922, when a new charter was procured.

The plaintiff contends that he became a tenant in common with the other resident members of the corporation in good standing on 18 August, 1915, and that he is the owner in fee simple and had the right to convey to the defendant one one-hundred sixty-eighth (1/168) undivided interest in the said property. The defendant denies the power of the plaintiff to convey the interest claimed.

The defendant contends: (1) That upon the expiration of the charter of the Capital Club of the city of Raleigh upon 18 August, 1915, the entire property of said club escheated to the University of North Carolina. We cannot so hold.

C. S., 1193, is as follows: "All corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall continue to be bodies corporate for three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets; but not for the purpose of continuing the business for which the corporation was established. In any pending action the court, in its discretion, may extend the time for winding up the affairs of such corporation."

C. S., 1194, in part, is as follows: "On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the 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,*" etc. (Italics ours.)

C. S., 1198, in part, is as follows: "Any surplus funds, after payment of the creditors and costs, expenses and allowances, shall be paid to the preferred stockholders according to their respective shares, and if there still be a surplus, *it shall be divided and paid to the general stockholders proportionately, according to their respective shares.*" (Italics ours.)

The statute permitted the corporation to continue as a corporate body for three years for the purpose of prosecuting and defending actions

and to enable the corporation to gradually settle and close up its business, dispose of its property and divide its assets. The business of the corporation ceased on 18 August, 1915. The assets of the corporation had to be applied first to the payment of debts and the surplus assets to be divided among the stockholders. The fact that the charter had expired was overlooked until 1922. This case does not involve the rights of creditors, it alone concerns the rights of stockholders. It is inconceivable that a court of equity, under the facts and circumstances disclosed by the record, would confiscate the assets of the corporation and permit an escheat.

C. S., 5784, is as follows: "All real estate which has heretofore accrued to the State, or shall hereafter accrue from escheats, shall be vested in the University of North Carolina, and shall be appropriated to the use of that corporation."

In 10 R. C. L. (Escheat), part sec. 6, pp. 607-608, we find the following: "The statute laws of certain states contain provisions prohibiting a corporation from holding real property except for the purposes of its charter, or from holding beyond a prescribed limit or quantity. As a general rule it may be said that the violation of such a prohibition, where no specific penalty is imposed, does not accomplish an escheat of the property to the State. There is no question, however, but that a state may validly impose the penalty of escheat for the violation of such a statute. Where this is the case the holding of real estate by a corporation in violation of the statute, while a cause of ground of escheat, does not *ipso facto* effect an escheat; in other words, the title to the property, notwithstanding the existence of the grounds of escheat, remains in the corporation until an action for escheat is instituted; and it has been ruled that if, before this is done, the corporation bona fide sells and conveys the property to a third person, the latter is vested with an indefeasible title to the land," etc.

In *Wilson v. Leary,* 120 N. C., at p. 93, 94, in speaking of escheats, it is held: "But whatever the extent of this rule at the common law, if it was the rule at all, it was not founded upon justice and reason, nor could it be approved by experience, and has been repudiated by modern courts. The modern doctrine is, as held by us, that 'upon a dissolution the title to real property does not revert to the original grantors or their heirs, and the personal property does not revert to the original grantors or their heirs, and the personal property does not escheat to the State.'" See *Asheville Division, No. 15 v. Aston,* 92 N. C., 578.

In the *Wilson case, supra,* the case of *Fox v. Horah,* 36 N. C., 358, is overruled. See *Von Glahn v. Harris,* 73 N. C., 323; *Von Glahn v. DeRosset,* 81 N. C., 467; *Dobson v. Simonton,* 86 N. C., 492; *Smathers v.*

Bank, 135 N. C., 410; *Loudermilk v. Butler,* 182 N. C., 502; *Worthington v. Gilmers,* 190 N. C., 128.

In 14A C. J. (Corporations) part sec. 3808(c), p. 1153-1154, the following is said: "In the absence of statute the legal title to property belonging to the corporation passes by operation of law to the stockholders, who are the beneficial owners through the corporation, even where there is a statute providing that the corporation may continue to act thereafter for the purpose of closing up its business, and equity may appoint a receiver or trustee to take possession of the property to pay the debts and turn over the surplus to the stockholders as the beneficial owners of the property." The matter is thoroughly discussed in *Houston v. Utah Lake L. W. & P. Co.,* 47 A. L. R. Anno., p. 1282, At p. 1355, the doctrine that the property of a defunct corporation constitute a trust fund is set forth, known as the "trust fund doctrine": "Its nature and scope are indicated by the following statements: 'When a business corporation, instituted for the purposes of gain or private interest, is dissolved, the modern doctrine is that its property, after payment of its debts, equitably belongs to its stockholders. The dissolution of a corporation cannot deprive its creditors or stockholders of their rights in its property; and, if the common law affords them no adequate remedy, they may obtain relief in equity. Under the modern rule of equity jurisprudence, the severity of the common law in this respect is greatly mitigated, and it is held that it is the franchise, and not the property of the corporation, that is forfeited by a judgment of ouster, and that the property of the corporation is a trust fund for the payment of debts and distribution among stockholders.'" At p. 1498, North Carolina statutes and decisions on the subject are annotated.

In the case of *General Electric Co. v. West Asheville Imp. Co.,* 73 Fed. Rep., *Simonton, Circuit Judge,* at p. 388, says: "The learned counsel who represents the petitioner, in a clear and very forcible argument, contended that no application could be made to the directors for relief, because, in point of fact, there are no directors of the West Asheville Improvement Company, as the repeal of the charter extinguished the life of the corporation and of all of its agencies. But the dissolution of a corporation from any cause does not destroy its property or pay its debts. The franchise of conducting itself as a legal entity, may be, is lost. But the rights of creditors, the obligation of debtors, and the property of the shareholders, remain. And in the absence of statutory regulations, without the necessity for statutory regulations, the courts of equity take hold of and protect these interests."

In *Baldwin v. Johnson,* 95 Texas Rep. (65 S. W., 171), at p. 87-88, it is said: "No debts existed against the corporation, and the com-

missioners appointed under the law of Louisiana were merely for the purpose of collecting the assets and distributing them among the stockholders; but the property itself, upon the dissolution of the corporation, became the property of the stockholders, each one of whom owned an undivided interest in it in the proportion that his stock bore to the whole capital stock. *Arkansas Pass Harbor Co. v. Manning,* 2 Texas Ct. Rep., 881; 94 Texas, 558. In the case cited, *Chief Justice Gaines,* for the Court said: 'But in its last analysis, the stockholders are the beneficial owners of the assets of the corporation. This proceeding is instituted upon the theory, which we think a correct one, that the shareholders are the ultimate owners of the corporate property, and, when the corporation is dissolved and its creditors are satisfied, they hold title to the assets in proportion to their respective shares.' The proposition quoted is well sustained by authority and by sound reasoning. When the corporation existed, the title to the property was vested in it, and if a receiver or some officer had been appointed by the court to wind up the affairs of the corporation, the legal title would have rested in such officer in trust for the creditors and the stockholders. But there being no corporation, no receiver, trustee, nor creditor in existence, the trust ceased to exist and the legal and equitable title united in the stockholders, the only person who had an interest in the land. 2 Perry on Trusts, sec. 920; *How v. Waldron,* 99 Mass., 281."

In 7 R. C. L. (Corporations), part sec. 758, p. 740, it is said: "The common-law doctrine which had its origin in the fact that corporations were originally either municipal or ecclesiastical whose property must either revert or escheat is now practically obsolete in this country either by virtue of statutes or by the equitable doctrine that the assets of a dissolved corporation will be protected in equity as a trust fund for creditors and stockholders."

The defendant contends (2) that the persons who became members of the club within three years after the expiration of the charter on 18 August, 1915, have the same rights in the club property as those who were members at the time of the expiration of the charter. We cannot so hold.

7 R. C. L., sec. 754, in part: "In case of nonstock corporations, the members, while not usually denominated stockholders, are in point of principle stockholders, having an interest in the corporate property similar to that of stockholders in ordinary corporations. And the modern view that the assets of a private corporation are regarded upon its dissolution as a trust fund for the benefit of its creditors and stockholders is held applicable to such nonstock corporations. But it would seem that in the distribution of the assets of such nonstock corporations only

such persons as are deemed members of the corporation at the time of its dissolution would be held to be entitled to share therein," etc.

The defendant contends (3) that the nonresident members who were members of the club in good standing at the date of the expiration of the charter and those who became members of the club within three years after the expiration of the charter are entitled to the same rights in the club property as the resident members. We cannot so hold.

Article 4 of the constitution of the corporation, in sections 1, 2 and 3, regulates and defines the status of resident and nonresident members. These sections are as follows:

"Section 1. Members shall be classed as 'resident,' 'nonresident,' and 'honorary.'

"Sec. 2. Resident members are such as reside or have a place of business in Raleigh Township. They are subject to dues and assessments and have a right to vote and hold office.

"Sec. 3. Nonresident members are such as reside out of and have no place of business in Raleigh Township. They are not subject to assessments and are not entitled to vote or hold office."

The constitution clearly provides that the club should be owned and governed by the resident members and that the nonresident members were merely licensees. They were persons who lived outside of Raleigh Township and only had the right to enjoy the conveniences of the club when visiting. They are expressly denied the right to vote and hold office, and are relieved from the burden of assessments. A nonresident was required to pay dues of $10 per year and exempted from all other dues and assessments. The entrance fee for resident members was $25 and the annual dues were $30.

The defendant contends (4) that plaintiff is not entitled to a 1/168 undivided interest in fee in said property, subject to outstanding mortgage indebtedness. We cannot so hold.

We think from all the facts and circumstances of this particular controversy, and giving a liberal construction to the statutes heretofore quoted, and the inherent equitable power of this Court, that plaintiff is entitled to 1/168 undivided interest in fee simple in said property, and can convey a good fee-simple title to defendant, subject to the outstanding mortgage indebtedness. The judgment below is

Affirmed.

MURCHISON NATIONAL BANK v. F. K. BROADHURST, J. J. BROADHURST, W. D. AVERY, J. D. UNDERWOOD AND ED. F. WARD.

(Filed 12 June, 1929.)

1. Abatement and Revival B a—Prior action in which full and adequate relief may be obtained will abate subsequent action.

It is the policy of our courts and system of pleading to avoid multiplicity of suits, and where full and adequate relief may be had in a prior action a subsequent action on the same cause of action by the same party will be abated.

2. Same—In this case held, prior action afforded full and adequate relief, and subsequent action should have been abated.

Where in a creditor's bill the plaintiffs seek to set aside certain of the debtor's conveyances on the ground of fraud, and the owner of a note executed by the debtor, and secured by hypothecated bonds, joins in the creditor's bill and seeks to recover on the note and to sell the collateral, and in defense to the action on the note the debtor alleges that he was only an accommodation endorser and that usurious interest thereon was paid which he seeks to recover under the statute, and a motion is made and granted that the other makers and endorsers on the note be made parties and their respective liabilities determined: *Held*, a second action on the same note by the owner thereof, seeking the same relief, brought in a different county against all the makers and endorsers will be abated, since all the issues can be determined in the prior action and full and adequate relief granted therein.

3. Pleadings B f—Pendency of another action may be taken by answer.

Where it does not appear upon the face of the complaint that another action is then pending in another county in which the same relief could be obtained, the objection may be taken by way of answer. C. S., 517.

ADAMS, J., dissents.

APPEAL by defendants, F. K. Broadhurst, and J. J. Broadhurst, from *Sinclair, J.*, at March Term, 1928, of NEW HANOVER. Reversed.

This is an action instituted by plaintiff *on 6 October, 1927*, against defendants, in the Superior Court of New Hanover County, to recover of defendants their pro rata liability on $100,000 demand note executed by defendants and J. H. B. Tomlinson and W. H. Austin, dated 30 June, 1925, with interest from 11 August, 1926. As collateral security for the payment of the note there were hypothecated 100 bonds of the par value of $1,000 each, totalling $100,000 first mortgage bonds of Smithfield Mills, Inc. It is alleged that the note is due, unpaid and demand has been made for payment.

The plaintiff prays for judgment against defendants for their pro rata liability upon said note—5/7ths of $100,000 and interest from 11 August, 1926, and decree of foreclosure of the bonds hypothecated.

The defendants, F. K. and J. J. Broadhurst, entered a special appearance and made a motion to *abate this action,* on the ground that an action by the same plaintiff and against the same defendants was instituted in the Superior Court of Johnston County *16 March, 1927,* and is now pending in said county. A certified copy of the record of said action in the Superior Court of Johnston County is appended to the motion. The action in the Superior Court of Johnston County is entitled "The Armour Fertilizer Works, a corporation, . . . Murchison National Bank, a corporation, . . . and all other creditors of F. K. Broadhurst, etc., *v.* F. K. Broadhurst, Trustee, F. K. Broadhurst, Nell Broadhurst, E. D. Broadhurst, and J. J. Broadhurst."

Section 11 of the complaint alleges: "That heretofore on 13 August, 1925, the said defendant, F. K. Broadhurst, became indebted to the plaintiff, Murchison National Bank, in the sum of $100,000, which sum is now due, with interest thereon at 6% from 15 February, 1927; the said plaintiff holds as collateral security of said debt 100 first mortgage bonds of Smithfield Cotton Mills, for the par value of $100,000, but, which, as said plaintiff is informed and believes, are really worth a much smaller sum, and this plaintiff stands ready to sell the same and apply the net proceeds on said indebtedness so as to determine the exact amount of the balance due thereon." It will be noted that the dates of the $100,000 notes and interest are different, but this is immaterial, as the debt is the same.

It further sets forth certain alleged indebtedness of F. K. Broadhurst due to defendant, E. D. Broadhurst, secured by certain deeds in trust on certain lands in Johnston County, made by F. K. Broadhurst, in which his wife, Nell Broadhurst, joins. The said deeds in trust are also signed by F. K. Broadhurst, trustee. Also certain alleged indebtedness due to defendant, J. J. Broadhurst, secured by deed in trust on certain lands in Johnston County in which his wife joins.

The complaint further alleges: "That while the said deeds in trust are, in form, deeds of trust, no third parties are named therein, and the indebtedness recited therein purports to be indebtedness of the defendant, F. K. Broadhurst, to the said E. D. Broadhurst, and J. J. Broadhurst.

That the defendants, F. K. Broadhurst and Nell Broadhurst, are husband and wife, and the defendants, E. D. Broadhurst and J. J. Broadhurst are, as plaintiffs are informed and believe, brothers of the defendant, F. K. Broadhurst; that as plaintiffs are informed and believe, at the time of the execution and registration of the aforesaid deeds of trust, there was no present valuable consideration paid by the grantees thereof for the same, and that the said F. K. Broadhurst was not indebted to either J. J. Broadhurst or E. D. Broadhurst in any substantial sum whatsoever.

"That the plaintiffs are informed and believe that the said deeds of trust were executed on the part of the grantors therein named with the intent to delay, hinder and defraud the plaintiffs, creditors of F. K. Broadhurst, as well as all other creditors, of their just and lawful actions and debts, and that the said F. K. Broadhurst well knew that he was then indebted to the plaintiffs, as well as to the United States Government for taxes, as above set forth, and to various and sundry other creditors, and while he was being pressed for the payment thereof, he executed voluntarily the aforesaid deeds of trust with the intent thus to encumber his property so as to prevent and to delay and to defraud the plaintiffs in the collection of their debts out of his property.

"These plaintiffs are informed and believe that the said deeds of trust are void in law, for that, at the time of the making thereof, the said defendant, F. K. Broadhurst, did not retain property fully sufficient and available for the satisfaction of his then creditors, but, in fact, retained no property of any substantial amount, and, although insolvent when making the said deeds of trust, the execution of the same, if allowed to stand as valid encumbrances practically withdraws from his then creditors all of the property of the said F. K. Broadhurst by said voluntary deeds of trust."

The prayer is as follows: "Wherefore, the plaintiffs pray judgment against the defendant, F. K. Broadhurst, in the amount of their respective debts above set out, and for a restraining order and injunction to prevent the transfer of the notes described in the said deeds of trust, and that the said deeds of trust be set aside and declared null and void, and for costs and for such other and further relief as to the court may seem just and proper."

In answer to paragraph 11 of the complaint, defendants say: "Paragraph 11 is untrue as stated and is denied. The facts as to the matters set out in said paragraph are: That some time prior to 13 August, 1925, the Ivanhoe Manufacturing Company executed a note to the Murchison Notional Bank in the sum of $100,000; and that on the said note F. K. Broadhurst was an accommodation endorser along with other endorsers, to wit: W. H. Austin, E. F. Ward, W. D. Avery, J. H. B. Tomlinson, J. D. Underwood and B. B. Adams. It is admitted that interest on the said $100,000 has been paid to 15 February, 1927. It is admitted that said plaintiff holds collateral security for the said $100,000 debt, 100 first mortgage bonds of Smithfield Mills, Inc., par value of $100,000. But it is untrue and is denied that said bonds are worth a much smaller sum. Defendants say that the claim of the plaintiff upon the said $100,000 note is subject to an offset on account of usurious interest executed and paid and on account of the penalty of usurious interest executed and paid on such as will more fully hereinafter appear. And

further that said Murchison National Bank has filed its claim in the matter of W. H. Austin, in bankruptcy, on account of his liability upon said note."

The defendants say that it was the intention of the grantors to execute mortgage deeds and the said instruments are mortgage deeds. The defendants deny all the allegations of fraud made by plaintiffs, but say that the liens executed were in good faith and to secure bona fide indebtedness.

In regard to the indebtedness of $100,000 set out in paragraph 11 to the Murchison National Bank, defendants say that on this indebtedness usurious interest was collected as follows: "In the sum of $3,500, the total interest paid being $14,000, and the defendants ask that the said indebtedness be offset in the sum of the penalty provided by law upon payment of usurious interest, to wit, $28,000, the total interest paid being $14,000, and the said sum of $28,000 is hereby pleaded as offset to said note of $100,000."

Defendants pray: "That B. B. Adams, Wachovia Bank and Trust Company, administrator and trustee of estate of J. H. B. Tomlinson, deceased, W. D. Avery, J. D. Underwood, and E. F. Ward, be made parties defendant hereto, to the end that their respective liabilities in the premises may be determined in this action; and that summons be issued out of this court accordingly as provided by law; and . . . That any recovery herein by Murchison National Bank upon the indebtedness described in paragraph 11 of the complaint, be credited with $28,000 penalty of usury hereinbefore pleaded, and further credited by such dividends as it may receive in the matter of W. H. Austin, in bankruptcy, on account of his obligation as principal or endorser of said note."

The above are the material facts. The court below rendered the following judgment: "This cause coming on to be heard at this term of the court, before his Honor, N. A. Sinclair, judge presiding, upon the motion filed herein by the defendants, F. K. Broadhurst and J. J. Broadhurst, to abate this action, all of said parties being before the court and represented by counsel, and all parties having waived a hearing upon said motion before the clerk, and having agreed to hear same as though upon appeal from the clerk: Upon consideration of which motion it is considered and adjudged that the motion to abate be and the same is hereby denied." The defendants duly excepted, assigned error and appealed to the Supreme Court.

Varser, Lawrence, Proctor & McIntyre for plaintiff.
R. G. Grady, Bailey & Weatherspoon for defendants.

CLARKSON, J. The question involved: Where plaintiff in a creditor's bill, in an action instituted in Johnston County, demanded judgment upon a $100,000 note and subsequently instituted an action in New Hanover County on the same note, should the second action be abated as to those who are defendants in both actions? We think so.

Plaintiff, a creditor, joined in a creditor's bill to set aside certain conveyances made by F. K. Broadhurst, by way of mortgage on lands in Johnston County on the ground that they were fraudulent and void as to creditors. The action must be tried in that county, subject to the power of the court to change the place of trial in certain cases. C. S., 463(1); *Wofford v. Hampton,* 173 N. C., 686; *Lumber Co. v. Lumber Co.,* 180 N. C., 12; and if brought in New Hanover County, it would have been subject to change of venue. C. S., 470; *Causey v. Morris,* 195 N. C., 532.

In the first action in Johnston County it will be noted that the Murchison National Bank, in the creditor's bill, sets forth the note of $100,000, and the hypothecated bonds of the Smithfield Mills, Inc., which it says it stands ready to sell and apply the net proceeds on the indebtedness. The prayer for judgment in that action is for the debt. The answer sets up certain defenses: (1) F. K. Broadhurst was an accommodation endorser along with other endorsers; (2) pleads an offset of $28,000 usurious interest and penalty, and prays that the other endorsers be made parties, and the indebtedness be credited with $28,000, and also credited with any amount received from the bankruptcy estate of W. H. Austin, the Murchison National Bank having filed this claim against the bankruptcy estate. All these matters, so far as the appealing defendants are concerned, can be tried out in the Johnston County action, under our liberal practice, as well as setting aside the conveyances for fraud. *Chemical Co. v. Floyd,* 158 N. C., 455; *Robinson v. Williams,* 189 N. C., 256; *Carswell v. Talley,* 192 N. C., 37.

This action in Johnston County was pending when the action in New Hanover County was instituted. Full and adequate relief against the appealing defendants is obtainable in the Johnston County action.

"*Tests of Identity in General.* Four leading tests have judicial sanction in determining whether or not the causes of action are the same for the purpose of abatement by reason of the pendency of a prior action: (1) 'Clearly, in order to hold the subsequent suit to be necessary, it is an essential prerequisite that the judgment in the former or prior action should be conclusive between the parties and operate as a bar to the second.' *(Williams v. Gaston,* 148 Ala., 214, 216, 42 S., 552.) In other words, if a final judgment in the former suit would support a plea of *res adjudicata* in the subsequent suit, the suits are identical for this purpose; otherwise they are not. (2) Many cases apply the following

test: Was full and adequate relief obtainable in the prior action? If so, the second action was improperly brought and is abatable; if not, the objection will be overruled. This, as we shall see, is a generally recognized rule. (3) A test having the support of some of the cases is this: Will the same evidence support both actions? (4) A fourth test supported by English and Canadian authorities is: Could the bill in the second suit have been procured by a fair amendment of the first?" 1 C. J., p. 66, par. 83.

Under the pleadings in the Johnston County action, by the submission of the issues arising on the pleadings, plaintiff could obtain full and adequate relief against the appealing defendants. The prayer in both actions, in the Superior Court of New Hanover County and Johnston County, is for judgment on the $100,000 note and interest, and in both pleadings the hypothecated collateral is set forth. In either case this collateral could be sold and applied on any judgment obtained. Plaintiff elected with others to file a creditors' bill in Johnston County Superior Court to set aside certain conveyances, alleged to have been made in fraud of creditors, and prays for judgment on its debt. Plaintiff did this voluntarily—it chose the forum, the jurisdiction. To be sure, such an action must be tried in the county where the land was situate, but it had the election to go in or not go in the particular action. It chose to go in Johnston County Superior Court. Multiplicity of actions against the same parties are not encouraged. *Emry v. Chappell,* 148 N. C., 327; *Construction Co. v. Ice Co.,* 190 N. C., 580; *Chappell v. National Hardwood Co.,* 234 Mich., 296, 44 A. L. R., 804; *Van Vleck v. Anderson,* 136 Iowa, 366; *Haas v. Righeimer,* 220 Ill., 193.

"In *Alexander v. Norwood,* 118 N. C., 382, the court said: 'The purpose of the Code system is to avoid a multiplicity of actions by requiring litigating parties to try and dispose of all questions between them on the same subject-matter in one action. Where an action is instituted and it appears to the court by *plea,* answer, or demurrer that there is another action pending between the same parties, and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed.' In that case the Court said that 'the plaintiff (in the second action) has no election to litigate in the one or bring another action, but must set up his defense in the first action, *Rogers v. Holt,* 62 N. C., 108, and the Court will *ex mero motu* dismiss the second action as the parties, even by consent, cannot give the court jurisdiction.' *Long v. Jarratt,* 94 N. C., 443." *Allen v. Salley,* 179 N. C., at pp. 150-1; *Distributing Co. v. Carraway,* 196 N. C., 58. "A demurrer would lie if the pendency of the former

action appeared on the face of the complaint." *Allen v. Salley, supra,* at p. 148; *Lineberger v. Gastonia,* 196 N. C., at p. 449. Grounds not appearing on the face of complaint, the objection may be taken by answer. C. S., 517. For the reasons given, the judgment below is

Reversed.

ADAMS, J., dissents.

TWIN CITY MOTOR COMPANY v. ROUZER MOTOR COMPANY AND COMMERCIAL FINANCE CORPORATION.

(Filed 12 June, 1929.)

1. **Chattel Mortgages A b—In this case held, description of chattel in chattel mortgage sufficient for identification.**

   The description in a chattel mortgage for the purchase price of an automobile "one S. H. Coupe No..... Model T" is sufficient to admit evidence *aliunde* for the purpose of identification when the purchaser owned only one automobile, the abbreviation "S. H." meaning "second-hand," and "Model T," a certain type of Ford; and when registered and identified is superior to a later registered mortgage given by the purchaser to others.

2. **Chattel Mortgages B c—Registered chattel mortgage is superior to later mortgage for repairs where mechanic surrenders possession.**

   Where a chattel mortgage for the purchase price of an automobile expressly retains title to the automobile and all improvements made thereon, and stipulates that the giving of possession thereof to the purchaser was not to pass title to him, and the instrument is duly registered, the purchaser during the continuance of the contract may have repairs made that are necessary for its operation, and the seller's mortgage is superior to a mortgage for repairs given to a mechanic in lieu of his mechanic's lien which he had lost by surrender of possession of the car.

APPEAL by plaintiff from *Oglesby, J.,* at October Term, 1928, of ROWAN. Affirmed.

The material facts agreed to by the parties necessary for the decision of the action:

On 3 May, 1926, one Wm. Simpson purchased from the defendant, Rouzer Motor Company, a second-hand Ford coupe automobile and executed a conditional sale agreement to secure the balance of the purchase price, $325, to be paid in certain installments, which was duly recorded in the office of the register of deeds for Rowan County, N. C.

The material language of the conditional sale agreement, for the consideration of this case: "That seller . . . has this day sold and delivered, but upon the conditions hereinafter recited, to the purchaser

(Wm. Simpson) one S. H. Coupe, No. ....., Model T. (hereinafter called the 'car') for three hundred seventy-five and no/100 dollars ($375.00), paid or to be paid by the purchaser to the seller. . . . . The conditions of this agreement are, that delivery of the car by seller to purchaser does not pass title thereto, *but both the car and all additions and improvements thereto* and the title thereto shall not pass by such delivery, but are and shall remain vested in and be the property of the seller and assigns (and any extension or assignment of said notes shall not waive this or any other condition herein contained) until said notes, or any renewals thereof, evidencing said installments of purchase price, and all interest thereon, are paid in full. . . . Purchaser shall keep the car free from all liens, taxes, charges, and shall at his expense and in his name cause the car to be registered and licensed in compliance with law." The abbreviations "S. H." appearing in the conditional sale agreement from William Simpson to Rouzer Motor Company stands for the words "second-hand," and the words "Model T" in said agreement refer to a particular type of Ford automobile.

The said Rouzer Motor Company duly transferred and endorsed said note and conditional sale agreement to the Commercial Finance Corporation, the defendant, of Salisbury, which now holds the same. That the said automobile described in said conditional sale agreement is the only automobile owned by the said William Simpson on 3 May, 1926, and until the bringing of this action. That William Simpson moved from Salisbury to Winston-Salem during the month of March, 1927, leaving a balance of $210 due on said note and conditional sale agreement. That William Simpson, then living in and a resident of Winston-Salem, on 8 July, 1927, employed the Twin City Motor Company, the plaintiff, at Winston-Salem, to place and did place a new engine or motor in the automobile described in the said conditional sale agreement to Rouzer Motor Company, and on the same day the said William Simpson executed to said Twin City Motor Company a note for $108, with interest from 8 July, 1927, (the balance due is $89.15) to cover the price of said new motor or engine and the cost of the labor in installing the same in said chassis, and to secure said note the said William Simpson executed to said Twin City Motor Company a conditional sales note and chattel mortgage. Said conditional sale note and chattel mortgage were duly recorded in the office of the register of deeds of Forsyth County, N. C., both describing same—the chattel mortgage—"One Ford coupe automobile, motor No. 14860614." In the conditional sale note the only change is "engine" instead of "motor."

On 17 November, 1927, defendants sold the coupe to one Homer Hall for $130, and took a chattel mortgage to secure said debt, which was duly recorded. That at the time of said sale $130 was the fair and

reasonable market value of said automobile, and $95 the fair and reasonable market value of said new engine or motor alone. That when plaintiff removed the old engine from said chassis said old engine was worn out and worthless. That said new engine or motor is separable from said chassis or body of said automobile and may be removed from said chassis or body without injury to same, which removal could be affected by unfastening certain bolts, nuts, and screws and lifting said engine out.

The court below rendered the following judgment: "This cause coming on to be heard at October Term, 1928, of Rowan Superior Court, before his Honor, John M. Oglesby, judge of the Superior Court, and being heard upon an agreed statement of facts signed by the parties, and the court being of the opinion that the plaintiff is not entitled to recover on the facts as set forth in the 'agreed statement of facts.' It is now, on motion of P. D. Carlton, counsel for defendants, ordered and adjudged:

1. That plaintiff take nothing by its action from the defendants, and that the defendants go hence without day.

2. That the costs of this action, including the costs incurred by the defendants, be taxed against the plaintiff.

3. That this action be, and the same is hereby dismissed."

The plaintiff excepted and assigned error to the court below signing the judgment, and appealed to the Supreme Court.

Lee Overman Gregory and F. L. Webster for plaintiff.
John Kesler and P. S. Carlton for defendants.

CLARKSON, J. (1) Is the description in the conditional sales agreement sufficient for the purpose of identifying the property in question? We think so. The facts agreed to in regard to the description is as follows: One S. H. coupe No. ....., Model T. (hereafter called the "car"). The abbreviation of the words "second-hand" is S. H., and the words "Model T" in said agreement refer to a particular type of Ford automobile. The same was purchased from Rouzer Motor Company on 3 May, 1926, by William Simpson, being one S. H. coupe No. ....., Model T, and the only automobile owned by William Simpson.

Both plaintiff and defendants cite *Stephenson v. R. R.*, 86 N. C., 455, and we will do the same. The general principle is laid down by *Ruffin, J.*, at pp. 456-7, as follows: "We concur in the view taken by his Honor. While it cannot be expected that a mortgage should set forth a description of the property conveyed with such certainty that it may be identified by the terms of the instrument alone, and without the aid of evidence *aliunde* to fit the description to the thing, still it is

necessary that it should furnish some description of the property accompanied with such certainty as will enable third parties, aided by inquiries which the deed itself suggests, to identify it. This latter has been held sufficient, under the maxim *id certum est quod certum reddi potest,* and from necessity—it being many times impossible to set out such a description of the thing conveyed, as would in itself be absolutely certain and complete. But a less degree of certainty will not suffice, and especially under our registry laws, the fundamental policy of which is to give such notice to third parties as will enable them to deal securely with reference to the property conveyed in mortgage."

In *Spivey v. Grant,* 96 N. C., at p. 223-4, it is said: "The possession of a single horse, and none others by the vendor in a conveyance of a horse, without more specific description, sufficiently points out and designates the animal to transfer property to the vendee. In *Sharp v. Pearce,* 74 N. C., 600, the conveyance was of 'one horse,' and this was recognized as a sufficient identification." *Alston v. Savage,* 173 N. C., 213; see *Atkinson v. Graves,* 91 N. C., 99.

11 C. J. (Chattel Mortgages), sec. 81, p. 461, makes the following observations: "The scarcity or plentitude of chattels similar to those mortgaged is an element to be considered in determining the sufficiency of the description of the chattels covered by the mortgage, and the nonexistence of other property to which the terms of the mortgage could apply frequently renders valid a description in a mortgage which otherwise would be too indefinite."

(2) Do the improvements or repairs placed on said car become the property of the defendants under the terms of their duly registered agreement, and also by the doctrine of accession? We think so.

It is a general rule of law that if the materials of one person are united to the materials of another by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole by right of accession. *Pulcifer v. Page,* 32 Me., 404, 405, 54 Am. Dec., 582." 1 Words and Phrases Judicially Defined, p. 59.

In *Gregory v. Stryker,* 2 Denio (N. Y.), at p. 630, speaking to the subject, it is said: "But it is equally clear, as a general proposition, that where the owner of a damaged or worn out article delivers it to another person to be repaired and renovated by the labor and materials of the latter, the property in the article, as thus repaired and improved, is all along in the original owner, for whom the repairs were made, and not in the person making them." *Comins v. Newton,* 10 Allen (Mass.), 518; *Southworth v. Isham,* 5 N. Y. Sup., 448.

C. S., 2435, in part, is as follows: "Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such prop-

erty so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of same until such just and reasonable charges are paid," etc. Where the vendor of an automobile takes a purchase-money mortgage and transfers the possession to the vendee, it is with the implied authority in the vendee that he may use the machine and keep it in such reasonable and just repair as the use will require; and where, at his instance, a mechanic has repaired the same, his reasonable charge for such repairs creates a lien on the automobile, retained in his possession, superior to that of the vendor's mortgage. *Johnson v. Yates,* 183 N. C., 24, 11 S. E., 630; *Sales Co. v. White,* 183 N. C., 671.

Under this section: The lien on personal property given by this section applies when possession is retained by the mechanic. *Glazener v. Gloucester Lumber Co.,* 167 N. C., 676, 83 S. E., 696. If the mechanic or artisan surrenders possession of the property, he loses his lien. *Tedder v. R. R.,* 124 N. C., 342, 32 S. E., 714.

The conditional sales agreement made by William Simpson distinctly says, "The conditions of this agreement are, that delivery of the car by seller to purchaser does not pass title thereto, *but both the car and all additions and improvements thereto,* and the title thereto shall not pass by such delivery, but are and shall remain vested in and be the property of the seller and assigns (any extension or assignment of said notes shall not waive this or any other condition herein contained) until said notes, or any renewals thereof, evidencing said installments or purchase price, and all interest thereon, are paid in full."

In *Bank v. Pearson,* 186 N. C., at p. 613, the following principle is laid down: "On the third objection it is the approved principle in this jurisdiction that a mortgage will be held to extend to and include after-acquired property 'when it so states in express terms, or it clearly appears from the language used that such was its manifest intention.' *Lumber Co. v. Lumber Co.,* 150 N. C., 282; *Dry Kiln Co. v. Ellington,* 172 N. C., 481-484." *Hamlin v. Jerrard,* 72 Me., 62.

Plaintiff had the possession of the car upon which defendants had a lien properly registered when it installed in the car a new engine or motor to replace the old one. It relinquished possession and thereby relinquished its lien for the repairs. It then took a conditional sale note purporting to be for the purchase price, of "one Ford coupe automobile, engine No. 14860614." At the same time the plaintiff had the said William Simpson to execute a chattel mortgage on "one Ford coupe automobile, motor No. 14860614," both of which instruments were duly recorded in Forsyth County.

The authorities are conflicting in other jurisdictions. The lien of defendants is superior to that of plaintiff. The judgment below is

Affirmed.

STATE v. JOHN FREEMAN AND DOCK CAUDILL.

(Filed 12 June, 1929.)

1. **Criminal Law L g—Upon appeal from conviction in a criminal case the Supreme Court is confined to matters of law or legal inference.**

The Supreme Court is ordinarily confined to matters of law or legal inference on appeal from a judgment upon a verdict of guilty in a criminal action where the evidence is conflicting upon the question of the defendant's guilt or innocence. Const., Art. IV, sec. 8.

2. **Criminal Law G j—Testimony of accomplice should be scrutinized, but is competent evidence.**

Upon the trial for arson under the provisions of C. S., 4238, testimony of an accomplice that the two defendants set fire to a dwelling at night in which the prosecuting witness was sleeping is competent, but should be scrutinized by the jury and not accepted as evidence unless they find beyond a reasonable doubt that it is true, and under correct instructions, it is within the province of the jury to accept it in part and reject it in part, and to convict one of the defendants and acquit the other upon conflicting evidence.

3. **Criminal Law G q—Testimony of witness as to communication between husband and wife made in his presence is competent.**

Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of C. S., 1802, and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case.

STACY, C. J., dissenting; BROGDEN, J., dissenting opinion.

APPEAL by defendant, John Freeman, from *Harwood, Special Judge*, at February Term, 1929, of YADKIN. No error.

Criminal action in which the above-named defendants were tried upon their plea of not guilty to an indictment charging them with arson.

There was a verdict that defendant, John Freeman, is guilty, and that defendant, Dock Caudill, is not guilty, of the felony and arson charged in the indictment.

From judgment that he suffer death, as prescribed by statute (C. S., 4238) the defendant, John Freeman, appealed to the Supreme Court.

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

S. E. Edwards, W. Reade Johnson and John C. Wallace for defendant.

CONNOR, J. During the night of 23 July, 1928, the dwelling-house and barn of C. F. Sofley, in Yadkin County, North Carolina, were de-

stroyed by fire; at the same time the garage, located on his premises, near the dwelling-house and barn, was damaged by fire. Weeds growing near the garage were burned; the weather-boarding and roof of the garage were scorched, but the building was not destroyed.

There was evidence on behalf of the State tending to show that the fires which destroyed the dwelling-house and barn, and damaged the garage, were separate and distinct, and that each of said fires was of incendiary origin. The fires were first discovered by C. F. Sofley between 11 and 12 o'clock at night. He and his family had gone to bed at about 9 o'clock and were asleep when they were awakened by the fire which destroyed their home. The barn and garage were then on fire and burning.

There was evidence tending to show that gasoline had been used to start each of the fires. Witnesses for the State testified that they saw three men walking on the highway a short distance from Sofley's home on the night of the fire, about 30 minutes before the fires were discovered. These men pulled their caps down over their eyes and turned their heads as the witnesses, riding in an automobile, passed them. Neither of witnesses recognized the men, or was able to identify them or either of them. One of the witnesses was of the opinion that all three were white men.

Tracks near the barn and the garage were discovered the morning after the fire. Some of these tracks led away from the premises in the general direction of the home of Jack Hunt, which is at a distance of about a mile from the home of C. F. Sofley. A short time before the fire Jack Hunt had been arrested on a warrant, procured upon information furnished by C. F. Sofley, charging him with the unlawful sale of intoxicating liquor. Shoes were found at his home which fitted some of the tracks which were discovered on the premises of C. F. Sofley. Jack Hunt was arrested and at a previous term of the court had entered a plea of guilty to house-burning. He had been sentenced to serve a term of ten years in the State's prison upon this plea, and is now serving this sentence.

Upon the trial of the defendants in this action the State relied upon the testimony of Jack Hunt as evidence to sustain its contention that defendant, John Freeman, set fire to the dwelling-house; that defendant, Dock Caudill, set fire to the barn, and that the witness, Jack Hunt, set fire to the garage, and that they had set fire to the buildings pursuant to a conspiracy entered into by and between them to burn said buildings because C. F. Sofley had caused the arrest of Jack Hunt for selling liquor. The testimony of Jack Hunt, if believed, was amply sufficient as evidence to sustain the contentions of the State that both the defendants are guilty as charged in the indictment.

There was evidence of facts and circumstances which tended to support the testimony of Jack Hunt. Each of the defendants offered evidence in contradiction of the testimony of Jack Hunt. The evidence for each of the defendants tended to sustain his contention that he had not entered into a conspiracy with Jack Hunt to burn the buildings of C. F. Sofley, as testified by him, and that he was elsewhere when the buildings were burned.

All the evidence was submitted to the jury under instructions which are free from error. The court instructed the jury that they should consider the fact as testified by him that Jack Hunt was an accomplice of the defendants in the commission of the crime for which they were on trial, and that for this reason they should scrutinize his testimony with great care and not accept such testimony as evidence unless they found beyond a reasonable doubt that it was true. The instruction in this regard was in full compliance with the principles stated in *S. v. Ashburn,* 187 N. C., 717, 122 S. E., 833. It was within the province of the jury to accept the testimony of Jack Hunt, in part, and to reject it, in part, and thus to convict the defendant, John Freeman, and to acquit the defendant, Dock Caudill. In the absence of error in the decisions of the trial court upon matters of law or legal inference, this Court is ordinarily without jurisdiction to grant a new trial to the defendant, John Freeman, upon his appeal from the judgment which is supported by the verdict. Constitution of N. C., Art., IV, sec. 8. The jury believed the evidence offered by the defendant, Dock Caudill, tending to establish his defense based upon an alibi, and rejected the evidence offered by the defendant, John Freeman, to establish a similar defense. This was within their province, and the judgment and verdict cannot be set aside and a new trial granted by this Court, in the exercise of its appellate jurisdiction, for the reason that we find no error in the record.

The defendant, John Freeman was at his home when he was arrested on a warrant charging him with arson. His wife was present at the time of the arrest, and in the presence of the officers said to him, "I told you, John, that you would get into it if you did not stay with me like I wanted you to do." He replied to her, "Hush."

Defendant's exception to the refusal of the court to sustain his objection to this evidence cannot be sustained. The objection was properly overruled upon the authority of *S. v. Randall,* 170 N. C., 757, 87 S. E., 227. In the opinion in that case it is said that conversations between husband and wife are not privileged as confidential, so as to prevent a third person who overheard them, from relating them to the jury. The statute in this State (C. S., 1802), which provides that no husband or wife shall be compellable to disclose a confidential communication made

by one to the other during their marriage, and that neither shall be competent or compellable to give evidence against the other in a criminal action, has no application, for the reason that the conversation between defendant and his wife was not a confidential communication, and for the further reason that the wife did not undertake to give evidence against her husband as in *S. v. Aswell,* 193 N. C., 399, 137 S. E., 174, nor was she under cross-examination as a witness for her husband as in *S. v. Adams,* 193 N. C., 581, 137 S. E., 657. Defendant's reply to the remark of his wife to him, made in the presence of the officers, was competent as evidence against him. The remark of his wife, taken together with his reply to her, was properly admitted as evidence. *S. v. McKinney,* 175 N. C., 784, 95 S. E., 162.

The evidence upon the trial of this case was amply sufficient to sustain the conviction of both defendants and of the witness, Jack Hunt, for arson. Jack Hunt upon an indictment for arson tendered a plea of guilty of house-burning, which was accepted by the State. He is now serving a term in the State's prison. Defendant, Dock Caudill, was acquitted by the jury, and he has been discharged. Defendant, John Freeman, was convicted, and the judgment that he suffer death, from which he appealed, must be affirmed, for we find no error of law in his trial.

No error.

STACY, C. J., dissenting.

BROGDEN, J., dissenting opinion.

BROGDEN, J., dissenting: I concede that this case is written in accordance with the precedents, but I do not concur in the reasoning of the precedents. C. S., 1802 provides in substance that the wife is not competent "to give evidence" against her husband. It is asserted, however, in the decisions that if the wife makes a declaration in the presence of her husband and a third party, she cannot go upon the witness stand and repeat her declaration because this would be giving evidence, but the third party can repeat to the jury her identical words and this is not giving evidence by her, although the evidence so admitted and used to convict is the exact language used by the wife. The evidence then is not the language repeated by the wife, but the repetition of it by some one who did not use it at all. Furthermore, the wife cannot "give evidence," that is, her declaration under oath in the presence of the jury—a third party—but if she make a declaration in the presence of her husband and a third party and not under oath, the same is competent if repeated by the third party in court. In other words, her sworn declara-

tion in court is not evidence, but her unsworn declaration out of court is evidence. It is suggested that if the declaration is made in the presence of a third party it is not a confidential communication because, presumably the parties knew of the presence of another person. However, it has been held that if a man and his wife were talking together, thinking that they were communicating in secret, and an eavesdropper, listening at the key-hole, should overhear the conversation, it would thereupon cease to be a confidential communication. *S. v. Wallace,* 162 N. C., 622; *S. v. Randall,* 170 N. C., 757. Hence the confidential character of the communication does not depend upon the known presence of a hearer.

The reason given for admitting the declarations or hysterical outbursts of the wife in the presence of an officer arresting her husband, is that his silence or rebuke is a confession of guilt of the identical crime charged in the warrant in the possession of the officers, even though the wife may not know the nature of the crime for which the husband is arrested. The logical suggestion is that the husband, under such circumstances, "ought to talk back to his wife" and enter into a debate with her upon the question of his innocence. Of course, in some instances this might be a highly dangerous undertaking for a husband, but if he fails to debate the question, her hysterical outburst will be used to convict him. In this situation the unfortunate husband may well exclaim, "Which way I fly is hell."

The present case illustrates the unreason of the rule. Jack Hunt, who admitted that he set fire to one of the buildings, and who was serving a term in the penitentiary therefor, was used as a witness against the defendant, Freeman, and one Caudill. Hunt testified that he entered into a conspiracy with the other two men to burn the dwelling and outbuildings of the prosecuting witness and that Freeman and Caudill participated in the burning thereof. The jury, however, did not believe Hunt because Caudill was acquitted. The evidence against Caudill was identically the same as that against the defendant, Freeman, with the sole exception of the declaration of Freeman's wife. The sheriff testified that when he went to Freeman's house to arrest him his wife began to cry and "take on," and thereupon made the declaration set out in the opinion. It would therefore seem to be clear that the defendant, Freeman, is now on death row under sentence of death and facing execution solely because of the hysterical outburst of his wife.

In my judgment this evidence was incompetent for two reasons:

First. The wife did not accuse the husband of burning a house. Indeed it does not appear that the warrant was read in her presence or that she even knew the nature of the crime laid against her husband.

Under the strain of nervous shock she merely exclaimed: "I told you, John, that you would get into it," etc. Get into what? It is assumed that she meant that she knew of the conspiracy to commit arson and was accusing her husband of guilt of committing the specific crime charged in the warrant, of which ostensibly she knew nothing. In my opinion the exclamation of the wife did not amount to an accusation, and had no probative value as evidence, although it was doubtless used with overwhelming effect before the jury.

I am authorized to say that this is the ground upon which STACY, C. J., also dissents.

Second. I do not think the evidence is competent because it permits the wife to do indirectly what she cannot do directly for that her sworn declaration is a nullity, but her unsworn declaration, repeated by another, is competent evidence, which, in this case, apparently sends her husband to the electric chair.

STATE OF NORTH CAROLINA, EX. REL. DENNIS G. BRUMMITT, ATTORNEY-GENERAL OF THE STATE OF NORTH CAROLINA, v. THE SNOW HILL RAILWAY COMPANY.

(Filed 12 June, 1929.)

1. **Corporations K a—State alone may sue for forfeiture of charter of railroad company for violation of C. S., 3456.**

   The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under the provisions of C. S., 3456, for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed.

2. **Corporations K b—Charter of railroad company may be forfeited for failure to comply with either of time limits under C. S., 3456.**

   Construing C. S., 3456, as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon the failure of a railroad to comply with either one of the provisions the suit of the Attorney-General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default.

3. **Same—In this case held, the State waived its right to forfeit the charter of the railroad company for noncompliance with C. S., 3456.**

   Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by statute, C. S., 3456, and thereafter by statute the Legislature declares

that certain bonds may be issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation: *Held*, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture.

CIVIL ACTION, before *Grady, J.*, at June Term, 1928, of GREENE.

On 13 February, 1920, the Snow Hill Railway Company duly filed articles of incorporation in the office of the Secretary of State. A board of six directors, with authority to manage the corporation until their successors were elected and qualified, was named in the certificate of incorporation.

The object of the incorporation, as set forth, was for the construction and operation of a railroad from the town of Snow Hill to connect with the East Carolina Railroad at the town of Hookerton, N. C., or the town of Maury, N. C., the length of the road to be about six miles.

The construction of said road was not begun until about 1 January, 1928. Prior thereto the said Snow Hill Railway Company had made a contract with Nello Teer, a competent and reputable contractor, to construct said railroad. Teer began work about 1 January, 1928, and had practically completed the grading thereof and had spent for such purpose the sum of $39,215.89. Thereupon on 12 March, 1928, the Attorney-General of the State brought this action to forfeit the charter of said railway company.

The railway company filed an answer admitting that it did not begin the construction of the road within a period of three years from filing the certificate of incorporation and that it did not within said period expend upon construction ten per cent of the amount of its capital. It alleged, however, that the delay was due to inability to finance the project, but that on 1 January, 1928, it had in good faith made a contract with Teer to construct said road, and that, relying upon said contract, Teer had in good faith expended a large sum of money before this suit was brought.

The trial judge entered a judgment declaring the charter forfeited and based his ruling upon the admission that the railway company had not begun construction within three years after its charter had been filed in the office of Secretary of State and had not within said period expended upon construction ten per cent of the amount of its capital stock.

From judgment rendered, the defendant appealed.

L. V. Morrill and Cowper, Whitaker & Allen for plaintiff.

J. Paul Frizzelle, Fuller, Reade & Fuller and John Hill Paylor for defendant.

BROGDEN, J. The sole question presented for determination is the meaning of C. S., 3456, and whether it applies to this case. The statute is worded as follows: *"Forfeiture for failure to begin or complete railroad.*—If any railroad corporation shall not within three years after its articles of association are filed and recorded in the office of the Secretary of State, or the passage of its charter, begin the construction of its road and expend thereon ten per cent of the amount of its capital, or shall not finish the road and put it in operation in ten years from the time of filing its articles of association or passage of its charter as aforesaid, its corporate existence and powers shall cease."

The sovereign alone, acting through the Attorney-General, can institute a proceeding to forfeit a charter for the cause set forth in the complaint. *Attorney-General v. R. R.*, 28 N. C., 456; *Asheville Division v. Aston*, 92 N. C., 579; *R. R. v. Lumber Co.*, 114 N. C., 690, 19 S. E., 646; *R. R. v. Olive*, 142 N. C., 257, 55 S. E., 263.

The statute, when an action is brought by the Attorney-General, in the name of the State inflicts the penalty of corporate death upon railroad companies for failure to begin construction within three years or to complete the road and put it in operation within ten years. The statute as written is worded in the alternative because the word "or" connects the three-year penalty and the ten-year penalty. However, if the alternate construction is adopted, it is obvious that if "corporate existence and powers shall cease" for failure to begin in three years that the ten-year clause is useless and contradictory. Upon the other hand, if "corporate existence and powers shall cease" only upon failure to finish the road and put it in operation within ten years, it is equally obvious that the three-year clause is useless and contradictory.

Manifestly, the statute intended to require railroads to begin construction work within three years and to complete the road and put it in operation within ten years, thus fixing a maximum time for beginning the work and a maximum time for the completion thereof, and pronouncing the sentence of corporate death upon failure to comply with either requirement.

But, can the State insist upon forfeiture in this case? "The government creating the corporation can alone institute such a proceeding, since it may waive a broken condition of a compact made with it as well as an individual." *Asheville Division v. Aston*, 92 N. C., 579.

Moreover, the acquiescence of the sovereign "is evidence that all things have been rightfully performed." *Attorney-General v. R. R.*, 28 N. C., 456. See, also, *R. R. v. Lumber Co.*, 114 N. C., 690; *In re F. W. Myers Co.*, 123 Fed., 952.

The acquiescence of the sovereign in the default of defendant was explicitly declared by the legislative enactment of chapter 89, Public-

Local Laws, Extra Session, 1924, ratified 21 August, 1924. Prior thereto, to wit, on 4 February, 1924, the defendant, Snow Hill Railway Company, submitted to the board of county commissioners of Greene County an offer in writing to complete said railroad within eight months from the time the work started, provided the same was started on or before 1 April, 1924, and to accept in full payment for said work the $100,000 of bonds voted by Snow Hill Township. The county commissioners accepted the offer by formal resolution in regular meeting assembled on 4 February, 1924. Chapter 89, referred to above, in section six thereof, declares: "And said bonds and contracts concerning same and the said improvement shall be valid notwithstanding any change in officers after the date," etc. In section seven of said act it is declared: "The said bonds may be executed and deposited in a bank of their selection, said bonds to be held in escrow by such bank and delivered to Snow Hill Railway Company on completion of said improvement by said company," etc.

Therefore, it clearly appears that the Snow Hill Railway Company was recognized as an existing corporation, in rightful exercise of its corporate functions, even though more than three years had elapsed since the filing of its charter and even though no construction had been done and no money expended thereon. Moreover, the act authorized the delivery of the bonds to the defendant "on completion of said improvement by said company." The time of completion, fixed by C. S., 3456, is ten years from the filing of the charter. Thus, the conclusion is inevitable that the State waived the default occasioned by failure to begin work within three years and expressly recognized the right of the defendant to proceed to completion, which of course must be accomplished "in ten years from the time of filing its articles of association."

The principle of law applicable was stated by *Ruffin, C. J.,* in *Attorney-General v. R. R., Co.,* 28 N. C., 456, to be that if the sovereign undertakes "to deal with the corporation as lawfully and rightfully existing, notwithstanding such known default; such conduct must be taken, as in other cases of breaches of conditions, to be intended as a declaration, that the forfeiture is not insisted on, and, therefore, as a waiver of the previous default."

Our conclusion is that the Attorney-General has no power to invoke a forfeiture of the charter of the defendant for failure to begin work within three years.

Reversed.

RALPH UREY v. SOUTHERN FIRE INSURANCE COMPANY.

(Filed 12 June, 1929.)

1. Insurance H a—Five days notice necessary for cancellation of policy by insurer.

The provisions in the standard fire insurance policy requiring the insurer to give the insured five days previous written notice before it cancels the policy is for the protection of the insured and must be complied with by the insurer before it can make a valid cancellation.

2. Insurance H b—Defense to action on policy that insured's agent canceled same must be proven by insurer.

Where the defense to an action to recover upon a fire insurance policy is that the policy was canceled by the plaintiff's agent the burden is on the defendant claiming it to show that plaintiff's agent so acted with the knowledge or authority of the plaintiff under the facts and circumstances of this case.

APPEAL by defendant from *Stack, J.*, and a jury, at February Term, 1929, of MECKLENBURG. No error.

This is an action by plaintiff against defendant to recover the sum of $1,500 on a fire insurance policy, dated 12 July, 1927, for one year, issued to him by defendant on his household goods destroyed by fire, in the city of Charlotte, on 10 December, 1927. Plaintiff contends that the policy, No. 18587, was issued by defendant through an insurance agent or broker, C. H. Williams, doing business in the city of Charlotte, and that plaintiff paid Williams the premium and he procured the policy from one Ernest Ellison, general agent of the defendant. That he had to obtain a permit to remove his household goods from the house to another in said locality and he had to get a permit. That he received said removal permit signed "by E. Todd" for defendant company, dated 15 September, 1927, and paid therefor the sum of $8.00, representing the higher rate applicable to the new location of the property covered under his policy of fire insurance.

The defendant admits it issued the policy to plaintiff through its duly authorized agent, Ernest Ellison, at the request of one C. H. Williams, acting for the plaintiff; that thereafter, to wit, on or about 15 October, 1927, the said plaintiff delivered up for cancellation to the said C. H. Williams said insurance policy, and said insurance policy, by the said C. H. Williams, agent for the plaintiff, was delivered up to the defendant's agent, Ernest Ellison, for cancellation, and was in due course by the said Ernest Ellison surrendered to this defendant and duly canceled. Defendant avers that the plaintiff never paid the premium upon said policy, and that the plaintiff voluntarily surrendered said

policy to the said C. H. Williams, his own agent, with instructions to cancel the same, and that the said policy was surrendered for cancellation by the plaintiff and his authorized agent, and was canceled, and thereupon became void.

The parties stipulated as follows: "It is agreed that prior to 12 July, 1927, the plaintiff applied to C. H. Williams for certain fire insurance on plaintiff's furniture; that the said C. H. Williams applied to Ernest Ellison, the local agent at Charlotte, of the Southern Fire Insurance Company, and that said Ellison as agent of the said company issued a certain policy of fire insurance, which policy was No. 18587 in the Southern Fire Insurance Company, said policy of insurance being in the standard form and covering the furniture described in the complaint and insuring said furniture for one year from 12 July, 1927, to 12 July, 1928; that, as stated, said policy of fire insurance was delivered by the said Ellison to the said Williams; that on or about 1 November, 1927, the said Williams delivered said policy of fire insurance to the said Ellison, and the said Ellison purported to cancel said policy of fire insurance, as of 15 October, 1927. It is admitted that said policy of fire insurance covered the furniture described in the complaint, and that the plaintiff has complied with the terms of said policy in reference to filing proof of loss and giving notice. It is further admitted that C. H. Williams was holding himself out in the city of Charlotte as an insurance agent at the time this policy was written, and that when said policy was purported to be canceled said C. H. Williams' name appeared on the face of said policy."

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

"1. Did the defendant issue to the plaintiff a policy of fire insurance in the sum of $1,500 on plaintiff's house furniture, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, Ralph Urey, authorize the cancellation of the said policy described in the complaint? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,500."

The defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

C. A. Cochran, F. A. McClenaghan and Stancill & Davis for plaintiff.

Brooks, Parker, Smith & Wharton, John M. Robinson and Hunter M. Jones for defendant.

PER CURIAM. Plaintiff contends that he had paid the premium in full and that the policy was in force at the time of the fire and that he had

no notice that the defendant had attempted to cancel the policy, and that he had not authorized the cancellation. There was some evidence to sustain these contentions.

The defendant admits that the policy of insurance was a standard fire insurance policy and issued in plaintiff's name.

In *Dawson v. Insurance Co.*, 192 N. C., at p. 315, 316, it is said: "It is expressly stipulated in each policy, as required by statute (1) that 'this policy will be canceled at any time at the request of the insured,' and (2) that 'the policy may be canceled at any time by the company by giving to the insured five days written notice of cancellation.' No notice of intention to cancel, or of cancellation was given to the insured by the company. Clearly, therefore, if the attempted cancellation of the policies, on 30 April, 1923, was upon the initiative of the companies, or of their agent, acting for them, it was void. It did not release the companies from their obligations under the policies; they were in force, notwithstanding such attempted cancellation, on 2 June, 1923. No contract, valid in its conception, and unobjectionable in its terms, can be canceled, without the consent of all parties, who have acquired rights thereunder. *Trust Co. v. Insurance Co.*, 173 N. C., 558. The insured, when he accepted the policy, consented that the company might thereafter cancel the policy, upon giving him notice, in writing, of five days. This provision is manifestly for the protection of the insured. The right of the company to cancel the policy exists only because of the consent of the insured, given at the time of his acceptance of the policy and thereafter to be acted upon by the company only upon strict compliance by it with the terms upon which such consent was given."

The only material question we think involved in this controversy: Was there sufficient evidence to be submitted to the jury on the second issue? "Did the plaintiff Ralph Urey authorize the cancellation of the said policy described in the complaint?"

From a careful review of the evidence, unnecessary to set forth, we think the matter resolved itself into practically a question of fact between the plaintiff and one C. H. Williams, and certain facts and circumstances corroborating the plaintiff's contention. The jury has found with the plaintiff, and we do not feel justified, from the evidence, to say that it was not sufficient to have been submitted to them for their consideration. It is admitted that defendant did not give the plaintiff 5 days written notice required by the policy to cancel same. The jury has found on sufficient evidence that Williams had no authority and the policy was not canceled at plaintiff's request.

In Cooley's Brief on Insurance, (2 ed.), Vol. 5, p. 4634, speaking to the subject and citing a wealth of authorities, it is said: "One who is

authorized or employed to procure insurance does not thereby acquire any authority to cancel the policies after being procured."

The court below charged the jury: "The burden is upon the defendant to satisfy you by the greater weight of the evidence that the cancellation was authorized by Mr. Urey, the policyholder. The burden of proof is on the defendant to satisfy you that they did cancel the policy with his authority and consent." We think the charge correct under the facts and circumstances of this case. *Kendrick v. Mutual Ben. L. Ins. Co.*, 124 N. C., 315; *Page v. Insurance Co.*, 131 N. C., 115; *Roberta Mfg. Co. v. Royal Exch. Assur. Co.*, 161 N. C., 88.

It would seem that, under all the facts and circumstances of the case, just dealing would require notice, which the standard policy so wisely provides, to plaintiff of so important a matter as the cancellation of his insurance policy, but this is not for us. The jury has settled the disputed facts in plaintiff's favor. In the judgment of the court below, we find

No error.

THE GROVES MILLS, INC., v. CAROLINA & NORTHWESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY.

(Filed 12 June, 1929.)

Carriers B g—Where goods have arrived at destination and notice of arrival duly given the liability of the carrier is that of warehouseman.

Where a shipment by common carrier arrives at its destination and is placed on a platform of a station owned by another carrier and used by it and the initial carrier jointly, and notice of the arrival of the shipment is duly given, the liability of the carriers is that of warehousemen; and in this case *held*, evidence of the negligence of the carriers, resulting in the destruction of the shipment by fire, was sufficient to be submitted to the jury, and the jury might place the liability upon either one or both as they found the negligence of the parties to be from the evidence, with the burden of proof on the plaintiff to show negligence by the greater weight of the evidence.

APPEAL by defendants from *Harding, J.*, and a jury, at December Term, 1928, of GASTON. No error.

On 7 May, 1927, J. Edward Kale & Company, a cotton firm of Clarksdale, Miss., delivered to Yazoo & Mississippi Valley Railroad Company seven bales of compressed cotton, marked Teddy, and consigned to the order of A. H. Boyd, Gastonia, N. C., notify Groves Mills, Inc., Gastonia, N. C. The standard form of bill of lading was issued

therefor. This cotton was carried by the initial railroad and its connecting carriers and delivered to the Carolina & Northwestern Railway Company, the defendant, at Chester, S. C., which line carried the said cotton to Gastonia, N. C. Upon the arrival of the shipment over the Carolina & Northwestern Railroad, at Gastonia, the cotton was placed upon the platform at the station of the Southern Railway Company, defendant, which station is jointly used by, and there was a joint arrangement between the Carolina & Northwestern and the Southern for unloading, receiving and handling freight over both lines.

The defendants were sued as joint *tort-feasors.* The plaintiffs contended that the 7 bales of cotton, weighing 3,747 pounds, were damaged by fire through the negligence of the defendants and plaintiff sustained a loss of ($865.60) $866.70. Defendants denied any negligence. The defendant, C. & N. Railway Company contended that if there was no negligence on its part the damage should not exceed $513.19 coming into its hands as salvage of the cotton.

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

"1. Was the plaintiff the owner and holder of the bill of lading for seven bales of cotton, as alleged in the complaint? Answer: Yes (by consent).

"2. Was notice of the arrival of such shipment of cotton duly given the plaintiff? Answer: Yes.

"3. When was such notice given? Answer: 23 May, 1927.

"4. Was the cotton damaged through the negligence of defendant, Carolina & Northwestern Railway Company? Answer: Yes.

"5. Was the cotton damaged through the negligence of defendant Southern Railway Company? Answer: Yes.

"6. What damage, if any, is plaintiff entitled to recover? Answer: $866.70."

Judgment was rendered on the verdict by the court below. Defendant made numerous exceptions and assignments of error and appealed to the Supreme Court.

Mangum & Denny for plaintiff.

John A. Marion and R. G. Cherry for Carolina & Northwestern Railway Company.

O. F. and Geo. B. Mason for Southern Railway Company.

PER CURIAM. The defendants, at the close of plaintiff's evidence and at the close of all the evidence, moved for judgment as in case of nonsuit. C. S., 567. The court below refused the motions and in this

we think there was no error. Without repeating, in our opinion, there was sufficient evidence to go to the jury as to the negligence of both defendants.

The court below charged correctly the law of negligence and proximate cause, also as to damages, and charged, in part, as follows: "The burden is on the plaintiff to satisfy you by the greater weight of the evidence that these defendants were negligent and that such negligence was the proximate cause of the injury and damage to the cotton and if it has so satisfied you, then it would be your duty to answer the issue, Yes. If the plaintiff has satisfied you that both of these railway companies were negligent and such negligence was the proximate cause of the injury to the cotton, then you would answer the fourth and fifth issues, Yes. If the plaintiff has failed to satisfy you that both were negligent and that the negligence was the proximate cause of the injury, then you would answer the fourth and fifth issues, No. If plaintiff has satisfied you that one company was negligent, but failed to satisfy you that the other was negligent, then you would answer that issue, Yes. If plaintiff fails to satisfy you as to the negligence of either company, then you can answer both issues, the fourth and fifth issues, No. You can answer the issues Yes against the Southern and No against the C. & N. W., or you can answer the issue Yes against the C. & N. W., and No against the Southern, or both Yes or both No."

From the verdict of the jury on the second and third issues, the defendants were liable only as a warehouseman. See *Edwards v. Power Co.*, 193 N. C., 780. On this aspect, the court charged, we think, the law applicable to the facts.

The liability of a carrier for loss or damage is well stated in Moore on Carriers, (2 ed.), Vol. 1, at p. 306, as follows: "The liability of a carrier of goods is that of a common carrier, which is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation no excuse avails such carrier, except that such loss or injury was occasioned by the act of God, or the public enemies of the State, or the sole fault of the owner or his agent. The law adjudges the carrier responsible, irrespective of any question of negligence or fault on his part, if the loss does not occur by the act of God or the public enemies. With these exceptions, the carrier is an insurer against all losses."

The case was tried carefully by the court below and from a painstaking review of the record, we can find

No error.

M. G. STAMEY, ADMINISTRATOR OF V. C. CARVER, DECEASED, v. SUNCREST LUMBER COMPANY, BUCK LANDERS AND HARVEY TYLER.

(Filed 12 June, 1929.)

Master and Servant E b—In this action under Federal Employers' Liability Act evidence held sufficient to be submitted to jury.

Under the facts of this case *Held*, contributory negligence of plaintiff's intestate, in an action against a lumber company to recover damages for the wrongful death of the intestate, caused while working on defendant's logging road, is not a bar to recovery, but was properly considered upon the question of diminution of damages, and the evidence of defendant's negligence was sufficient to be submitted to the jury and to overrule its motion as of nonsuit.

APPEAL by defendants from *Harwood, J.*, at March-April, Term, 1929, of HAYWOOD. No error.

This was an action for actionable negligence instituted by plaintiff against the defendant. The plaintiff's intestate, Virgil C. Carver, was in the employ of the defendant, Suncrest Lumber Company, as conductor and brakeman on one of defendant's log trains. The evidence on the part of plaintiff tended to show that at the time of his death, 26 August, 1927, he was engaged in the performance of his duties and in the course of his employment, assisting his coemployee, a member of the train crew, in rerailing a log car, which had been derailed. The log car in question had been loaded with logs by employees of the defendant company, commonly called the loader crew. There were no standards on this log car to prevent the logs from rolling off, and when the logs were loaded two chains were placed around part of the logs on the car at each end of said log car, and three logs, one of which was very crooked, were placed on top of said chains with nothing to hold or prevent said logs from falling or rolling from said car.

Pass Collins, witness for plaintiff, testified, in part, as follows: "I know the custom adopted by these companies with reference to how logs are chained on the cars. The custom in general, common, and approved use. On these jobs where I have worked they put chains around the logs over the top of all the logs. They loaded their cars up so far where they used the chains and then put the chains over so many of the logs and left a little sag in that, then put some more logs on the chain and tied it down then put another chain over the top of the logs to hold them. The chain over the top logs fastens in the middle of the car, in the middle of the car, in the middle of the bunk you have loaded."

While plaintiff's intestate was engaged in rerailing said log car, the same was jerked by the engineer operating said engine with such force "abrupt and quick" that one of said loose logs fell from the top of said car, striking and instantly killing plaintiff's intestate. The defendant denied any negligence and set up the plea of contributory negligence.

The defendant offered evidence tending to show that the logs were loaded on the car in the usual and customary way. That the intestate was an experienced conductor, and in full charge of the train, and that members of the train crew were required to obey his orders; that he ordered an employee to place one of the rerailers and he placed the other. That the intestate then stood at a position slightly behind the front end of the derailed car and in the way of the logs and gave the signal to the engineer, who testified that it was his duty to obey the signal, and that he did obey the signal and moved the train just as easily ahead as he could move it, and that the brakes having not been released from the derailed car skidded upon the rerailer, kicking the inside one out from under the wheel, dropping the wheel down a distance of seven or eight inches, lurching the car to one side, causing the log to roll off, striking the plaintiff's intestate, who stood right in the immediate path of the log and that he could have stood a few feet farther to the front and beside the box car and been perfectly safe. That the rerailers were put down in the usual way and properly placed and that the method of rerailing the car was the customary method and one in common and general use by all railroads.

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

"1. Was plaintiff's intestate killed by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"2. Did plaintiff's intestate, by his own negligence, contribute to his own death, as alleged in the answer? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $6,500."

Morgan & Ward, Zeb V. Curtis and Edwards & Leatherwood for plaintiff.

Rollins & Smathers for defendants.

PER CURIAM. The defendant, at the close of the plaintiff's evidence and at the close of all of the evidence, moved for judgment as in case of nonsuit. C. S., 567. The court below refused both motions and in this we see no error. We think the evidence sufficient to be submitted to the jury.

In the present action, contributory negligence is no bar to recovery, but mitigates, or diminishes, damages. See C. S., 3465, 3466, 3467, 3468, 3470; *Stewart v. Lumber Co.*, 193 N. C., 138.

The court below gave the contentions fairly to both sides. The law applicable to the facts was carefully and clearly stated. We find

No error.

W. K. JOHNSTON v. PHOENIX UTILITY COMPANY, H. F. LINCOLN, J. R. BASSETT, AND G. W. MORGAN.

(Filed 12 June, 1929.)

Removal of Causes C b—Action alleging joint negligence on part of resident and nonresident defendants is not removable.

An action against a nonresident corporation and its resident superintendent, brought by an employee who alleges that he was under the direction and control of the resident superintendent, and that both defendants were negligent in failing to provide a safe place to work, in changing the method of work without warning the plaintiff, in employing a dangerous method of doing the work, and in failing to warn and instruct the plaintiff as to the change of the method of work: *Held*, the complaint alleges a joint *tort*, and the petition of the nonresident defendant for removal to the Federal Court will be denied.

CIVIL ACTION, before *Harwood, J.*, at April Term, 1929, of HAYWOOD.

Plaintiff filed a complaint alleging that on 14 April, 1928, he was injured by the negligence of the defendants while engaged in making certain excavations and tunnels in and along the banks of Pigeon River. Plaintiff, who was a foreman, and the men working under him, were removing rocks that had been loosened by blasting, and the defendants were removing said rocks "some one hundred feet or more above the place where the plaintiff and the men working under him were engaged in cleaning up." The defendants removed said rocks by means of a derrick and scale pans operated by electrical power, and the plaintiff alleged that without signal, notice or warning the defendants changed the method of loading and transferring said rocks and dumped a large quantity of rock inside a coffer dam at a point directly above the place where plaintiff was working, and these rocks suddenly and with great force rolled down upon the plaintiff, causing serious and permanent injuries.

The items of negligence set up in the complaint were in substance: that the defendants failed to provide a reasonably safe place for the work, and that without warning the method of doing the work was

changed so that said rocks were dumped at a point on a steep hill directly above the place where the plaintiff was required to work, and that such was a dangerous method; and furthermore, that the defendants failed to give any instruction, notice or warning to the plaintiff, and negligently failed to provide and use any system of signals to give notice of the intention to change the place of dumping said rocks.

Plaintiff further alleged that the individual defendants, including the defendant, Morgan, were citizens and residents of North Carolina.

In apt time the defendant filed a petition for removal, alleging that the defendants, Lincoln and Bassett, were nonresidents of North Carolina, but admitting that the defendant, Morgan, was a citizen and resident of North Carolina.

The trial judge upon appeal from the clerk, denied the petition for removal and retained the cause for trial in Haywood County, from which judgment the corporate defendant appealed.

Alley & Alley for plaintiff.
Harkins & Van Winkle for defendant.

PER CURIAM. The plaintiff alleged a joint cause of action against the corporate defendant and the individual defendants. The petition for removal denies that the defendants, Lincoln and Bassett, were citizens of North Carolina, but admits that the defendant, Morgan, was a citizen and resident of North Carolina. Said petition of removal further admits that said Morgan was a general foreman, and that plaintiff "was under the direct supervision of the defendant, G. W. Morgan," and "that it was the duty of the defendant, G. W. Morgan, to transmit to the several foremen on the job such orders and directions as he had received from the general superintendent . . . as well as to go from place to place on said work, see that the same was progressing according to plans and specifications, and to generally observe and report the progress made thereon."

While it is denied that Morgan was actually present at the time plaintiff was injured, it clearly appears that he was, so far as the plaintiff was concerned, the general representative or *alter ego* of the corporate defendant because he was charged with the duty of delivering instructions to the workmen and of determining whether the work was done according to plans and specifications. It further appears that the plaintiff was at the time of his injury under the direct supervision of said defendant Morgan.

Upon this state of facts the judgment is affirmed upon the authority of *Givens v. Mfg. Co.*, 196 N. C., 377.

Affirmed.

R. B. SLAUGHTER, ADMINISTRATOR OF ESTATE OF LEE DAVIS, DECEASED, v. BEMIS LUMBER COMPANY AND ROBERT HUMES.

(Filed 12 June, 1929.)

Removal of Causes C b—Action alleging joint negligence on part of resident and nonresident defendants is not removable.

An action against a nonresident corporation and its resident foreman, brought by an employee who alleges that he was under the direction and control of the resident foreman, and that both defendants were negligent in ordering the plaintiff to operate an "electrical stacker" and failing to instruct him how to use the machine which was new and not in general use, and in failing to give him a helper necessary for the safe operation, of the machine, and in failing to warn and instruct the plaintiff as to the danger incident to the work: *Held*, the complaint alleges a joint *tort*, and the petition of the nonresident defendant for removal to the Federal Court will be denied.

CIVIL ACTION, before *McElroy, J.*, at April Term, 1929, of GRAHAM.

The plaintiff alleged that his intestate, Lee Davis, was killed as the proximate result of negligence of the Bemis Lumber Company and the defendant, Robert Humes.

While it is not alleged in the complaint that the defendant, Bemis Lumber Company, is a nonresident corporation, such allegation is found in the petition for removal to the Federal Court.

It is alleged that the defendant, Robert Humes, is a citizen and resident of Graham County, and that at the time of the injury to plaintiff said Humes was yard foreman and superintendent of the corporate defendant "with full authority and power . . . to employ and discharge hands and to give specific instructions to each and every of the laborers and servants of his codefendant relative to all work and labor done and performed upon said yard. . . . That plaintiff's intestate, Lee Davis, was employed by the defendant, Bemis Lumber Company, as a common laborer . . . and by it was placed under direct control, direction and supervision of its codefendant, Robert Humes, he, the said intestate, being required to do and perform all and every duty required of him in the way and manner directed by the defendant, Robert Humes."

Plaintiff further alleged that he was required by the defendants to operate an electric stacking machine used for the purpose of stacking lumber, and that said appliance was not approved and in general use "but to the contrary was a new device still in its experimental stage. That the defendants and each of them negligently and carelessly ordered, directed and required plaintiff's intestate to operate said electrical stacker . . . without sufficient instructions . . . and without

any instructions . . . and the defendants and each of them required him to attempt to load and run the same alone, when it was necessary to furnish a helper to put on the large and heavy pieces of lumber so as to keep said appliances constantly in use; and further, to give the operator of the same an opportunity to keep a lookout for his safety, but when required to work alone, as so negligently ordered by the defendants and each of them, it was impossible for the operator of said machine . . . to keep a lookout for his own safety."

Plaintiff further alleged that the defendants negligently failed to properly warn and instruct him as to the danger incident to the work.

The defendant in apt time filed a petition for removal, alleging fraudulent joinder of Robert Humes in order to prevent removal to the Federal Court.

The cause was heard by the clerk of the Superior Court, who overruled the petition and retained the case for trial in the State court.

Whereupon the nonresident defendant appealed to the judge of the Superior Court, who likewise declined to remove the cause to the Federal Court, and said defendant appealed to the Supreme Court.

Morphew & Morphew and A. Hall Johnston for plaintiff.
R. L. Phillips for defendants.

PER CURIAM. The judgment of the Superior Court is affirmed upon the authority of *Givens v. Mfg. Co.*, 196 N. C., 377. We see no substantial difference between the facts and law applicable thereto, between the case at bar and the *Givens case.*

Affirmed.

FATE LANGFORD v. KITCHEN LUMBER COMPANY.

(Filed 12 June, 1929.)

Master and Servant C b—In this case held evidence of master's negligence sufficient to be submitted to jury.

In this case held, evidence of the master's negligence in failing, in the exercise of reasonable care, to provide the servant a reasonably safe place to work and reasonably safe and suitable tools and appliances was properly submitted to the jury, and defendant's motion for judgment as in case of nonsuit was properly overruled.

APPEAL by defendant from *Harwood, J.*, at January Term, 1929, of GRAHAM. No error.

This is an action for actionable negligence brought by plaintiff against defendant.

The evidence on the part of plaintiff tended to show that under the direction of defendant's foreman he and the other employees of defendant were ordered to load rails by hand on an incline car. The steel rails were piled up on the ground about 4 feet high and were 25 to 30 feet in length and weighed 60 pounds to the foot. The rails were "crooked and wrapped up." The foreman, whom plaintiff was bound to obey or be discharged, ordered him and the other employees to load the rails by hand. Plaintiff had loaded about 5 or 6 rails before he got hurt. "Someone in the crowd spoke of rail-dogs and McCrary, the foreman, said that he did not have any and we would have to load them with our hands. . . . This rail that hit my foot had been used on the curve end that left the rails in a curve when they were racked up, and they were just piled up there, and this rail—I did not know it was crooked as it was until after I threw it out and it hit me—it bounced back on my foot. . . . By dealing you take hold of this end and swing this end out and the other will come off and then you can walk in there and pick up the rail and carry it and load it. We could not but one handle the rails because we had nothing to handle them with but our hands and just one was all that would work throwing them out."

It was in evidence that at the time plaintiff was injured, the method known, approved and in general use in the territory where plaintiff was engaged in handling steel rails and doing the work he was ordered by the foreman to do, was to use a tool called a rail-dog, or railroad tong. There was evidence that plaintiff's foot was permanently injured.

It was in evidence on the part of the defendant that the usual method was to load the rails by hand. The defendant denied negligence and set up the plea of contributory negligence.

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 by his own negligence contribute to his injury? Answer: No.

"3. What damage, if any, is the plaintiff entitled to recover? Answer: $1,500."

The defendant made several exceptions and assignments of error and appealed to the Supreme Court.

T. M. Jenkins for plaintiff.

R. L. Phillips for defendant.

PER CURIAM. The major and only material assignment of error on the part of defendant, was the refusal of the court below, on motion by defendant, to dismiss the action or judgment as in case of nonsuit. C. S., 567. We think the court below gave the contentions of both parties fairly and clearly, and accurately charged the law applicable to the facts. This case is governed by a case on "all fours"—*Murdock v. R. R.*, 159 N. C., 131. There is

No error.

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1929

W. W. CANDLER, ADMINISTRATOR OF C. H. PARKER, v. SOUTHERN RAILWAY COMPANY.

(Filed 11 September, 1929.)

1. **Master and Servant E a—Liability of railroad for injury to employee engaged in interstate commerce is governed by Federal Decisions.**

The liability of a railroad company to its employees for injuries sustained by him while engaged in interstate commerce, in an action brought in the State courts, is governed by the Federal Employers' Liability Act and the Federal decisions thereunder.

2. **Master and Servant E b—Conflicting evidence of liability of railroad under the Federal Employers' Liability Act raises question for jury.**

Where there is evidence tending to show that a conductor of the defendant railroad company, was struck and injured while crossing the defendant's tracks in the performance of his duties in interstate commerce by the negligence of an independent crew of another of defendant's trains in shunting a car a distance of two hundred yards without warning to persons or employees rightfully in the yard, in violation of rules of defendant, with conflicting evidence as to whether plaintiff's intestate knew of the customary violation of the rule, with further evidence of contributory negligence: *Held*, defendant's motion for judgment as of nonsuit was properly denied.

3. **Master and Servant C f, C g—The burden of proof of assumption of risk and contributory negligence is on defendant.**

The burden of proof is on the defendant pleading them on the issues of contributory negligence and assumption of risk by the plaintiff's intestate in plaintiff's action to recover damages for a negligent killing.

4. Master and Servant E b—Contributory negligence effects only diminution of damages under Federal Employers' Liability Act.

Where the jury has found the issue of negligence in favor of the plaintiff and the issue of contributory negligence in favor of the defendant railroad company in an action in the State court for the negligent killing of the plaintiff's intestate while he was engaged in interstate commerce, under the Federal Employers' Liability Act, the plaintiff's right to recover is not barred, but the amount of damages are properly reduced under the rule of comparative negligence.

5. Same—Railroad engaged in interstate commerce owes employees duty to use due care to furnish reasonably safe place to work.

A railroad company engaged in interstate commerce owes to its employee the duty to use due care to furnish him a reasonably safe place in which to work.

6. Same—Where on the issue of assumption of risk the evidence is conflicting the question is for the jury.

Where there is evidence tending to show that the defendant railroad company had a rule for the safety of its employees, and there is conflicting evidence as to whether the plaintiff's intestate knew of the customary abrogation of the rule by defendant's employees, the question of assumption of risk is properly for the jury.

APPEAL by defendant from *Harwood, Special Judge,* at March Special Term, 1929, of BUNCOMBE. No error.

Action to recover damages resulting from the death of plaintiff's intestate, caused by the negligence of employees of defendant in the operation of one of its trains.

The defendant is a common carrier by railroad. Plaintiff's intestate was an employee of defendant. Both he and defendant were engaged in interstate commerce at the time he was injured and killed. At his death, plaintiff's intestate left surviving his widow and three children, each of whom was under the age of twenty-one.

This action was brought in the Superior Court of Buncombe County by the plaintiff as the personal representative of the deceased employee, for the benefit of his widow and children.

The issues submitted to the jury were answered as follows:

"1. Was the plaintiff's intestate, C. H. Parker, killed by the negligence of the defendant, Southern Railway Company, as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, C. H. Parker, assume the risk, as alleged by the defendant in its answer? Answer: No.

3. Did the plaintiff's intestate, C. H. Parker, by his own negligence contribute to his death as alleged in the answer? Answer: Yes.

4. What damages, if any, is plaintiff entitled to recover? Answer: $15,000."

From judgment on the foregoing verdict that plaintiff as administrator of C. H. Parker, recover of the defendant, Southern Railway Company, the sum of $15,000, and costs, defendant appealed to the Supreme Court.

Fortune & Fortune and Harkins & Van Winkle for plaintiff.
Thomas S. Rollins for defendant.

CONNOR, J. The liability of defendant to plaintiff in this action, if any, must be determined in accordance with the provisions of the Federal Employers' Liability Act, as the same have been construed and applied by the Federal Courts. The law of this State with respect to the liability of a common carrier by railroad to its employee for damages resulting from personal injuries sustained by him, or to his personal representative for damages resulting from his death, has been superseded by the act of Congress, when such act is applicable. Where there is conflict between such law, and the provisions of the act of Congress, the latter control, whether the action to recover damages by reason of such liability has been brought and is prosecuted in the State or in the Federal Courts. *Mondou v. New York, N. H. & H. R. Co.*, 223 U. S., 1, 56 L. Ed., 327, 38 L. R. A. (N. S.), 44. This principle is recognized by this Court, and has been uniformly applied in its decisions. *Potter v. R. R., ante,* 17, 147 S. E., 698; *Inge v. R. R.,* 192 N. C., 522, 135 S. E., 522; *Capps v. R. R.,* 183 N. C., 181, 111 S. E., 533. In *Lamb v. R. R.,* 179 N. C., 619, 103 S. E., 440, *Hoke, J.,* says: "This action is brought under the Federal Employers' Liability Act, and this being true, the question of substantive liability must be determined according to its provisions applicable, and authoritative Federal decisions construing the same."

The evidence offered by the plaintiff at the trial of this action tended to show that his intestate, C. H. Parker, while crossing a railroad track of defendant, in its passenger yard at Asheville, N. C., was knocked down by a moving car on said track, dragged a distance of about ninety feet, and thereby killed. He was employed by defendant as the conductor of a freight train, running from Asheville, N. C., to Knoxville, Tenn., and return. His train was standing on another track of defendant, in said passenger yard, awaiting orders for its movement on its regular schedule. As conductor of said train, he had received orders for its movement, delivered to him in the office of the dispatcher, and was walking across the tracks, which were located between the dispatcher's office and the track on which his train was standing, to give such orders to his engineer. He was performing his duties as an employee of defendant, at the time he was struck and killed by the moving car. He

had no duty with respect to the movement of the car which struck and killed him, or with respect to the train, in which said car was to be included.

This car had been shunted or kicked into or upon the track over which plaintiff's intestate was required to cross, in the performance of his duties as a conductor. No engine was attached to the car; there was no brakeman or other employee of defendant on said car; no warning by signal or otherwise was given to plaintiff's intestate or to other employees of defendant at work in the passenger yard of the movement of said car. The car was shunted or kicked from the west yard of defendant, where cars were usually switched, and had moved a distance of about two hundred yards, at a rapid speed, when it struck and killed plaintiff's intestate.

There was evidence tending to show that the car which struck and killed plaintiff's intestate was shunted or kicked by the switching crew engaged in making up a train which was to include said car, in violation of rules of the defendant, and contrary to the custom followed by said switching crew in making up said train. There was also evidence tending to show that plaintiff's intestate, as he crossed the track on which the car was moving toward him, failed to keep a lookout for moving cars or trains. There was conflict in the evidence as to whether plaintiff's intestate knew that defendant's switching crew customarily violated the rules of the defendant, or frequently failed to follow the custom, if there was such custom, to give warning to employees of defendant when cars were shunted or kicked from the west yard into or upon the track in the passenger yard, over which plaintiff's intestate was crossing, at the time he was struck and killed. There was no evidence from which the jury could find that plaintiff's intestate saw the moving car as it approached him, or that he was warned of its approach. There was evidence tending to show that he was struck and knocked down and under the moving car, before he was aware of its approach. The car with no engine attached to it, and with no brakeman or other employee on it, proceeded a distance of about ninety feet before it was stopped. The lifeless body of plaintiff's intestate was then taken from under the car.

Upon this evidence, defendant's motion for judgment as of nonsuit was properly denied. There was evidence tending to show affirmatively negligence on the part of defendant's employees, in causing the car to be shunted or kicked a distance of two hundred yards from the west yard into the passenger yard, without warning to persons or employees rightfully in the passenger yard, and that this negligence was the proximate cause of the death of plaintiff's intestate. He had no duty by reason of his employment by defendant with respect to said car, or with

respect to the train which was to include said car. He was at a place on defendant's premises where he was required to be in order to perform his duties as a conductor. While he was there, engaged in the performance of his duties, defendant owed him the duty to exercise due care to furnish and maintain for him a reasonably safe place in which to perform his duties. There was evidence tending to show a breach of this duty, which was properly submitted to the jury.

The jury has found that plaintiff's intestate by his own negligence contributed to his death, and under the provisions of the Federal Employers' Liability Act, the amount of plaintiff's recovery in this action has been reduced in accordance with this finding. The answer to the third issue is in accordance with the contentions of the defendant.

It cannot be held as a matter of law, as contended by defendant, that upon all the evidence plaintiff's intestate assumed the risk of injury arising from the negligence of defendant, as found by the jury. The conflicting evidence as to whether plaintiff's intestate, as an employee of defendant, knew of the custom of defendant's switching crew, if any such custom existed, to kick or shunt cars upon the track over which he was passing, without warning by signals or otherwise, or of the continued violations of the rules of defendant, with respect to the movement of cars on its tracks, which resulted in the abrogation of such rules, was properly submitted to the jury. Without such knowledge, it cannot be held that he assumed the risk arising from the negligence of defendant's switching crew. *Cobia v. R. R.*, 188 N. C., 487, 125 S. E., 18.

Upon its appeal to this Court, defendant relies upon the decision in *Toledo, St. L. & W. R. Co. v. Allen*, 276 U. S., 165, 72 L. Ed., 513, to sustain its contention that upon all the evidence plaintiff is not entitled to recover in this action. In that case, it was held that a car-checker working in a railroad yard, at night, assumes the risk of injury from the shunting of cars without warning along a track adjoining the one on which he was at work, where he is familiar with the conditions of the tracks and the method of doing the work. In the instant case the evidence with respect to knowledge on the part of plaintiff's intestate of the method of making up trains by the switching crew of defendant was conflicting, and was, therefore, properly submitted to the jury. The burden of the second issue was on defendant. Defendant offered no evidence, but relied upon its motion for judgment of nonsuit, at the close of plaintiff's evidence.

As we find no error in the denial of this motion, the judgment is affirmed.

No error.

W. J. SIMMONS v. CITY OF ELIZABETH CITY

(Filed 11 September, 1929.)

Municipal Corporations D a—Board of aldermen can abolish office during term of incumbent when they have valid delegated power of creation.

An act authorizing a municipality to create in its discretion an office local thereto implies the power to abolish the office, the act being a valid delegation of legislative power in exception to the general rule, and one accepting the position cannot acquire a vested right therein by contract for a definite term of employment. *Mial v. Ellington*, 134 N. C., 131, overruling *Hoke v. Henderson*, 15 N. C., 1, cited and applied.

APPEAL by defendant from *Devin, J.*, at March Term, 1929, of PASQUOTANK. Reversed.

Aydlett & Simpson for plaintiff.
Thompson & Wilson and J. B. Leigh for defendant.

ADAMS, J. On the first Monday in June, 1927, the plaintiff was appointed by the board of aldermen as sanitary inspector of the defendant city for a term of two years at an annual salary of $1,440, payable in equal monthly installments. He qualified as provided by law and served in this capacity for more than a year; but at a meeting held on 10 August, 1928, the board passed an ordinance or made an order abolishing the office of sanitary inspector, and thereupon notified the plaintiff that his services would not be required after the first day of September. The order was made for the alleged reason that the installation of a water system for the city and the adoption of sanitary provisions recommended by the State Board of Health had curtailed the officer's duties to such extent that to continue the office would impose a pecuniary burden upon the taxpayers of the city which was neither necessary nor justifiable.

On 4 October, 1928, the plaintiff brought suit against the defendant before a justice of the peace and recovered a judgment for $120, the installment alleged to be due for the month of September, and afterwards in the Superior Court, upon a verdict duly returned, he was awarded judgment for the same amount. The defendant excepted and appealed upon error assigned, including the denial of its motion for nonsuit.

The plaintiff contends that the board of aldermen had no legal authority to abolish the office of sanitary inspector during the term for which he had been appointed, and the defendant insists that the action

taken by the board is altogether defensible. These contentions present the point in controversy. The ordinance, it must be observed, did not undertake to remove the officer and continue the office, but to abolish the office itself.

The general rule is that the constitutional power conferred upon legislatures to make laws may not be delegated; but an exception to the rule is the authority granted by the Legislature to a municipal corporation to exercise the power of local legislation. This authority, in such event, is said to be the delegation of legislative power by the State. 1 McQuillin on Mun. Corp. (2 ed.), sec. 395; *S. v. Thomas,* 118 N. C., 1221; *Wharton v. Greensboro,* 146 N. C., 356.

Public offices are not property, but agencies and trusts; between the agent or officer and the government he represents there is no contract right, in the broad sense, of which he cannot be deprived. His contractual right to a salary may accrue during his incumbency, but not after the rightful abolition of the office. His appointment and his tenure of an office created for the public use, as stated by the Supreme Court of the United States in *Butler v. Pennsylvania,* 10 Howard, 402, do not come within the constitutional import of the term "contract" or of the vested, private, personal rights thereby intended to be protected. It is there pointed out that they are functions of powers and obligations by which governments foster and promote the general good—functions which the government cannot be presumed to have surrendered. *Newton v. Commissioners,* 100 U. S., 548, 25 Law Ed., 710. "Nothing is better settled than the legislative power to terminate at pleasure the incumbency of a statutory office, either by an abolition of the office itself or by a change in the tenure or the mode of appointment." *Kendall v. Canton,* 53 Miss., 526. This is true whether the exercise of legislative power be original or delegated.

In a further discussion of the question McQuillin says: "No law reducing the salary of an officer, imposing additional duties without increasing the compensation, or abolishing the office will be held unconstitutional as "impairing the obligation of contracts" or as depriving any person of property "without due process of law," notwithstanding the officer is elected or appointed for a definite term." Mun. Corp., sec. 514. There is authority for saying that a municipal office created by the Legislature cannot be abolished by an ordinance; but where a municipal corporation under a provision of its charter or special legislative act has the power to create an office it has also the power to abolish it, because the power to create implies the power to destroy. Dillon Mun. Corp., 4 ed., sec. 231; 5 ed., sec. 423; McQuillin, sec. 514; *Downey v. State,* 67 N. E. (Ind.), 450; *People v. Brooklyn,* 43 N. E. (N. Y.), 554, and numerous cases cited by McQuillin.

The principle is discussed under a copious citation of authorities in *Mial v. Ellington,* 134 N. C., 131. There the question was whether a supervisor of roads for a township who had been appointed for two years had a vested property interest or contract right in his office of which the Legislature could not deprive him. The Court holding that he had no such right or interest, overruled *Hoke v. Henderson,* 15 N. C., 1, so far as it affirmed the law to be that public office is private property, with all the results that logically flow from the proposition. We may safely rest our decision upon the broad doctrine promulgated in *Mial v. Ellington,* for it will be observed that other cases citing *Hoke v. Henderson* in support of the position that a public office is a contract which cannot be impaired were decided prior to the express repudiation of that doctrine. *Ward v. Elizabeth City,* 121 N. C., 1; *Wood v. Bellamy,* 120 N. C., 212. But in *Ward v. Elizabeth City,* approving *Hoke v. Henderson,* it was said that every one who accepts an office created by legislative enactment takes it with notice that his office may be abolished.

The act revising and consolidating the charter of the defendant city was ratified 31 January, 1923. Private Laws 1923, ch. 15. Section 44 required that the board of aldermen after its organization should proceed to the appointment of a health officer, a city attorney, and an officer to be known as the city manager, and as soon thereafter as possible, upon the recommendation of the city manager, should appoint a city auditor, a city tax collector, a street commissioner, a harbor master, a chief of police, a building inspector, and "all such other officers, deputies and assistants as it should deem necessary," who should hold their offices for the term of two years, subject to removal for sufficient cause.

Under the direction of the Legislature a health officer was appointed; but the creation of the office of sanitary inspector and the appointment to this office were left to the discretion of the aldermen. Upon the board was conferred the legislative power to create the office and to appoint the officer, and this involved the power to declare the office no longer existent, notwithstanding the designated tenure of two years. Doing away with the office necessarily forestalled the officer's right to demand a continuation of his salary. The motion for nonsuit should have been granted.

Judgment reversed.

D. B. WALSTON v. W. B. COPPERSMITH AND E. COPPERSMITH, TRADING AS COPPERSMITH BROTHERS.

(Filed 11 September, 1929.)

1. **Accord and Satisfaction A a—Acceptance of check marked in full payment of disputed account discharges debt in absence of agreement to contrary.**

   The acceptance by the creditor of a check stating thereon to be in full for a disputed account is a satisfaction thereof when there is no ambiguity in the transaction and nothing to show that its acceptance was upon a different understanding or agreement.

2. **Evidence D b—Evidence that deceased made agreement that check was not to be in full payment held inadmissible as communication with decedent.**

   Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon balance on account was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by C. S., 1795.

3. **Same—Where door is thrown open by introduction of evidence of transaction with deceased, evidence of opposition is confined to that transaction.**

   In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by C. S., 1795, such evidence must relate to the particular subject-matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy.

CIVIL ACTION, tried before *Devin, J.*, at the December Term, 1928, of PASQUOTANK.

The evidence tended to show that in May, 1927, the plaintiff was an Irish potato grower, and the defendants were partners and Irish potato buyers; that the plaintiff made a contract with the defendants to deliver two hundred barrels of Irish potatoes on 14 June, 1927, at $4.75 per barrel. Thereafter, by agreement between the parties, the plaintiff agreed to deliver said potatoes on 7 June, and the price was increased to $5.25 per barrel. It was agreed between the parties that the potatoes furnished under the contract were to be "No. 1 U. S. grade Irish Cobbler Potatoes."

The plaintiff contended and offered evidence tending to show that potatoes of the specified grade were delivered to the defendants.

The defendants offered evidence tending to show that the potatoes delivered were not according to contract, and that the plaintiff was advised that the potatoes would not pass inspection, and thereupon it was

agreed that the potatoes were to be sold for plaintiff's account. The defendants further contended and offered evidence tending to show that they had sold the potatoes for $8.50 per barrel, and that by reason of plaintiff's breach of contract they had suffered a loss of $650. The evidence further tended to show that subsequently the plaintiff agreed to sell to the defendants sixty-six barrels of potatoes at $6.50 per barrel.

On or about 25 June the plaintiff and one of the defendants, E. Coppersmith, met for the purpose of settling the account. The plaintiff contended that the potatoes were shipped according to contract, and the defendants contended that the potatoes were not in accordance with the grade specified, and that as a result thereof the defendants had suffered a loss. After some conversation between the plaintiff and E. Coppersmith the said Coppersmith delivered to the plaintiff a check for $628, containing the following notation thereon: "Balance on potatoes." The plaintiff cashed the check and used the money. At the time of the trial E. Coppersmith was dead. Plaintiff contended that, while he could read, he did not notice the notation on the check. The defendants contended that the receipt of the check by the plaintiff, under the circumstances, constituted a settlement in full.

An issue of indebtedness was submitted to the jury and answered in favor of the plaintiff in the sum of $640. From judgment upon the verdict the defendant appealed.

Aydlett & Simpson for plaintiff.
McMullan & LeRoy for defendants.

BROGDEN, J. Did the delivery of the check with the notation thereon "balance on potatoes," after a dispute had arisen between the parties, and the subsequent cashing of said check by the plaintiff, constitute an accord and satisfaction?

The principle of law involved in the transaction has been discussed in many cases. The leading authorities upon the subject are assembled in *Hardware Co. v. Farmers Federation,* 195 N. C., 702, 143 S. E., 471. It is not controverted that a dispute had arisen between the parties before the delivery of check. Obviously, if the check had been delivered under the circumstances with the notation thereon, nothing else appearing, the delivery, acceptance and cashing of said check would have undoubtedly constituted a settlement.

The legal principle was expressed in *Supply Co. v. Watt,* 181 N. C., 432, 107 S. E., 451, as follows: "There was no ambiguity or grounds for misunderstanding defendant's tender and offer of settlement. Obviously he wanted to adjust all of their differences at one and the same time. The plaintiff had its choice, and we think it is precluded by its accept-

ance and election knowingly made. The check should have been returned if the conditions of its acceptance were not satisfactory, or at least, the defendant should have been given an opportunity to say whether he would waive the conditions and allow the check to be credited on account."

However, the plaintiff contends that something else does appear and that the acceptance of the check was explained by the conversation occurring between him and the defendant, E. Coppersmith, at the time the check was given and accepted. The defendant, E. Coppersmith, was dead at the time of the trial. The plaintiff testified that the defendant, W. B. Coppersmith, was not present at the time "we were discussing it," nor at the time when the check was given. The plaintiff was asked what statement was made by E. Coppersmith at the time the check was delivered. The defendant objected upon the ground that any statement made by E. Coppersmith was incompetent under C. S., 1795. The witness was permitted to give the following answer: "I told him I could not settle for that. You had not figured it right. I can't settle that way. He said he would get three disinterested potato men, and whatever they say I will give you every cent of it. I said that is as fair as we can do; that is the reason I received the check. The three disinterested men were selected at this time, and I walked over to the place where they were. The three disinterested men were not there with Elisha Coppersmith at the time I received the check."

The defendant contends that this evidence constituted a personal transaction within the purview of C. S., 1795, and was therefore incompetent. The position of the defendants is supported by the authorities, and the evidence should have been excluded.

Hence the result is that the check, with the notation thereon, without other explanation of the intention of the parties, was received and used by the plaintiff. Under these circumstances there was a settlement between the parties, and the motion for nonsuit should have been granted.

The plaintiff insists that the defendant, W. B. Coppersmith, had "opened the door" because he had testified about the purchase of the potatoes and with reference to other facts involved in the transaction. A careful examination of the record, however, does not disclose that the living defendant testified with reference to the giving of the check or the discussion between E. Coppersmith, deceased, and the plaintiff regarding the controverted items. The law is to the effect that if the "door is opened" with respect to one transaction or set of facts, it is not necessarily opened to all transactions or fact situations growing out of the controversy. In other words, if one party opens the door as to one transaction, the other party cannot endeavor to swing it wide in order to

admit another independent transaction. This principle was definitely declared in *Pope v. Pope,* 176 N. C., 283, 96 S. E., 1034, in which the Court declared: "There is nothing inequitable in requiring that the opposing testimony to that given in evidence by the other side should be limited to the same transaction or communication."

New trial.

COMMISSIONERS OF CHOWAN COUNTY v. CITIZENS BANK, INC., ET AL.

(Filed 11 September, 1929.)

Principal and Surety B c—Admissions of administrator of principal are not admissible against surety when their interests are at variance.

A judgment upon the admissions in the answer of the administrator bank of a deceased county treasurer is not competent in an action by the county commissioners as evidence against the surety on the official bond of the deceased when the bank has been made a party defendant and the surety at once raises the issue as to whether a part of the defalcation was moneys defaulted from the bank when the deceased was acting as its assistant cashier, the interest of the bank and the surety being in conflict, and C. S., 358, not applying in such cases.

APPEAL by defendant, Maryland Casualty Company, from *Devin, J.*, at April Term, 1929, of CHOWAN.

Civil action by the commissioners of Chowan County to recover of the Citizens Bank, Inc., administrator of the estate of W. H. Ward, deceased treasurer of Chowan County, and the Maryland Casualty Company, surety on his official bonds, the sum of $17,733.56, alleged shortage in the official accounts of the said deceased treasurer.

The answer filed by the administrator admits liability for the full amount demanded, and upon this admission judgment on the pleadings was accordingly rendered against the administrator. This judgment, over objection, was then offered in evidence against the surety.

The Maryland Casualty Company contends that $10,260 of this amount is not properly chargeable against the official accounts of the deceased treasurer, but represents a claim of the Citizens Bank, Inc., against the estate of W. H. Ward, deceased, who was also assistant cashier of said bank at the time of his death, for moneys misappropriated by him as its assistant cashier and used to discharge, in part, his obligations to the county.

The Citizens Bank, Inc., on motion of the Maryland Casualty Company, was made a party defendant, and in its answer takes issue with the position of the surety.

A jury trial was waived, and all the parties agreed that the judge should find the facts and render judgment accordingly. No specific facts are found, but the judgment recites "and the court having found the facts and being of opinion and so finding, that the plaintiff is entitled to recover of the defendant, Maryland Casualty Company," the full amount of the alleged shortage, it is considered and adjudged, etc.

The Maryland Casualty Company appeals, assigning errors.

W. D. Pruden and McMullan & LeRoy for plaintiffs.
W. S. Privott and Aydlett & Simpson for defendant, Citizens Bank.
Manning & Manning for defendant, Maryland Casualty Company.

STACY, C. J. It appearing that the interests of the Citizens Bank, Inc., and the Maryland Casualty Company are in conflict with respect to the amount of the alleged shortage in the official accounts of the deceased county treasurer, we are of opinion that the judgment rendered on the admission of the Citizens Bank, Inc., as administrator, should have been excluded as evidence against the surety, notwithstanding C. S., 358, which provides that in actions on official bonds, any receipt or acknowledgment of the obligors shall be admissible and competent as presumptive evidence against any or all of the sureties. This statute has no application to self-serving receipts or acknowledgments made by a party under circumstances such as disclosed by the present record. The judgment was entered on the day of trial, over objection of the surety, and, in view of the relationship disclosed, we are of opinion that the objection should have been sustained. This was the only opportunity the surety had to challenge the correctness of the judgment, or to attack it in any way.

The administrator having a personal or corporate interest at variance with that of the surety will not be permitted to create evidence favorable to its personal or corporate interest, and practically foreclose the rights of the surety, by admitting liability when the facts are in dispute. It is true that in the instant case, the answer of the administrator was filed before the bank, in its corporate capacity, was brought in as a party defendant, but its corporate interest was apparent at the time of trial. There was nothing said in *Insurance Co. v. Bonding Co.*, 162 N. C., 385, 78 S. E., 430, which, when properly applied, militates against our present position. That case dealt with an unquestioned judgment against the principal, previously entered in another court and in a separate suit.

The cause will be remanded for a fuller finding or determination of the facts and for further adjudication of the rights of the parties.

Error and remanded.

MARY JANE WALKER AND L. N. WALKER v. APPOLLAS OWENS AND MARVIN ROBERTSON.

(Filed 11 September, 1929.)

Ejectment C b—Paper-writing which is not deed, will, lease, nor contract specifically enforceable is inadmissible as evidence in ejectment.

A paper-writing expressing that the deceased signer is to let O. have certain described property at the signer's death, O. to keep all buildings in good condition, and at the death of O. "this property goes back" to the signer's estate is inoperative as a deed, as it contains no apt word of conveyance and not being under seal, or as a will or as a lease or contract specifically enforceable, and will not be received in evidence in an action in ejectment.

APPEAL by defendants from *Cowper, Special Judge,* at April Term, 1929, of CURRITUCK.

Civil action in ejectment.

It is admitted that both parties claim title to the land in controversy under Jordan Poyner, deceased. The plaintiffs offered evidence of a fee-simple title in themselves and rested. The defendants then offered the following paper-writing, registered in Book 25, page 63, of the registry of Currituck County, as the only evidence of their right to hold the property during the life of A. A. Owens:

"Feb. 10th, 1922. This is to certify that I, Jordan Poyner, am to let A. A. Owens have the following property at my death. (Description not in dispute.) A. A. Owens is to keep all buildings in good condition. At his death this property goes back to Jordan Poyner's estate.

(Signed) Jordan Poyner."

Objection having been made, the instrument was excluded on the ground that it conveys no title to the land described therein. Exception by the defendants.

Verdict and judgment in favor of plaintiffs, from which the defendants appeal, assigning as error the exclusion of the paper-writing offered by them as evidence of their title.

Chester Morris and Ehringhaus & Hall for plaintiffs.

Thos. J. Markham for defendants.

STACY, C. J. The paper-writing in question was properly excluded as evidence. It is not a deed, for it contains no apt words of conveyance, and is not under seal. *Fisher v. Owens,* 132 N. C., 686, 44 S. E., 369.

It is not a will, nor was it offered as such for probate. Neither is it a lease or contract specifically enforceable. It conveys no interest to A. A. Owens who claims a life estate in the property under said instrument.

No error.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK v. E. W. LILES, AFFIE LILES AND CAROLINE R. LILES.

(Filed 11 September, 1929.)

1. Principal and Agent A c—In this case held: the attorney securing loan was agent of borrower to pay off prior encumbrances.

Where the lender of money makes a loan secured by a mortgage on the land containing a warranty that the title was free from encumbrances, and has no actual knowledge of a prior registered mortgage, and sends its check payable to the attorney securing the loan and the borrower, and the borrower endorses the check and gives it to the attorney and trusts him to pay off the prior mortgage lien, the attorney is the agent of the borrower for the purpose of paying the prior mortgagee, and the lender may recover from the borrower upon the default of the attorney to pay off the existing mortgage lien and his appropriation of the money to his own use.

2. Same—In this case held: evidence of declarations of agent as to transaction was incompetent.

Where one of two parties must suffer loss by the fraud or misconduct of another acting as agent in the transaction between the contracting parties, he who reposes the confidence in the agent, or by whose negligent conduct makes it possible for the loss to occur, without the knowledge or concurrence of the other, must bear the loss, and *Held*, under the facts of this case, evidence of the declarations of the agent in respect to the transaction was incompetent as evidence.

3. Principal and Agent C d—Principal placing his agent in position to commit a wrongful act must suffer the loss occasioned thereby.

Where the applicant to a land bank for a loan negotiates his loan through an attorney, and represents in his application that the land upon which the proposed loan was to be made was free from mortgage liens or encumbrances, and in his deed of trust on the land securing the loan warrants the title to be free and clear from encumbrances, and thereupon after the investigation of the title for the land bank by the attorney and his certificate to the land bank, the loan is made by check payable to the attorney and to the borrower, and the latter endorses the check and gives it to the attorney with the understanding that the attorney should cancel a prior registered mortgage with the proceeds: *Held*, the negligence of the borrower in not personally seeing to the cancellation of the prior lien makes him liable to that extent to the lender upon the failure of the attorney to have it canceled and his appropriation of the money to his own use, and a directed verdict upon evidence establishing these facts is proper.

BANK *v.* LILES.

APPEAL by defendants from *Midyette, J.*, and a jury, at June Term, 1929, of PASQUOTANK. No error.

Material facts: The plaintiff is a money-lender. It instituted this action to recover the sum of $4,500, and interest, loaned the defendants. The loan was made 1 January, 1926. The $4,500 indebtedness was payable in 66 semiannual payments, bearing six per cent interest, $157.50 each, payable on 1 January and July of each year. The note was secured by deed of trust of even date, which was duly recorded, on certain lands of the defendants.

The application for the loan signed by the defendant, E. W. Liles, recites: (a) "There are no outstanding deed or mortgages upon said premises unrecorded, and no liens or equities of any kind affecting the title thereto not fully disclosed of record, and I do not know of anything that may give rise to adverse claims of any kind." (b) "The undersigned represents, warrants, guarantees and insures to the said bank the truth of all and singular the foregoing statements, which are understood to form the basis for the proposed loan and are to be construed in connection therewith and as relating to the security offered therefor."

The deed in trust executed by all the defendants to a trustee for benefit of plaintiff recites: "That the same is free from all valid and subsisting liens and encumbrances; and that they will warrant and defend the title thereto against the claims of all persons whomsoever."

At the time the loan to defendants was made, the Federal Land Bank of Columbia, S. C., on 14 September, 1922, had loaned the defendants $4,000 on the lands on which plaintiff claims a lien. The deed in trust to secure same was duly recorded on 18 September, 1922. That the balance due on said loan is $3,720.17, with interest thereon at five and a half per cent from 1 December, 1928.

The defendants contend that C. F. Garrett, secretary-treasurer for plaintiff, wrote on 7 January, 1926, the defendant, E. W. Liles, the following letter:

"1. This is to notify you that, in pursuance of your application to this bank, and acting upon the recommendation of Federal Appraiser, C. L. Ball, we have approved the loan proposed to be made to you, to the amount of $4,500 in lieu of the $6,000 applied for, based on the acreage as set out in your application.

2. We, therefore, request that you now place in the hands of our attorney, E. A. Matthews, Roanoke Rapids, N. C., any papers or information in your possession which might be of assistance to him in preparing an abstract of your title to the land offered as security.

3. We especially request that you turn over to him for use in connection with, and to be attached to the abstract, a map or plat, prepared by some competent surveyor showing accurately the boundaries and

acreage of your land, and bearing the surveyor's signature in certification of these facts. This map should be procured at once by you, if you do not already have it.

4. We are sending a copy of this letter to the above mentioned attorney, to signify our request and desire that he proceed as speedily as possible with preparation of your abstract of title, in accordance with arrangements previously made with him by this bank; also that he send us, as soon as possible, legal description, for our use here in preparing trust deed.

5. Before paying you the proceeds of this proposed loan, we shall require a policy of insurance to be taken out on your buildings, providing for payment, by the New York Standard form of mortgage clause, of any loss to the Southern Trust Company, Elizabeth City, N. C., as trustee. We think the amount of this insurance should be $1,500."

The abstract of title by "E. A. Matthews, attorney," on 16 January, 1926, recited, among other things: "No encumbrances of record against the property of E. W. Liles described in caption of this abstract."

The final certificate made by "E. A. Matthews, attorney," on 4 March, 1926, recites, among other things, that there were no liens or encumbrances on the property that plaintiff took a deed in trust on and the lien was duly recorded "and is now a first lien on said property." The defendants further deny that they owe said debt and contend that E. A. Matthews, of Roanoke Rapids, N. C., was an agent and attorney of the plaintiff and procured the aforesaid loan for the defendants from the plaintiff. That the defendant, E. W. Liles, went to E. A. Matthews to get him to have released from the lien of a deed of trust held by the Federal Land Bank of Columbia, S. C., certain timber subject to the lien of said bank. He did not get the land released from the lien of said bank, and then made application to the plaintiff for the loan sued upon on an application blank which E. A. Matthews had in his office. Matthews fixed up the application in his office, at Roanoke Rapids. After having signed the application, he subsequently received the letter above set forth.

The defendant, E. W. Liles, testified in part: "I signed this paper (application for loan) in Roanoke Rapids; Matthews made it out. It is my signature at the bottom. I executed it in his office. After that time I executed a note payable to the Virginia-Carolina Joint Stock Land Bank, and the deed of trust also. The check was for $4,513.25, and was read by the witness to the jury as follows: 'Virginia-Carolina Joint Stock Land Bank, Elizabeth City, N. C., 26 February, 1926, pay to the order of E. A. Matthews, attorney, and E. W. Liles, borrower, $4,513.25, loan No. 2823, First and Citizens National Bank, Elizabeth City, N. C.'

I endorsed that check and gave it to Mr. Matthews; however, Matthews gave it to me and I endorsed it. I did not see him endorse it. I think he did. I do not think he had endorsed it at the time he gave it to me. I left a space at the top because his name appeared first in the face of the check. I don't think Matthews' name was endorsed before mine. Matthews turned over to me $540.00 some odd dollars in cash. I think he deducted $75.00 as his fee out of this check; that was satisfactory to me at the time. I could not say whether he had agreed on any fee before. I don't remember discussing it with him. My loan with the Federal Land Bank was in 1922 and 1923. I went to Roanoke Rapids to see Matthews to get him to write the Federal Land Bank and get them to release the timber. When I first got the loan I went to see Matthews about it. He prepared an abstract and I paid him his fee, but don't remember the amount."

E. A. Matthews, attorney, never paid the prior lien of the Federal Land Bank of Columbia, S. C., and has absconded. Defendants did not discover it was not paid until November, 1927, after Matthews had gone.

The court below charged the jury that if they believed the evidence and found the facts to be as testified to by all the witnesses, their answer to the issue would be that the defendants were indebted to the plaintiff and gave the amount and interest, to which there is no dispute. The jury found the issue in favor of the plaintiff. To this charge the defendants excepted and assigned error.

The defendants also duly excepted and assigned error to the following evidence, excluded by the court below: "That Matthews upon the arrival of the check represented by the loan in controversy informed the defendant that it would be necessary, as a part of the requirements of the plaintiff to withhold sufficient of the funds, amounting to approximately $3,700 to pay off the Federal Land Bank mortgage."

Worth & Horner and Thompson & Wilson for plaintiff.
George C. Green and Parker & Allsbrook for defendants.

CLARKSON, J. The question involved, as contended by defendants: "Is there sufficient evidence to show that Matthews was acting as agent of the plaintiff in the receipt and disbursement of the proceeds of the loan made to Liles?" We think not, under the facts and circumstances of this case.

From the evidence, plaintiff bank knew nothing about the prior lien on the land given by defendants to the Federal Land Bank of Columbia. The defendants (through E. W. Liles) in their application to plaintiff

bank for the loan, stated that there were no liens on the land. He represented, warranted and guaranteed the truth of the statement that there were no liens on the land. In the deed of trust defendants gave to plaintiff, the warranty was to the effect that there were no liens and encumbrances on the land. Plaintiff, with no knowledge of the Federal Land Bank lien on the property, sent a check, on 26 February, 1926, payable to the order of E. A. Matthews, attorney, and E. W. Liles, borrower, for the loan, $4,513.25. E. W. Liles endorsed this check and turned it over to Matthews, who kept a fee of $75.00 out of it, to which Liles made no objection, and Matthews turned over to him $540 in cash, the balance Matthews kept to be applied on the lien of the Federal Land Bank of Columbia, S. C. Matthews never paid the Federal Land Bank of Columbia, and has absconded. On whom must the loss fall? Under the facts and circumstances of this case, we think on the defendants.

The defendants are *sui juris,* and it is a great hardship on them, but we cannot break into well-settled principles of law in hard cases. If we did, we would have no orderly system, and law would be a "rope of sand." The check was payable to the order of E. W. Liles, borrower, as well as E. A. Matthews, attorney. True, it was sent to Matthews, but he could not collect the money until Liles endorsed the check. Liles knew that he and the other defendants had given a lien on the land; the plaintiff knew nothing of the lien. Liles had even represented, warranted and guaranteed to plaintiff that there were no liens on the land. It was Liles' duty to have seen that the money sent by check to his and Matthews' order, was applied on the lien, but instead of doing this he endorsed the check and gave it to Matthews, and by so doing turned the money over and trusted Matthews, as his agent, to pay the lien, which plaintiff had not done by a check payable alone to Matthews. Liles trusted Matthews and made him his agent to perform an act that plaintiff knew nothing about, and Liles knew all about. We think the well-settled principle of law applies, as stated in the following cases: In *Lickbarrow v. Mason,* 2 T. R., 63, at p. 70, *Ashhurst, J.,* says: "Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." It is well said by *Lord (C. J.) Holt* in *Hern v. Nichols,* 1 Salk., 289: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger." In *County of Macon v. Shores,* 97 U. S., 272, 279: "Where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his power to do the wrong, rather than by a stranger." In *O'Connor v. Clark,* 170 Pa., 318, 321, 29 L. R. A., 607, "Where one of two innocent persons must

suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud." In *Bartlett v. First National Bank,* 247 Ill., 490, 498, "Where one of two innocent parties must suffer loss by reason of the wrongful acts of a third party, the rule is almost universal that the party who has made it possible, by reason of his negligence, for the third party to commit the wrong must stand the loss." See note in Mechem on Agency (2 ed.), Vol. 1, page 531. In *R. R. v. Kitchen,* 91 N. C., at p. 44, the principle is thus stated by *Ashe, J.*, and has been time and time again reiterated in this jurisdiction: "Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *S. ex rel. Barnes v. Lewis,* 73 N. C., 138; *Vass v. Riddick,* 89 N. C., 6; *R. R. v. Barnes,* 104 N. C., 25; *Ellison v. Sexton,* 105 N. C., 356; *Medlin v. Buford,* 115 N. C., 260; *Havens v. Bank of Tarboro,* 132 N. C., 214; *Bank v. Oil Co.,* 150 N. C., 718; *Campbell v. Huffines,* 151 N. C., 262; *Wynn v. Grant,* 166 N. C., 39; *Stelges v. Simmons,* 170 N. C., 44; *Bank v. Dew,* 175 N. C., 79; *Mann v. Mann,* 176 N. C., at p. 363; *Fain Grocery Co. v. Early & Daniels Co.,* 181 N. C., 459. See *Atlantic Life Insurance Co. v. Rowland* (C. C. A., 4th Circuit), 22 Fed. (2d), 126 (1927); *Kirkpatrick and Howard v. Warden,* 118 Va., 382, 87 S. E., 531 (1916).

An interesting discussion of this subject, which is termed "The dilemma of choosing between two innocent persons," may be found in Mechem on Agency (2d ed.), Vol. 1, p. 532 *et seq.*, and Vol. 2, p. 1552.

We do not think it necessary to discuss the two classes of agents general or particular or special and analyze the evidence. We think the principle stated above applies. Defendant Liles was negligent, and there was a lack of due care on his part, in trusting Matthews, the attorney, and defendants must bear the loss. Plaintiff took no chance and made the check payable to the order of both.

The letter saying "our attorney" does not affect the case. Defendants had the opportunity of protecting themselves, and failed to do so, by the check being made payable to the order of both.

From the position here taken, the evidence of the declaration of Matthews was incompetent.

No error.

GREENE COUNTY ET AL. v. SNOW HILL RAILWAY COMPANY ET AL.

(Filed 11 September, 1929.)

1. **Taxation A a—Township bonds to aid in construction of railroad are not for necessary expense and issuance must be submitted to voters.**

   Township bonds issued for aiding the construction and operation of a railroad therein are not for a necessary expense, and require the approval of the voters of the township under a valid statute authorizing the issuance of the bonds.

2. **Statutes A c—In this case held: curative statute and ratification of acts under prior defective statute valid and constitutional.**

   A retrospective act to cure an irregular or defective statute and to ratify proceedings thereunder, which the Legislature originally had the authority to enact, and which does not impair the obligations of a contract or affect vested rights is valid and constitutional.

3. **Taxation A f—In this case held: act not specifying amount of bond issue cured by later statute prescribing amount.**

   Where a statute authorizing a township to issue bonds to aid in the construction of a railroad therein omits to specify the amount of the issuance, and the commissioners have called an election upon a petition therefor to vote thereon in an amount not to exceed $100,000, and this election is carried and the bonds are issued in that sum and held in escrow, and later a curative statute is enacted likewise fixing the amount of the issue in that sum: *Held*, the bonds are not invalid by reason of the omission in the original act.

4. **Same—Denomination of bonds held a detail concluded by signature of chairman and clerk of county commissioners under facts of this case.**

   Where an act authorizing the issuance of township bonds provide that they shall be in the sum of $100 each, and a curative act is passed providing that the signature of the chairman and the clerk of the board of county commissioners "shall be conclusive of said form and details" the denomination of the bonds, nothing else appearing, is to be regarded as a detail, and validity of the bonds is not affected by the fact that they were issued in larger denominations.

5. **Taxation A c—Uniform rule of taxation applies to levy of taxes and not to expenditure of revenue derived therefrom.**

   Township bonds to aid in the construction of a railroad, issued in accordance with a valid statute, are not objectionable on the grounds that taxes levied against such railroad are to be expended in paying the interest coupons of the bonds and in maintaining the sinking fund provided for in the act, the provision of the Constitution requiring uniformity in the levy of taxation not applying to the distribution of the revenue derived therefrom.

CIVIL ACTION, before *Grady, J.*, at Chambers. From GREENE.

On 27 February, 1917, the General Assembly of North Carolina enacted chapter 403, Public-Local Laws of North Carolina. In sub-

stance the act provided that the board of commissioners of Greene County, upon petition of one-fifth of the voters of any township or townships, were authorized to call an election in such township for the purpose of submitting to the qualified voters thereof the question of subscribing a specific sum for the purpose of constructing a standard gauge railway "either from the town of Hookerton or the town of Maury, Greene County, North Carolina, to the town of Snow Hill." Pursuant to said statute a petition was filed with the board of commissioners of Greene County requesting the said board to call an election "for the purpose of voting bonds to secure a railroad from Hookerton, North Carolina, to Snow Hill, North Carolina," the amount of the bonds issued not to exceed $100,000. Thereupon, on 3 November, 1919, the board of commissioners found that said petition was signed by one hundred and sixteen voters of Snow Hill Township, and that said number was more than one-fifth of the voters of said township. Consequently it was "ordered that an election be held on Friday, 12 December, 1919, according to law and the provision of said act, in said Snow Hill Township, at the usual voting place at Snow Hill, upon the said proposition to subscribe a sum not exceeding $100,000 for said first mortgage bonds." Thereafter an election was duly held in Snow Hill Township on Friday, 12 December, 1919. The canvassing board reported that there were two hundred and fifteen registered voters, and further, that there were cast "For subscription" one hundred and seventy-three votes, and "Against subscription," three votes. On 4 February, 1924, the board of commissioners duly passed a resolution declaring that "the one hundred thousand of Snow Hill Township bonds, voted 12 December, 1919, are fully authorized, and the said election was duly and properly held, and the said bonds shall now be prepared and issued in accordance with the law." The resolution of the board recites that the Snow Hill Railway Company had offered to build said railway, and thereupon it was resolved "that the proposition submitted by the Snow Hill Railway Company for the said bonds at par and interest, is hereby accepted, and same ordered to be duly filed." Thereafter, on 3 November, 1924, the commissioners duly passed a resolution that "$100,000 Snow Hill Township public improvement bonds shall now be executed with the written signature of the chairman of this board and attested by the clerk with the county seal impressed on it, dated 1 September, 1924; . . . that said bonds shall be deposited in the Snow Hill Banking and Trust Company, . . . and held by said bank in escrow, . . . and shall be finally delivered to the order of said purchaser when the said railway has been completed and placed in operation, and the resolution determining such fact shall have been passed by the board." In pursuance of the resolution bonds were executed and placed in escrow with the Snow

Hill Banking and Trust Company. Subsequently the National Bank of Snow Hill was duly appointed receiver of the Snow Hill Banking and Trust Company, which said receiver now holds said bonds.

On 12 March, 1928, the commissioners of Greene County and a number of taxpayers of Snow Hill Township instituted an action against the Snow Hill Railway Company, the National Bank of Snow Hill, receiver, and others, seeking to enjoin the said receiver from delivering said bonds or any proceeds thereof.

After hearing the cause the trial judge entered judgment "that the defendant, National Bank of Snow Hill, receiver of Snow Hill Banking and Trust Company, is perpetually enjoined and restrained from delivering to the Snow Hill Railway Company, . . . or to any other person the bonds described in the complaint." It was further adjudged "that said bonds be delivered up by the said defendant, National Bank of Snow Hill, receiver of the Snow Hill Banking and Trust Company, to the clerk of the Superior Court of Greene County and by said clerk be marked canceled under the terms of this judgment."

From the foregoing judgment both parties appealed.

The plaintiffs appealed for the reason that the judgment rendered "failed to expressly declare that any attempted issuing of any bonds heretofore upon the face of the whole record . . . was unauthorized and a nullity."

L. V. Morrill and Cowper, Whitaker & Allen for plaintiffs.

Fuller, Reade & Fuller, John Hill Paylor and J. Paul Frizzelle for defendants.

BROGDEN, J. Three questions of law are presented by the record:

1. Did the commissioners of Greene County have the power to issue the bonds in controversy?

2. Was the power properly exercised?

3. Are the bonds valid?

As the bonds were not issued for a necessary expense of a township, the power of the commissioners to issue them depended upon valid legislative authority and a vote of the people as contemplated by law. *Henderson v. Wilmington,* 191 N. C., 269, 132 S. E., 25; *Herring v. Dixon,* 122 N. C., 420, 29 S. E., 368; *Tate v. Commissioners,* 122 N. C., 812, 30 S. E., 352.

An election was duly held on 12 December, 1919. No attack is made upon the regularity of this election. However, an attack is made upon the special legislative authority, empowering the commissioners to call the election and issue the bonds. The legislative authority is contained

in chapter 403 of Public-Local Laws of 1917, ratified 27 February, 1917, and in chapter 89 of Public-Local Laws, Extra Session, 1924, ratified 21 August, 1924.

The act of 1917 is assailed upon four distinct grounds:

(a) That the bonds contemplated were the bonds of Greene County and not those of Snow Hill Township.

(b) That no specific sum was mentioned therein.

(c) That the bonds were to be delivered to the Railway Company when the railroad shall have been completed and put in operation, and in addition, when the railroad delivered to the board of commissioners its bonds secured by first mortgage upon its property. The plaintiffs contend that the railroad, when completed, would engage in interstate commerce and, as it had no authority so to do, no valid delivery of the bonds could be made.

(d) That the act is unconstitutional by reason of the provisions of section 4 thereof to the effect "that all taxes levied upon the said railroad properties, when the said extension shall have been completed, shall be paid to the treasurer of Greene County and by him expended in paying the interest coupons and sinking fund hereinbefore provided for."

Chapter 89 of Public-Local Laws, Extra Session, 1924, is a curative act and ostensibly designed to supplement the act of 1917, and purports to validate the bonds. The act of August, 1924, provides that the bonds "shall be issued in the name of Snow Hill Township by the board of county commissioners of Greene County as agents of Snow Hill Township, in the amount of $100,000, . . . to be known as the Snow Hill Township public improvement bonds, and to be in such further form and details as may be provided by the chairman and clerk of said board of county commissioners whose signatures thereto shall be conclusive determination of said form and detail."

The plaintiffs also attacked the curative act of 1924. It is perhaps pertinent to observe in the outset that the petition for the election, signed by one-fifth of the qualified voters of Snow Hill Township, expressly provided that the amount of the bonds to be issued was not to exceed $100,000. The resolution of the county commissioners calling the election also stipulated that the election was to be held in order to determine whether or not Snow Hill Township would subscribe "a sum not exceeding $100,000." It would appear that the expression "not exceeding $100,000" would be sufficiently specific. But, however that may be, the curative act expressly specifies $100,000 in bonds. The objection to the act of 1917 upon the ground that the bonds are issued by Greene County is also removed by the curative act of 1924, which provides that in issuing the bonds Greene County should act as agent for Snow Hill Township. Therefore, if the curative act is valid, the principles an-

nounced in *Commissioners v. State Treasurer,* 174 N. C., 141, 93 S. E., 482, and in *Commissioners v. Boring,* 175 N. C., 105, 95 S. E., 43, would have no application.

The general rule with respect to curative acts of the kind involved in this controversy is thus stated in *Belo v. Commissioners,* 76 N. C., 489: "The competency of the Legislature to enact retrospective statutes, to validate an irregular or defective execution of power by a county corporation, is well settled. In *St. Joseph Township v. Rogers,* 16 Wall., 644, the election at which the subscription was approved was held before the law authorizing the subscription, and the court there decided that this and all defective subscriptions of the kind may be ratified, where the Legislature could have originally conferred the power, and that such laws when they do not impair any contract or injuriously affect the rights of third persons are never objectionable. The ratification operates as a previous authority." The principle thus announced has been cited with approval in many decisions of this Court. *Leak v. Gay,* 107 N. C., 468, 12 S. E., 251; *Edwards v. Commissioners,* 183 N. C., 58, 110 S. E., 600; *Jones v. Board of Education,* 185 N. C., 303, 117 S. E., 37; *Holton v. Mocksville* 189 N. C., 144, 126 S. E., 326. Manifestly, the Legislature had the power originally to fix a specific amount of said bonds and to empower Greene County to act as agent for Snow Hill Township. No principle of law is called to the attention of the Court tending to establish the invalidity of the curative act. Therefore, the first two grounds of objection to the act of 1917 are removed by the curative act of August, 1924.

The third ground of attack upon the act of 1917 refers to the delivery of the bonds rather than to their validity.

The fourth ground of attack is based upon section 4 of the act of 1917, which provides "that all taxes levied upon said railroad properties . . . shall be . . . expended in paying the interest coupons and the sinking fund hereinbefore provided for." This ground of attack cannot be sustained. The point has been expressly decided in *Brown v. Commissioners,* 100 N. C., 92, 5 S. E., 178; *Tate v. Commissioners,* 122 N. C., 812, 30 S. E., 352; *Newell v. Green,* 169 N. C., 462, 86 S. E., 291. In the latter case the Court declares: "Even if this were a property tax and not a privilege tax or an exercise of the police power, the provision of the Constitution requiring uniformity applies to the levy of taxes and not to the distribution of the revenue derived therefrom."

The application of the principles of law pertinent to this controversy leads to the conclusion that the commissioners of Greene County had the power to issue the bonds, and that such power has been properly exercised. Therefore, it follows that the bonds are valid.

Attention is called to the fact that the act of 1917 provided that the bonds should be "in the sum of $100 each"; whereas, in fact, the bonds as issued have been issued in the sum of $1,000 each. It will be observed, however, that the curative act of 1924 provides that the signatures of the chairman and the clerk of the board "shall be conclusive determination of said form and details." The denomination of the bonds, nothing else appearing, is a detail.

The final inquiry is whether the bonds can be delivered to the railway company. A companion case to this case is *Brummitt, Attorney-General, v. R. R., ante,* 381, in which action the Attorney-General brought a suit to forfeit the charter of Snow Hill Railway Company. This Court held that the Attorney-General had no power to invoke a forfeiture of the charter of Snow Hill Railway Company under the circumstances appearing in the decision. The judgment of the trial court in requiring the bonds to be canceled was based entirely upon the proposition that the charter of the Snow Hill Railway Company had been forfeited and that the railroad, when completed, would engage in interstate commerce, contrary to law. The act of 1917, and the act of 1924 specified certain conditions under which the bonds may be delivered. Unless the Snow Hill Railway Company can comply with all statutory conditions, no valid delivery of the bonds can be made to it. This phase of the controversy, however, is not before us, and this opinion of the Court is confined exclusively to the questions of law discussed and decided herein.

Reversed.

A. L. OWENS v. E. D. CARSTARPHEN.

(Filed 11 September, 1929.)

1. Sales H a—In this case held: evidence did not show total failure of consideration in sale of bank stock.

Where in an action on a note, the evidence tends to show that the consideration for the note was certain shares of bank stock and the promise of the payee to make the payer a director of the bank, and that the payer was made a director and, acting as such director, voted for and received dividends upon his stock, the execution of the note being admitted, upon the later insolvency of the bank the payer may not maintain the position that there was a total failure of consideration, and an instruction that the jury should answer the issue of indebtedness in favor of the defendant if they found the stock to be worthless is reversible error.

2. Contracts D a—Party may not accept benefits of contract and at same time deny its validity.

A party may not accept the benefits of a contract and at the same time deny its validity.

OWENS *v.* CARSTARPHEN.

APPEAL by plaintiff from *Devin, J.*, at July Term, 1929, of WASHINGTON. New trial.

Edward L. Owens and Zeb Vance Norman for plaintiff.
Martin & Martin for defendant.

PER CURIAM. The plaintiff brought suit to recover the amount alleged to be due on a negotiable promissory note in the sum of $250 executed and delivered to him by the defendant on 14 January, 1920, payable 1 January, 1921, for the purchase of two shares of stock in the Bank of Plymouth. The defendant admitted the execution of the note, but alleged that the bank was insolvent and the stock worthless when the note was signed and the certificate of stock received, and pleaded total failure of consideration in bar of the plaintiff's recovery. His Honor instructed the jury to answer the issue of indebtedness in favor of the defendant if they found that the stock was worthless at the time of the transaction, and that there was in this respect a failure of consideration. To this instruction the plaintiff excepted.

The plaintiff testified that in January, 1920, the Bank of Plymouth was in his opinion as solvent as any bank; that it had no bad paper; that its assets were good, and that its stock was worth more than the purchase price.

The bank and another were consolidated in 1922 under the name of the United Commercial Bank, for which a receiver was afterwards appointed.

According to the defendant's testimony the consideration for the note was the stock he purchased and the plaintiff's promise to make him a director of the bank. A week after the note was executed the plaintiff's promise was fulfilled, and the defendant served as a director for two years thereafter. During each year he voted for and received a dividend of six per cent on his stock. He testified, "I helped declare these dividends and received my part; the board of directors of which I was one paid a dividend one year on something worthless."

True, the defendant says that after two years he found the stock was worthless when he gave the note; but according to his own testimony it was not without value, for he received annual dividends of several dollars each. If the dividends were permissible the investment was a good one; if not permissible the defendant, in his capacity as director should have known it, and in either event he cannot be permitted to accept the benefits of his contract and at the same time deny its validity. Particularly is this true when as he admits he paid interest on his note for six years—four years after his alleged discovery that the stock was worthless. Moreover, the promise of a place on the board of directors

held out the "thought of a big job," as he said; and if the "job" was not as great as anticipated the fact remains that a promise for a promise is itself a consideration.

The question of a partial failure of consideration seems not to have been considered. We do not intend to intimate that it would or would not have been a defense *pro tanto*. C. S., 3008. There must be a

New trial.

W. E. HARRELL v. I. A. TRIPP ET AL.

(Filed 18 September, 1929.)

1. Trial E c—Instructions that omit contention of defense supported by evidence held erroneous.

Where, in an action in claim and delivery involving the title to an automobile, there is evidence tending to show that the plaintiff bought the car for himself and *per contra* that he made a gift of the car to the two daughters by delivering the car with intent to pass title either to their father for them or to them direct, an instruction that limits the defense to the evidence to the effect of an immediate delivery by the father to his daughters and deprives the defendant of their defense upon the second phase thereof of the gift direct to the daughters is reversible error.

2. Gifts A a—Actual or constructive delivery with present intent to pass title necessary to gift inter vivos.

To constitute a gift of personal property *inter vivos* there must be actual or constructive delivery of the thing given with the present intent to pass the title to the donee.

3. Replevin G a—The correct form of judgment for plaintiff in action in claim and delivery.

Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against him should require the delivery of the property with damages for its detention and costs and against the surety on the bond for damages and costs within the amount of the penalty thereon, or, in the event that delivery of the property cannot be had, for the value at the time of its wrongful detention with interest as damages therefrom, and costs, and likewise against the surety within the penalty of the bond, the surety to be discharged upon such payment.

APPEAL by defendants from *Cowper, Special Judge,* at Special March Term, 1929, of BERTIE.

Action in claim and delivery to recover the possession of one Ford coupe, Engine No. 11710751. The property was seized by the sheriff, but before its delivery to the plaintiff, the defendant, I. A. Tripp, replevied and retained possession thereof by giving bond as required by law, with H. P. Sewell as surety.

Plaintiff contends that he bought the car in question and loaned it to I. A. Tripp for the use of his two daughters. The defendants, on the other hand, contend that the plaintiff bought the car and gave it outright to Estelle and Elizabeth Tripp.

It is conceded that the plaintiff took I. A. Tripp along with him when he purchased the car and permitted or requested the said Tripp to drive it home, the plaintiff preceding him in his Buick automobile. When they arrived at the Tripp home, Estelle Tripp testifies that the plaintiff said: "There is the car; get in and take a ride." She further testified: "Mr. Harrell stayed while Elizabeth, father and I went to ride. We kept the car five or six weeks before this action was begun."

It is suggested that the plaintiff wished to marry one of the young ladies at the time he purchased the car and had her father drive it home, but, failing in this, he now desires to repossess it. Title to the car, at the time it was purchased, 10 July, 1925, was issued in the name of I. A. Tripp. Another certificate of title was issued to the plaintiff for the same car on 28 July, 1925, without the first being surrendered or canceled.

The jury answered the issue of ownership in favor of the plaintiff and fixed the value of the car at $550. Judgment on the verdict for plaintiff with the following provision inserted therein: "And it appearing that the value of the said car has been fixed at the sum of $550 on the day of seizure of the same, it is further considered and adjudged that plaintiff, W. E. Harrell, recover of I. A. Tripp and H. P. Sewell, surety upon the replevy bond, the sum of $550 with interest thereon from 18 July, 1925, and the costs of this action to be taxed by the clerk of this court." Exception by defendants.

The defendants appeal, assigning errors.

Gillam & Spruill and Winston & Matthews for plaintiff.
L. W. Gaylord and J. A. Pritchett for defendants.

STACY, C. J., after stating the case: The validity of the trial is called in question by a number of exceptions and assignments of error, but consideration of them *seriatim* is omitted, as we deem it necessary to award a new trial for error in the following instruction on the issue of ownership, which forms the basis of one of the defendants' exceptive assignments of error:

"The court further charges the jury that if the jury shall find from the evidence that the plaintiff permitted Mr. Tripp to drive the car to his home, but that he did not either by words or by unequivocal conduct, authorize the father to deliver the said car to his daughters, and that

the said car was not immediately upon the surrender of the same to Mr. Tripp, placed in the possession of or control of the daughters, then the jury will answer the first issue, Yes."

The vice of this instruction lies in the fact that it requires an undue immediacy of delivery on the part of Mr. Tripp to his daughters, and further deprives the defendants of their contention, based on the testimony of Estelle Tripp, that delivery of the car was made direct to the *feme* defendants by the plaintiff himself. The position of the defendants that the instruction is unduly restrictive of their evidence would seem to be well taken.

The decisions in this jurisdiction are to the effect that, to constitute a valid gift of personal property *inter vivos,* there must be an actual or constructive delivery of the thing given with the present intent to pass the title to the donee. *Handley v. Warren,* 185 N. C., 95, 116 S. E., 168; *Patton v. Heath,* 190 N. C., 586, 130 S. E., 500; *Thomas v. Houston,* 181 N. C., 91, 106 S. E., 466. "To constitute a valid gift *inter vivos* there must be an intention to give and a delivery to the donee, or to some one for him, of the property given." *Harris Banking Co. v. Miller,* 1 L. R. A. (N. S.), 790. See, also, *Parker v. Mott,* 181 N. C., 435, 107 S. E., 500 and cases there cited.

It would also seem that the form of the judgment as pointed out in *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466, 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 surety 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 surety in no event to exceed the penalty of the bond. *Polson v. Strickland,* 193 N. C., 299, 136 S. E., 873.

For the errors, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

M. B. STONE v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 September, 1929.)

1. Appeal and Error G b—Exceptions not discussed in briefs are deemed abandoned on appeal.

Assignments of error based on exceptions to instructions which are not discussed in the brief filed in the Supreme Court are taken to be abandoned on appeal under Rule 28.

2. Railroads D b—where railroad knowingly permits use of crossing by public it owes the duty to keep such crossing in reasonably safe condition.

Where a railroad company has knowingly permitted automobiles and other vehicles to cross its right of way for a long period of time at a certain road crossing, from one public highway to another, it owes the duty to keep such crossing in a reasonably safe condition whether the crossing was constructed by the railroad company or not, and it is liable in damages for injuries proximately caused by its negligent failure to do so. C. S., 3449.

3. Same—In this case held evidence of railroad's negligent failure to keep crossing in reasonably safe condition sufficient to be submitted to the jury.

Where a railroad company has knowledge that automobiles and other vehicles have been accustomed to cross its tracks at a certain roadway, for a long period of time, it owes the duty to keep the crossing in reasonably safe condition for this purpose, and where there is evidence tending to show that the public had so crossed at this place for a long period of time and that the railroad company had left a hole on its right of way which caused plaintiff's automobile to get stuck and consequently struck by defendant's train, without fault or negligence on plaintiff's part, the question of defendant's actionable negligence is for the jury under correct instructions from the court.

4. Appeal and Error E h—Where cause has been tried on one theory in lower court appellant is confined to that theory on appeal.

Where a running train of defendant railroad company has injured the plaintiff's automobile by a collision with it at a grade crossing, and the sole controverted matter on the trial in the Superior Court related to the question of defendant's negligence in failing to stop its train in time to have avoided the injury, the railroad company may not on appeal assume the position that it is not liable upon a different theory not controverted on the trial in the lower court.

APPEAL by defendant from *Barnhill, J.,* at March Term, 1929, of VANCE. No error.

Action to recover damages resulting from injuries to plaintiff's automobile, caused by the negligence of defendant in failing to exercise due care (1) to maintain a public crossing which passes over its track, in a reasonably safe condition, and (2) to stop its train before it struck and

injured the automobile, which by reason of the defective condition of said crossing, plaintiff was unable to drive off or move from said track, in time to avoid the injury.

The issues submitted to the jury were answered as follows:

1. Was the plaintiff's property damaged by the negligence of the defendant, as alleged? Answer: Yes.

2. If so, did plaintiff by his own negligence contribute to his injury and damage? Answer: No.

3. What damages, if any, is plaintiff entitled to recover? Answer: $1,500.

From judgment on the verdict defendant appealed to the Supreme Court.

Perry & Kittrell for plaintiff.

J. H. Bridgers and Murray Allen for defendant.

CONNOR, J. It is not contended by defendant on this appeal that there was error in the trial of this action with respect to the allegation that defendant was negligent in failing to exercise due care to stop its train, and thus avoid the injury to plaintiff's automobile, which was on defendant's track when it was struck and injured by defendant's train. The evidence in support of this allegation, although contradicted by evidence offered by defendant, was submitted to the jury under instructions which are free from error. Assignments of error based on exceptions to these instructions are not discussed in defendant's brief, filed in this Court. They are therefore taken as abandoned on this appeal. Rule 28.

Defendant contends, however, that there was error in the trial with respect to the allegation that defendant was negligent in failing to exercise due care to maintain in a reasonably safe condition the crossing over its track, on which the automobile was standing when it was struck and injured by defendant's train. All the evidence tended to show that the crossing was defective, in that there was a hole on the right of way, just beyond the cross-ties, and that this hole was not discovered by plaintiff before the wheel of his automobile dropped into it, causing the running-board of his automobile to rest upon the ground. Plaintiff was unable to drive his automobile off the track, or to move it therefrom before it was struck and injured by defendant's train, which appeared after plaintiff had driven upon the crossing.

In his complaint plaintiff alleged that the crossing was a public crossing. This allegation was denied by defendant in its answer. All the evidence tended to show that the crossing had been in existence for many years; that it was used generally by the public, and that defendant

knew of its existence. There was no evidence tending to contradict the evidence to the effect that it was a public crossing. Plaintiff knew when he drove his automobile on the crossing that it had been used for many years by the public for the purpose of passing over defendant's track, from the public road on one side of the track to the State highway on the other side.

The court instructed the jury in effect that upon all the evidence it was the duty of defendant to exercise due care to maintain the crossing on which plaintiff's automobile was standing when it was struck and injured by defendant's train in a reasonably safe condition, and that if defendant failed to perform this duty, and such failure was the proximate cause of the injuries to plaintiff's automobile, defendant was liable for damages resulting from the injuries.

Defendant contends that there was prejudicial error in this instruction, for that it is assumed therein that the crossing on which plaintiff's automobile was standing when it was struck and injured, is a public crossing, whereas the allegation in the complaint to that effect is denied in the answer. In view of the fact that all the evidence was to the effect that the crossing is a public crossing, and that on the trial defendant did not controvert this evidence, defendant's contention cannot be sustained. Defendant's evidence was directed altogether to support its contention that it was not negligent in failing to stop its train before it struck and injured the automobile. There was apparently no controversy as to the character of the crossing, or as to its defective condition.

The duty of a railroad company with respect to the maintenance of a crossing over its track, where its track has been constructed over an established road or highway, whether public or private, is well settled. The duty is prescribed by statute, C. S., 3449, and has been recognized and enforced by this Court in numerous decisions. In *Goforth v. R. R.*, 144 N. C., 569, 57 S. E., 209, it is said: "It is just that crossings necessitated by the construction and operation of a railroad should be kept in a safe condition by it." As the crossing is on the railroad company's right of way, no one except the company has the right to enter upon the crossing for the purpose of repairing the same.

It is immaterial whether the company constructed the crossing or not. If, with its knowledge and implied consent, the public has used the crossing over its track and right of way for many years, for the purpose of passing from a public road on one side of the track to a public road on the other side, in automobiles or other vehicles, the company owes to those who thus use the crossing the duty to exercise due care to maintain the crossing in a reasonably safe condition. *Bradley v. R. R.*, 126 N. C., 735, 36 S. E., 181. The company cannot be held liable, of course,

as an insurer; it is, however, liable for negligence with respect to the condition of the crossing on its right of way. It can relieve itself of liability by closing the crossing, where the public has acquired no right to use it. So long, however, as it permits the public to use the crossing, it must respond in damages caused by its negligence in failing to exercise due care to maintain the crossing in a reasonably safe condition. There is No error.

NETTIE COWEN v. GABRIEL WILLIAMS ET UX.

(Filed 18 September, 1929.)

1. Bills and Notes A a—Seal on promissory note imports consideration.

Where a husband and wife execute a promissory note under seal secured by a mortgage on lands, the seal affixed thereto imports that a good and sufficient consideration had been given for it, and in an action against them by the holder of the note in due course the defense of *nudum pactum* is not available to the wife.

APPEAL by plaintiff from *Moore, Special Judge,* at April Special Term, 1929, of MARTIN.

Civil action to recover on a promissory note and to foreclose deed of trust given to secure payment of said note.

On 8 March, 1921, Gabriel Williams and wife, Lucy Williams, together with others, executed and delivered their joint promissory note for $1,921.65, due and payable on or before 8 November, 1922, to J. L. Hassell & Co., and to secure the payment of same, executed a deed of trust on a tract of land in Martin County.

The plaintiff is a holder in due course of said note, which is under seal, and is seeking to forclose the security and enforce collection of said note.

Lucy Williams contends that the note is without consideration as to her, and denies liability on this ground.

On this phase of the case, the trial court instructed the jury as follows:

"The defendant contends that you ought to be satisfied by the preponderance or greater weight of the evidence that Lucy Williams was only the wife of Gabriel Williams; that she had no interest in this land except such dower right as she may have and that she got no benefit from the execution of the note; contends that you ought to be satisfied from this evidence and by its greater weight and answer that issue 'No'; that she is not liable for the sum due on the note. . . . The burden is on her to satisfy you by the greater weight or preponderance of the evi-

dence before you can answer it no. If she has so satisfied you, it would be your duty to answer it 'No.' Otherwise, you would answer it 'Yes.' Exception by plaintiff.

From a verdict and judgment relieving Lucy Williams from any and all liability on the note, the plaintiff appeals, assigning errors.

B. A. Critcher for plaintiff.
No counsel appearing for defendants.

STACY, C. J., after stating the case: It would seem that the plea of *nudum pactum* is not open to the defendant, Lucy Williams, as against the plaintiff, who is a holder in due course of the note sued on. Hence the instruction, above set out, which forms the basis of one of the plaintiff's exceptions, we apprehend, should be held for error. *Angier v. Howard,* 94 N. C., 27.

A note under seal imports consideration, and it is presumed from the use of a seal, that the consideration is good and sufficient. *Harrell v. Watson,* 63 N. C., 454; *Wester v. Bailey,* 118 N. C., 193, 24 S. E., 9; *Moose v. Crowell,* 147 N. C., 551, 61 S. E., 524; *Burriss v. Starr,* 165 N. C., 657, 81 S. E., 929. See, also, *Barbee v. Barbee,* 108 N. C., 581, 13 S. E., 215.

For the error, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

S. L. ARRINGTON, ADMINISTRATOR OF MAMIE MORGAN, v. TOWN OF PINETOPS AND HOOKERTON TERMINAL COMPANY; AND MANDY MURPHY v. TOWN OF PINETOPS AND HOOKERTON TERMINAL COMPANY.

(Filed 18 September, 1929.)

1. Electricity A a—Company transmitting electricity must use care commensurate with danger therefrom.

A company engaged in the transmission of deadly electric currents by wires strung on poles is held to a high degree of care in the maintenance of this equipment commensurate with the danger, and its failure in this duty renders it liable in damages for injuries proximately caused thereby.

2. Electricity A d—Evidence that third person impaired power line and left it in dangerous condition sufficient to be submitted to jury in this case.

Where there is evidence tending to show that a company authorized to do so entered on land upon which power lines were maintained, and excavated sand and gravel therefrom, and in so doing, undermined one of the poles upon which transmission wires were strung so that the pole

slipped down until the wires hung about five feet from the ground at a place where it could be reasonably anticipated injury would likely result, and that the company left the wires in this dangerous condition, and that a child caught hold of one of the wires and was killed thereby: *Held*, the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence.

3. Electricity A c—In this case held: evidence of failure of town to keep its power line in reasonable repair sufficient to be submitted to the jury.

Where an incorporated town owns and maintains its own poles and wires for the transmission of electricity from another town from which it buys its power, and there is conflicting evidence that it permitted one of its poles carrying a high voltage wire to remain for a month or more fallen so that the wire hung only five feet from the ground, the question of whether the town, in the exercise of due care, should have discovered and made the necessary repairs is for the jury, and is properly submitted to them upon the issue of its secondary liability for the negligent killing of the plaintiff's intestate in an action against the town and the company impairing the power line.

4. Electricity A b—In this case held: defendants may not avoid liability on ground that intestate killed by power line was trespasser.

Where the defendants in an action for the negligent killing of plaintiff's intestate are guilty of negligence proximately causing the injury, in impairing and failing to properly maintain a power line, they may not avoid liability on the ground that plaintiff's intestate was a trespasser when the father of the plaintiff's intestate rented and cultivated a field eleven steps from the power line, and his child was killed by coming in contact with a wire permitted to remain five feet from the ground, the doctrine of attractive nuisances applying under the facts of this case.

CIVIL ACTION, tried before *Small, J.*, at April Term, 1929, of EDGECOMBE.

The evidence tended to show that John R. Pitt owned certain land in Edgecombe County, and on 23 May, 1922, conveyed to the town of Pinetops a right of way across his land for the purpose of erecting a transmission line. This deed was recorded on 8 December, 1926. The town of Pinetops purchased electric power from the town of Tarboro, and in order to convey said power from Tarboro to Pinetops, erected a power line consisting of poles and wires. The line carried thirteen thousand volts of electricity, but this voltage was "stepped down" at Pinetops to twenty-three hundred volts. The poles carrying the power were from thirty-five to thirty-seven feet in height and were erected on top of the bank of a "pretty deep cut" on the right of way of the East Carolina Railway Company. On or about 17 June, 1926, Pitt, the owner of the land, entered into an agreement with the Hookerton Terminal Company by the terms of which the said company was authorized to remove sand and gravel from the area on which the poles were situ-

ated. There was further evidence that Louis Morgan, father of the plaintiff, Mamie Morgan, rented a crop from Pitt for the year 1926, and was cultivating cotton in a field bordering the transmission line. The edge of Morgan's cotton field was only eleven steps from the power line. There was further evidence tending to show that prior to 6 December, 1926, the Hookerton Terminal Company, in excavating sand and gravel, had undermined one of the poles of said transmission line, which caused the pole to drop down into the excavation, leaving the wires thereon from five to seven feet above the ground on the top of the embankment. On 6 December, 1926, Mamie Morgan, a child about twelve years and ten months old, went into the woods adjoining the field of her father. Coming back from the woods to her work in the field she stopped at the pole in controversy, apparently looking over the embankment into the sand pit below.

The half sister of the deceased, the only eye witness, gave the following narrative: "We came back from the woods and passed by the pole coming back about a yard from it; we stopped and were looking at the sand digger; it was not working. I didn't see anybody on it; we didn't stay there long; I turned around and was coming back to the field and missed Mamie; when I turned to go back to the field is when I missed Mamie; I heard a roaring; I hollered and called Gus and looked around. I saw Mamie standing there; she couldn't get away; her right hand up above her head; she was not so far from the edge of that place; I don't think she was standing on her tiptoes, the best I can remember her hand that was sticking up was touching the wire. I had my back to her and turned around and saw her, and she was standing on the ground, had one hand up above her head on the wire; she didn't stay there long. I screamed and called Gus and Mandy, and Mandy pulled Mamie away, and the wire slung her off. She lay flat on her back on the ground. . . . We walked straight under the wire and looked over the embankment; I peeped over there."

Apparently Mamie Morgan was killed instantly.

The other plaintiff, Mandy Murphy, sister of Mamie Morgan, testified that she heard hollering and looked and saw her sister Mamie on the wire. She said: "I ran there to pull her away, and when I was pulling her away the electricity from her drew me to the pole. I don't remember anything else that happened because I was speechless, and when I came to I was at the house. I felt just like somebody dead, and my left foot and right hand were burned."

There was testimony that from the point where the pole rested on the top of the bank to the wires was about five feet. There was also testimony to the contrary. There was also evidence tending to show that the pole had been in the condition described by witnesses from about 16

October, 1926. There was also strong testimony offered by the defendants to the effect that the pole had been inspected a few days before the death of Mamie Morgan, and that it was then standing and had not been undermined.

The cases were consolidated, and issues of negligence, contributory negligence, and primary and secondary liability were submitted in both cases. The jury answered all the issues in favor of plaintiffs, awarding $1,500 damages in the death case and $250 damages in the case of Mandy Murphy. The verdict also established primary liability against the defendant, Hookerton Terminal Company, and secondary liability against the town of Pinetops.

From judgment upon the verdict both defendants appealed.

Battle & Winslow for plaintiff.

Henry C. Bourne for Hookerton Terminal Company.

Albion Dunn, H. H. Phillips and J. L. Bridgers for Town of Pinetops.

BROGDEN, J. The plaintiffs seek to recover damages from both defendants upon two theories:

1. That the defendant, Hookerton Terminal Company, negligently excavated around the pole, causing it to slip into the cut and thus leaving the wires, carrying an enormous voltage, only five feet above the ground and adjacent to a cultivated field.

2. That the town of Pinetops was negligent in not discovering the condition of said pole and permitting it to remain in a dangerous situation for an unreasonable length of time.

In *Ellis v. Power Co.,* 193 N. C., 357, 137 S. E., 163, it is declared: "that electric power is an industry-producing agency, and the hydroelectric development has been one of the greatest factors in the State's progress, and especially its industrial expansion. Every legitimate encouragement should be given to its manufacture and distribution for use by public utility corporations, manufacturing plants, homes, and elsewhere. On the other hand, the highest degree of care should be required in the manufacture and distribution of this deadly energy and in the maintenance and inspection of the instrumentalities and appliances used in transmitting this invisible and subtle power."

The principles of law creating liability have been declared and reiterated in many decisions of this Court. *Harrington v. Wadesboro,* 153 N. C., 437, 69 S. E., 399; *Ferrell v. Cotton Mills,* 157 N. C., 528, 73 S. E., 142; *Ferrell v. R. R.,* 172 N. C., 682, 90 S. E., 893; *Graham v. Power Co.,* 189 N. C., 382, 127 S. E., 429; *Helms v. Power Co.,* 192 N. C., 784, 136 S. E., 9; *Ellis v. Power Co.,* 193 N. C., 357, 137 S. E.,

163; *Ramsey v. Power Co.*, 195 N. C., 788, 143 S. E., 861; *Murphy v. Power Co.*, 196 N. C., 484, 146 S. E., 204. In *Graham v. Power Co.* this Court approved the rule of liability announced by the Court of West Virginia in *Love v. Virginia Power Co.*, 86 W. Va., 393. The rule is thus stated: "A company maintaining an electric line, over which a current of high and dangerous voltage passes, in a place to which it knows or should anticipate others lawfully may resort for any reason, such as business, pleasure, or curiosity, and in such manner as exposes them to danger of contact with it by accident or inadvertence, is bound to take precaution for their safety by insulation of the wire or other adequate means." The principle underlying the rule is to the effect that, when any person undertakes the performance of an act which, if not done with care and skill, will be highly dangerous to other persons, known or unknown, the law imposes as a public duty the obligation to exercise such care and skill. *Ferrell v. R. R.*, 172 N. C., 682. Again in *Helms v. Power Co.*, 192 N. C., 784, this Court declared: "Electric companies are required to use reasonable care in the construction and maintenance of their lines and apparatus. The degree of care which will satisfy this requirement varies, of course, with the circumstances, but it must always be commensurate with the dangers involved, and where the wires maintained by a company are designed to carry a strong and powerful current of electricity, the law imposes upon the company the duty of exercising the utmost care and prudence consistent with the practical operation of its business, to avoid injury to those likely to come in contact with its wires."

Applying these principles to the case at bar, it is obvious that permitting an uninsulated wire, carrying thirteen thousand volts of electricity, to remain only five feet from the ground, near a cotton field, where people are constantly at work, created a dangerous situation. Under such circumstances severe injury or death ought reasonably to have been anticipated. In effect the defendant, Hookerton Terminal Company, undermined a pole, causing it to slip down until high powered wires were within five feet of the ground. To leave a live wire charged with deadly current in such condition was evidence of negligence to be submitted to the jury.

The question as to whether the town of Pinetops, in the exercise of due care, should have discovered the condition of the wire and to have made the necessary repairs, was a question of fact for the jury. Certainly this Court cannot declare, as a matter of law, that the town of Pinetops was free from negligence under the facts and circumstances disclosed at the trial of the cause.

The Hookerton Terminal Company insists that the little girl was a trespasser upon its property and that her administrator should not be

allowed to recover. The identical contention was made in the case of *Ferrell v. R. R.*, 172 N. C., 682. The Court, however, in disposing of this defense, says: "It is undoubtedly the general rule that a trespasser cannot maintain an action against the owner for negligent injuries received by reason of conditions existent upon the premises, but this is a principle growing out of and dependent upon the right of ownership and considered essential to their proper enjoyment." . . .

Louis Morgan, father of plaintiff, testified that he rented the land up to the right of way of the railroad. If so, he and his children, in cultivating the cotton field, had a right to use the land, and the defendant, Hookerton Terminal Company, was charged with notice that these children were working in the field only eleven steps away, and that they had a right to use the woods for any lawful purpose. While there was no pathway or walkway at the place where the pole was excavated, still these children, doubtless attracted by the machinery and sand pit, could not be reasonably held as trespassers in a legal sense because they came up to the bank out of curiosity and peeped over into the sand pit.

No error.

H. W. QUALLS v. THE FARMERS AND MERCHANTS BANK.

(Filed 18 September, 1929.)

1. Bills and Notes I c—Bank of deposit sending check in due course to its reputable correspondent bank for collection is not liable thereon.

A bank receiving from the payee a check on a bank in a different town performs its duty by sending it for collection in due course to its reputable correspondent bank at or near the place of payment.

2. Same—Bank in course of collection is agent of payee and not the bank of deposit.

Where a bank receives from the payee a check drawn on a bank in a different town, and sends it in due course to its reputable correspondent bank, which sends it to an intermediate bank for collection: *Held*, the bank in course of collection is the agent of the payee and not the bank of deposit, and the bank of deposit is not liable to the payee for the negligence, if any, of the collecting bank.

3. Same—Check received by drawee bank through the mail is payable by it by draft on another bank.

Where the payee of a check drawn on a bank in a different town deposits it for collection in a bank without requesting that payment by the drawee bank be demanded in cash, and in due course of collection the check is sent by the bank of deposit to its reputable correspondent bank, which in turn sends it to an intermediate bank for collection: *Held*, the check, being sent through the postoffice, is payable by the drawee bank

by its draft on its reserve funds in another bank, and the bank of deposit is not liable to the payee upon the ultimate nonpayment of the check because of the insolvency and nonpayment of the draft of the drawee bank. Public Laws of 1921, ch. 4, sec. 39.

4. Same—Bank of deposit not liable for failure to give prompt notice of nonpayment of check when damages are not shown to have resulted therefrom.

The failure of the bank of deposit to promptly notify the payee of the nonpayment of a check deposited by him will not subject the bank to liability in damages when no damages are shown to have resulted therefrom.

APPEAL by plaintiff from *Barnhill, J.*, at March Term, 1929, of HALIFAX.

Submission of controversy without action under C. S., 626, upon the following facts:

1. The plaintiff is a resident of Halifax County, N. C., and the Farmers and Merchants Bank was a banking corporation under the laws of the State of North Carolina, with its principal place of business in Littleton, Halifax County, N. C.

2. On or about 17 December, 1925, O. B. Taylor & Co., for value, drew its check on the Bank of Whitakers, a bank then doing business under the laws of the State of North Carolina, with its principal place of business in Whitakers, N. C., said check being in favor of Louis Lynch, and in the sum of $390.55, which said check was, in due course, for value, endorsed by the said Louis Lynch, to the order of H. W. Qualls.

3. On 21 December, 1925, H. W. Qualls deposited said check for collection with said Farmers and Merchants Bank, using therefor a deposit slip furnished by said bank on which is the following notation: "All items are accepted at the depositor's risk until we have received final actual payment. We assume no liability beyond due diligence in forwarding items to any bank or collection agency."

4. On said date, 21 December, 1925, the account of the said Qualls with said Farmers and Merchants Bank was duly credited with the amount of said check, to wit, the sum of $390.55; and that on the same date the said bank forwarded said check for collection to the First National Bank of Portsmouth, Virginia, a duly organized and acting bank, and the regular correspondent of the Farmers and Merchants Bank, which said check was received by said First National Bank of Portsmouth on 23 December, 1925.

5. The First National Bank of Portsmouth, on 23 December, 1925, forwarded said check to the Merchants National Bank of Richmond, Virginia, which bank, on the next day received same and forwarded it to the Bank of Whitakers for payment.

6. On 30 December, 1925, the Bank of Whitakers sent to the Merchants National Bank of Richmond, Va., its draft on the National Bank of Commerce of Norfolk, Va., in payment of said item, which was duly presented and payment was refused because the Bank of Whitakers did not have sufficient funds available with which to pay it. Thereafter, the First National Bank of Portsmouth, Virginia, charged back against the Farmers and Merchants Bank of Littleton, N. C., the amount of said check, and on 8 January, 1926, the Farmers and Merchants Bank of Littleton charged back said check against the account of the said H. W. Qualls.

7. When said check was sent by the Merchants National Bank of Richmond to the Bank of Whitakers the Bank of Whitakers marked the same paid, and on the first of the following month returned said check to O. B. Taylor & Co., marked paid.

8. On or about 17 December, 1925, the date on which said check was drawn, and continuously thereafter, on the books of the Bank of Whitakers there was to the credit of the defendant, O. B. Taylor & Co., sufficient balance with which to pay said check.

9. During the times above mentioned, and ever since, the Bank of Whitakers was and is insolvent.

10. H. W. Qualls has never been reimbursed on account of said check.

11. The route selected for sending said check by the defendant was the usual and customary one.

12. On 4 January, 1926, the Bank of Whitakers was closed by the Corporation Commission of North Carolina on account of its insolvency.

Upon these facts it was adjudged that the plaintiff recover nothing and that the defendant recover its costs. Affirmed.

Joseph P. Pippin and Dunn & Johnson for plaintiff.
No counsel contra.

ADAMS, J. In *Quarles v. O. B. Taylor & Company and the Farmers and Merchants Bank* we held that as to Taylor & Company the check in controversy had been paid. 195 N. C., 313. The action is now prosecuted against the bank alone.

In this appeal the first question is whether the plaintiff is entitled to prevail on the ground that one of the correspondent banks, the Merchants National Bank of Richmond, instead of demanding the cash, accepted the drawee's check or draft on another bank which was not paid for want of funds. The question involves the legal relation sustained by the plaintiff, not only to the defendant, but to the corresponding banks to whom the check in controversy was sent in due course of

the attempted collection; and with us, notwithstanding a divergence of views expressed by various courts, this relation has been definitely determined. We have adopted the Massachusetts rule, which is thus stated: When the first bank transmits the paper with proper instructions to a reputable and proper agent, either in the place where the collection is to be made, or in the place nearest thereto where it has a correspondent or agent whom it deems fit to employ for the purpose of forwarding, it has done its duty, and is not responsible for the negligence of the correspondent or its agents. 1 Morse on Banks (6 ed.), sec. 274. Accordingly, in *Bank v. Bank,* 75 N. C., 534, *Bynum, J.,* cited *Fabens v. Mercantile Bank,* 23 Pickering, 330, and quoted with approval this statement of the principle: "It is well settled that when a note is deposited with a bank for collection which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine it is well settled that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank that it was to be transmitted to the place of residence of the promisor," . . . to which, in *Bank v. Floyd,* 142 N. C., 187, 191, the words "drawee or payer" are superadded. In the latter case there is a comprehensive discussion of the principle by *Justice H. G. Connor,* who said that *Bank v. Bank, supra,* had been recognized as controlling in this State and as sustained by the weight of authority "in other courts and the reason of the thing." He also approved the proposition affirmed in *Bank v. Bank,* 71 Mo. App., 451, that if a bank receives a paper for collection on a party at a distant place, the agent it employs at the place of payment is the agent of the owner and not of the bank, and if the bank selects a competent and reliable agent and gives proper instructions its responsibilities cease.

In his brief the plaintiff admits we are committed to the Massachusetts Rule, but he insists that our decisions supporting it should be overruled. As an exhaustive investigation of the authorities led to the conclusion reached in *Bank v. Floyd, supra,* that is, that the rule is sustained both by reason and by the weight of judicial thought, we see no convincing reason for receding from the position which has been uniformly upheld by this Court for more than half a century. See Annotation in 52 L. R. A. (N. S.), 608, and in 36 A. L. R., 1308.

The Merchants National Bank of Richmond sent the check to the drawee bank; but if this could formerly have been negligence, as held in *Bank v. Floyd, supra,* and in *Bank v. Trust Co.,* 172 N. C., 345, it would now be recognized as "due diligence" in view of the provisions of Public Laws 1921, ch. 4, sec. 39. It was so held in *Bank v. Barrow,*

189 N. C., 303, 309. The Merchants National Bank of Richmond was the agent of the plaintiff, and its liability to its principal, if any, would not be the liability of the defendant. Besides, as above suggested, under Public Laws 1921, ch. 20, the plaintiff's check having been presented to the drawee through the postoffice was payable by the drawee on exchange drawn on its reserve deposits, in the absence of a contrary specification on the face of the check. The drawer did not on the face of the check demand payment in cash; nor was such demand made by the plaintiff as endorser. The plaintiff's agent, the Merchants National Bank of Richmond, received just what it was authorized to accept. *Braswell v. Bank, ante,* 229.

The second question is whether the defendant was negligent in failing promptly to notify the plaintiff of noncollection. The drawee was closed by the Corporation Commission on 4 January, 1926. It does not clearly appear when the defendant was notified that the First National Bank of Portsmouth had charged back to it the amount of the check; but it does appear that the defendant charged the amount against the account of the plaintiff on 8 January, 1926, and in the absence of specific evidence it is reasonable to infer that the plaintiff was immediately notified. In any event there is no evidence of loss sustained by the plaintiff by reason of the alleged delay.

We concur with his Honor in the conclusion that the facts agreed disclose no such negligence or want of due diligence on the part of the defendant as will subject it to liability in damages to the plaintiff. Judgment

Affirmed.

AULANDER BRICK COMPANY v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 18 September, 1929.)

Railroads E a—Action on contract made with Director General of Railroads does not lie against railroad under facts of this case.

A contract made with the Director General of Railroads during Federal control to the effect that the railroad would pay for a side track to plaintiff's manufacuring plant upon condition that the freight tonnage would amount to a certain quantity, which during Federal control it did not do, will not now lie against the railroad company operating its own road, the required tonnage being now the amount agreed upon, the agent designated by the President (U. S. Compiled Statutes, Cum. Sup. 1925, sec. 10071¼ cc) not having been made a party to the action.

BRICK COMPANY *v.* R. R.

APPEAL by plaintiff from a judgment of nonsuit rendered by *Cowper, Special Judge,* at March Special Term, 1929, of BERTIE. Affirmed.

Winston & Matthews for plaintiff.
M. B. Gillam and McLean & Rodman for defendant.

PER CURIAM. The plaintiff brought suit for $750 alleged to be due by the defendant under a written contract executed by the plaintiff and the Director General of Railroads during the period of Federal control. The defendant denied liability and contended that it was not a party to the contract and that the plaintiff did not comply with the provisions of section ten, which is herein set out. At the close of the evidence the action was dismissed as in case of nonsuit and the plaintiff excepted and appealed.

On 19 November, 1919, the plaintiff, a corporation engaged in the manufacture and sale of bricks, and the Director General of Railroads, operating the Atlantic Coast Line Railroad, entered into a written agreement for the construction, maintenance, use, and operation of a sidetrack at Aulander for the convenient conduct of the plaintiff's business. Section 10 of the agreement is as follows:

"It is hereby mutually agreed that if and when, during Federal control of the railroad of the Atlantic Coast Line Railroad Company, there shall have been delivered to the shipper on or forwarded by the shipper from the sidetrack such a number of cars of carload freight yielding road haul revenue to the railroad as, at the rate of $2.00 per car, will produce a sum equal to the cost of the part of the sidetrack on the right of way or premises of the railroad between the switch point and the clearance point, said cost now being estimated at $750, then the railroad will refund to the shipper the cost of such part of the sidetrack, and thereafter such part of the sidetrack between the switch point and the clearance point shall be maintained by the railroad."

It was provided in the Transportation Act of 1920 that actions at law and suits in equity based on causes of action arising out of the possession, use, or operation of the railroad of any carrier of such character as prior to Federal control could have been brought against such carrier, might, after the termination of Federal control, be brought against an agent designated by the President for such purpose. U. S. Compiled Sts., Cum. Sup., 1925, sec. 10071¼ cc.

The stipulated number of cars were not shipped by the plaintiff from the sidetrack during Federal control; nor did the plaintiff bring suit against the Director General or against the agent appointed by the President. Section 9 of the agreement, on which the plaintiff seems

chiefly to rely, must be construed in connection with section ten; and when so construed it is obvious that the duties referred to in section 9 are those previously set out. Indeed, the "note" appended to section ten and made a part of the agreement shows that preceding provisions were made "subject to the provisions of paragraph 10 hereof." The judgment is

Affirmed.

C. B. HASSELL v. AMERICAN PEANUT CORPORATION.

(Filed 18 September, 1929.)

Contracts F c—Refusal of trial court to submit instruction on counterclaim held erroneous under the facts of this case.

Where, in an action on contract to recover the purchase price of a carload of peanuts sold and delivered, the defendant sets up a counterclaim for damages for the failure of the plaintiff to ship three other carloads of peanuts under an alleged contract, the plaintiff contending that he was the agent for the purchase of the three carloads and not under contract to ship them: *Held*, under the facts of this case, it was error for the trial court to refuse to give the jury instructions upon the counterclaim so pleaded and proven.

APPEAL by defendant from *Small, J.*, at March Term, 1929, of MARTIN.

Civil action to recover $1,212.08, the price of a carload of peanuts shipped to the defendant at Norfolk, Va., on 8 December, 1927, by the plaintiff who is a resident of Martin County, this State.

The defendant admits liability for the peanuts in question, but sets up a counterclaim for $720 because of the plaintiff's alleged failure to deliver three carloads of peanuts sold to the defendant in November, 1927. The defendant tenders judgment for the difference between the plaintiff's claim and its counterclaim.

Plaintiff denies liability for failure to deliver the three cars in November, alleging that he purchased same as agent of the defendant and because of a rising market was not able to secure deliveries from those who agreed to sell to him.

From a verdict and judgment in favor of the plaintiff and denying the defendant any recovery on its counterclaim, the defendant appeals, assigning errors.

B. A. Critcher, A. R. Dunning and Ward & Grimes for plaintiff.
Stanly Winborne and H. W. Stubbs for defendant.

PER CURIAM. Without detailing the evidence, or the long correspondence had between the parties, we are of opinion that a contract of sale for the three carloads of peanuts, as alleged by the defendant in its counterclaim, rather than one of agency, has been established and that the defendant is entitled to have the jury assess its damages for the breach of said contract. The court's refusal so to instruct the jury was error.

New trial.

STATE v. PERCY MILLER.

(Filed 25 September, 1929.)

1. **Arrest B a—Officer making arrest may use force apparently necessary for the purpose.**

An officer of the law in making an arrest is required to execute his warrant by overcoming force with such sufficient force as is apparently necessary under the circumstances to comply with his duty at the time, and in so doing he is regarded in law as rightfully the aggressor.

2. **Homicide B a—Evidence of premeditation held sufficient to sustain verdict of first degree murder in this case.**

Where there is evidence that the prisoner had been engaged in manufacturing intoxicating liquors in violation of statute and had threatened to kill any officer who attempted to arrest him, particularly the deceased, and this threat was made known to the deceased, who was killed by the prisoner in a gun battle on the street while the deceased was attempting to arrest the prisoner under a valid warrant: *Held*, the evidence of deliberation and premeditation is sufficient to sustain a verdict of guilty of murder in the first degree.

3. **Same—Voluntary intoxication to carry out premeditated murder does not mitigate the offense of first degree murder.**

Where one with a previously fixed purpose to kill an officer if the officer attempted to arrest him, voluntarily intoxicates himself to carry out his purpose, or deliberately brings on the difficulty when the officer attempts to arrest him under a valid warrant, and kills the officer according to his previously fixed design, the law will not mitigate the offense, but pronounces his crime murder in the first degree.

4. **Homicide A a—Premeditation and deliberation are the distinctive elements of murder in the first degree.**

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; while murder in the second degree is the unlawful killing of a human being with malice, the presence in one case of premeditation and deliberation being the distinguishing difference between these two grades of an unlawful homicide.

5. Same—Presumptions from use of deadly weapon and burden of showing premeditation necessary for first degree murder.

The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. C. S., 4200.

APPEAL by defendant from *Moore, Special Judge,* May Term, 1929, of BERTIE.

Criminal prosecution, tried upon an indictment charging the defendant with a capital felony, murder in the first degree.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

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

Phillip A. Escoffery for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on Sunday afternoon, 10 February, 1929, the prisoner, Percy Miller, a colored man, shot and killed Patrick White, chief of police of the town of Windsor, Bertie County, while the latter, in the discharge of his duties as an officer, was attempting to arrest the prisoner or to prevent his forcible escape from custody. The defendant, on a number of occasions, sometimes when drinking and others when sober, and once while at a still, had threatened to kill any officer who attempted to arrest him, and several times the deceased was singled out as the object of his threats: "The first time the s-o-b policeman (Patrick White) arrests me, I am going to kill him." And again: "If Sheriff White comes up here (to the still), I would shoot hell out of him." Dewey Smithwick, knowing that a warrant was out for the defendant, asked him "if they wouldn't get him if he went around town now?" His reply was: "I would like to see anybody try to arrest me. I will kill the first s-o-b that does." These threats were communicated to the deceased. About eight or nine minutes before the homicide, the defendant was in the street, in front of Boone's Cafe, apparently under the influence of an intoxicant, with a pistol in his hand, flashing it around, saying that he wanted to kill somebody—some s-o-b. There were no eye-witnesses to the homicide, but from the number of shots heard, the prisoner and the chief of police were apparently engaged in a gun battle, in the middle of the street, when the fatal shot was fired. The deceased was shot in the

heart and died instantly. His pistol was found four steps back of his body. A few minutes before the shooting, the officer was seen holding the defendant by the arm or shoulder, while the prisoner seemed to be in a resisting position.

The prisoner, who testified that he was not drinking on the day in question, tendered a plea of murder in the second degree, but this was not accepted by the State. The appeal, therefore, presents the single question as to whether the evidence tending to show premeditation and deliberation is sufficient to warrant a verdict of murder in the first degree. We think it is. *S. v. McClure,* 166 N. C., 321, 81 S. E., 458; *S. v. Durham,* 141 N. C., 741, 53 S. E., 720; *S. v. Kale,* 124 N. C., 816, 32 S. E., 892.

That the prisoner had premeditated upon the killing, "thought of it beforehand," is amply shown from the threats made against the officer; and where one with a previously fixed purpose to kill, formed while sober, deliberately bringing on a difficulty, or voluntarily intoxicates himself in order to carry out his previously fixed design, and under such circumstances, kills his intended victim, the law will not excuse him or mitigate his offense, but pronounces his crime murder in the first degree. *S. v. Benson,* 183 N. C., 795, 111 S. E., 869; *S. v. Murphy,* 157 N. C., 614, 72 S. E., 1075.

It is in evidence that the officer was within his rights in arresting or attempting to arrest the defendant. *S. v. Robinson,* 188 N. C., 784, 125 S. E., 617. And it is the law of this jurisdiction that forcible resistance to the execution of legal warrants, or lawful arrests, will not be sanctioned. *S. v. Phillips,* 119 Iowa, 652, 67 L. R. A., 292, and note.

Speaking to the subject in *Holloway v. Moser,* 193 N. C., 185, 136 S. E., 375, it was said: "As against those who defy its decrees and threaten violence to its officers, the law commands that its writs be executed, peaceably, if they can; forcibly, if they must. *S. v. Garrett,* 60 N. C., 144. An officer, in making an arrest or preventing an escape, either in case of felony or misdemeanor, may meet force with force, sufficient to overcome it, even to the taking of life, if necessary. *S. v. Dunning,* 177 N. C., 559, 98 S. E., 530. And he is not required, under such circumstances, to afford the accused equal opportunities with him in the struggle. He is rightfully the aggressor, and he may use such force as is necessary to overcome any resistance. He is not bound to put off the arrest until a more favorable time. *S. v. McMahan,* 103 N. C., 379, 9 S. E., 489; *S. v. Gosnell,* 74 Fed., 734. 'His duty is to overcome all resistance, and bring the party to be arrested under physical restraint, and the means he may use must be coextensive with the duty, and so the law is written'—*Black, J.,* in *S. v. Fuller,* 96 Mo., 165. If the offender put the life of the officer in jeopardy, the latter may *se defendendo* slay

him; but he must be careful not to use any greater force than is reasonably and apparently necessary under the circumstances, for necessity, real or apparent, is the ground upon which the law permits the taking of life in such cases. *Head v. Martin,* 85 Ky., 480. It has been said, however, that where officers of the law, engaged in making arrests, are acting in good faith, and force is required to be used, their conduct should not be weighed in golden scales. *S. v. Pugh,* 101 N. C., 737, 7 S. E., 757; *S. v. McNinch,* 90 N. C., 696."

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; while murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. The presence in the one case of premeditation and deliberation and the absence in the other of one or both of these elements is the distinguishing difference between these two grades of an unlawful homicide. *S. v. Benson, supra.*

When on a trial for homicide, a killing with a deadly weapon is admitted or established by the evidence, the law raises two—and only two—presumptions against the slayer: first, that the killing was unlawful; and, second, that it was done with malice; and an unlawful killing with malice is murder in the second degree. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Fowler,* 151 N. C., 731, 66 S. E., 567. The additional elements of premeditation and deliberation, necessary to constitute murder in the first degree, are not presumed from a killing with a deadly weapon. They must be established beyond a reasonable doubt, and found by the jury, before a verdict of murder in the first degree can be rendered against the prisoner. *S. v. Thomas,* 118 N. C., 1113, 24 S. E., 431. It is provided by C. S., 4200, that a murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree, punishable by death, and all other kinds of murder shall be deemed murder in the second degree, punishable by imprisonment in the State's prison. *S. v. Banks,* 143 N. C., 652, 57 S. E., 174; *S. v. Newsome,* 195 N. C., 552, 143 S. E., 187.

The verdict in the instant case is warranted by the evidence, and no sufficient reason has been shown for disturbing the judgment.

No error.

JOE BATTLE v. P. C. SHORE.

(Filed 25 September, 1929.)

Descent and Distribution B b—Wife's illegitimate children take to exclusion of husband's illegitimate child upon a devise to their heirs.

A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. C. S., 1654, Rule 9.

APPEAL by plaintiff from *Barnhill, J.*, at May Term, 1929, of EDGECOMBE. Affirmed.

Action to enforce the specific performance of a contract to convey land. Defendant declined to accept the deed tendered by plaintiff, and to pay the purchase money for said land, on the ground that plaintiff was not the owner of the land which he had contracted to sell and convey to the defendant.

From judgment on the facts admitted in the pleadings, plaintiff appealed to the Supreme Court.

J. P. Bunn for plaintiff.
Spruill & Spruill for defendant.

CONNOR, J. The only question presented by this appeal is whether the plaintiff is the owner of the land which he has contracted to sell and convey to the plaintiff. The facts involved in this question are admitted in the pleadings. Upon these facts, it was adjudged that plaintiff is not entitled to a decree of specific performance.

Plaintiff claims title to the land under the will of Horace Battle, deceased, which has been duly probated and recorded. Horace Battle was the owner in fee and in possession of the land at the date of his death. By his will he devised the land to his wife, Harriet Battle "for the term of her natural life, and after her death to be equally divided between the heirs of Horace Battle and the heirs of Harriet Battle."

Horace Battle left surviving brothers and sisters, and one illegitimate son, Horace Battle, Jr.

Harriet Battle is dead. She left surviving brothers and sisters, and two illegitimate sons, James Battle and plaintiff, Joe Battle.

Both James Battle, illegitimate son of Harriet Battle, and Horace Battle, Jr., illegitimate son of Horace Battle, the testator, by deeds which have been duly recorded, have conveyed all their right, title and interest in and to the land, to the plaintiff, Joe Battle, who contends

that by virtue of said deeds and of the will of Horace Battle, Sr., he is now the owner of said land. This contention cannot be sustained.

Upon the death of Harriet Battle, her sons, James Battle and Joe Battle, although illegitimate, by virtue of the statute, became her heirs. C. S., 1654, Rule 9. *Wilson v. Wilson,* 189 N. C., 85, 126 S. E., 181. Under the will of Horace Battle, they therefore became the owners as tenants in common of an undivided one-half interest in said land. By the deed of James Battle, the plaintiff became and is now the owner of said undivided half interest.

Horace Battle, Jr., although the son of Horace Battle, the testator, was not his heir, for it is admitted that he is illegitimate. He did not, therefore, take any interest in the land under the will, or otherwise. The plaintiff, Joe Battle, acquired no right, title or interest in or to the land by virtue of the deed to him from Horace Battle, Jr. He is, therefore, not the owner of the one-half undivided interest in the land which was devised to the heirs of Horace Battle. As he is the owner of only the one-half undivided interest in the land, which was devised to the heirs of Harriet Battle, he is not entitled to a decree for the specific performance by the defendant of his contract to purchase and pay for the land. The judgment is

Affirmed.

W. S. WOLFE v. THE TOWN OF MOUNT AIRY ET AL.

(Filed 25 September, 1929.)

Taxation A a—Where voters have approved payment of municipal debt a vote on the issuance of bonds therefor is unnecessary.

Where a deficit has accumulated in the running expenses of a public school of a township, and the voters of the township under a valid statute have approved its payment by the township, it is not necessary that the question of the issuance of bonds, authorized by a later statute for paying the indebtedness, be submitted to the voters of the township in order to validate the bonds so issued, the later statute merely prescribing the method by which the former authority should be executed.

APPEAL by plaintiff from *McElroy, J.,* 3 August, 1929, from SURRY.

Controversy without action, submitted on an agreed statement of facts to determine the validity of certain bonds of the town of Mount Airy.

The facts, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

1. Pursuant to the provisions of chapter 37, Private Laws 1927, an election was held in the town of Mount Airy and carried by which the commissioners of said town, among other things, were authorized to

assume and pay off an accumulated deficit or school indebtedness of $35,000, but no reference was made in said act to the manner in which this should be done. Hence, while the indebtedness was approved, the question as to whether bonds should be issued to care for the outstanding deficit which had accumulated in the operation of the public schools over a period of several years, was not submitted to a vote of the people.

2. Thereafter, the Legislature of 1929, Private Laws, ch. 171, without a vote of the people, authorized the commissioners of the town of Mount Airy to issue bonds for the payment of said indebtedness.

3. It is the contention of the plaintiff that as the act of 1927 did not specifically authorize the issuance of bonds to care for said indebtedness, the same has not been approved by a vote of the people—the act of 1929 not being submitted to a vote—and that said proposed bonds are therefore not valid obligations of the town.

From a judgment holding the bonds to be valid, and dismissing the action, the plaintiff appeals, assigning error.

Geo. K. Snow for plaintiff.
Folger & Folger for defendants.

STACY, C. J. Objection is made to the validity of the bonds in question on the ground that the act of 1927, calling for an election, did not specifically authorize the issuance of bonds, though payment of the indebtedness was approved by a majority of the qualified voters. The objection is untenable. *Jones v. Board of Education,* 185 N. C., 303, 117 S. E., 37; *Honeycutt v. Commissioners,* 182 N. C., 319, 109 S. E., 4.

Whatever difference of opinion may be found in the decisions elsewhere, it has been held with us, in a number of cases, that "when the power to incur a debt for necessary expense exists (and we may add when an outstanding indebtedness has been properly approved), there would seem to be no good reason of law to prevent the governing authorities of a town from making provision for the present or ultimate payment of such a debt by issuing bonds for the purpose, if good business prudence and existing conditions are such as to render this course desirable and proper." *Commissioners v. Webb,* 148 N. C., 120, 61 S. E., 670; *Jones v. Commissioners,* 137 N. C., 579, 50 S. E., 291. This was approved in *Bennett v. Commissioners,* 173 N. C., 625, 92 S. E., 603, where *Hoke, J.,* writing the opinion, took occasion to say: "True, we have held in this jurisdiction that when county commissioners have power to contract a debt or to provide for valid debts already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation, the right of taxation therefor being re-

stricted to the constitutional limitations as to debts incurred since the same was adopted," citing as authority for the position, *Commissioners v. Webb,* 148 N. C., 120; *McCless v. Meekins,* 117 N. C., 34; *French v. Commissioners,* 74 N. C., 692; *Johnston v. Commissioners,* 67 N. C., 103.

Under these authorities the trial court correctly held that the act of 1929, authorizing the commissioners to issue bonds for the payment of the indebtedness previously incurred and properly approved, was valid without being submitted to a vote of the people.

The judgment upholding the bonds and dismissing the action will be Affirmed.

NEVER FAIL LAND COMPANY v. S. F. COLE, PAGE TRUST COMPANY AND KYLE MATTHEWS, SHERIFF OF HARNETT COUNTY.

(Filed 25 September, 1929.)

1. Appeal and Error J a—On appeal in injunction proceedings the evidence is reviewable, but the judgment of the lower court is presumed correct.

While the Supreme Court may review the evidence on appeal in injunction proceedings, there remains the presumption that the proceedings and judgment of the lower court are correct with the burden of proof on the appellant to show error.

2. Replevin G b—Notice to principal of motions in action in claim and delivery is notice to the surety on his bond.

The sureties on a replevy bond in claim and delivery are parties of record in an action on the bond before final judgment has been rendered, and notice to the principal on the bond is sufficient notice to the surety of every motion or proceeding made in the ordinary and reasonable purview and compass of the action.

3. Same—After final judgment notice to the principal on bond in claim and delivery of motions therein is not notice to his sureties.

A judgment in claim and delivery proceedings which adjudicate and determine the rights of the parties to the action without reservation of further power by the court to proceed therein is a final judgment, and notice thereafter to the principal on the replevy bond of further proceedings therein on motion of a party, which substantially changes the effect of the judgment, is not notice to the sureties on his bond, the effect of the judgment being to terminate the agency of the principal in such instances, and judgment later rendered on the motion does not affect the liability of the sureties, and as to them it is void.

4. Landlord and Tenant H a—Landlord has right of lien for rents and advancements on crops of his tenant's subtenant.

Where a tenant leases the premises to another who raises a crop thereon, the crops so raised by the subtenant are subject to a lien for advances made to him by his immediate lessor and also to the original lessor or owner of the land, and the latter being a landlord's lien is superior to the lien of the lessor tenant, and the crop is subject to seizure for the payment of rent due to the owner of the land. C. S., 2355.

APPEAL by plaintiff from *Lyon, Emergency Judge,* at April Term, 1929, of HARNETT. Error.

Material facts: This is a proceeding for injunction to restrain Kyle Matthews, the sheriff of Harnett County, from selling approximately 5,736.32 acres of land of plaintiff that he had advertised to be sold on Monday, 4 July, 1927, under an execution on an alleged judgment in favor of S. F. Cole and Page Trust Company *v.* S. J. Cooper and S. S. Puckett and Never Fail Land Company, sureties on a replevy bond signed by them. The plaintiff's contention was to the effect:

(1) That it rented its farm land above mentioned the year 1922 to one S. S. Puckett, who agreed to pay plaintiff one-fourth of all crops raised or caused to be raised on the land in said year and advancements made and expenses incurred in making and saving the crops, and Puckett on said contract was indebted to it in the sum of about $1,600.

(2) That Puckett, without plaintiff's consent, subrented the land to one S. J. Cooper, who is largely indebted to Puckett.

(3) That on 2 January, 1923, the defendant, S. F. Cole, took claim and delivery for "All my (S. J. Cooper's) interest in tobacco grown on the Pine View Farm and Puckett Farm, at least 20 acres grown in tobacco in the year 1922." This was done under chattel mortgage made to S. F. Cole by S. J. Cooper. That under said proceeding the sheriff of Harnett County seized on 2 January, 1923, about 2,500 pounds of tobacco raised on the land plaintiff rented to Puckett; that as landlord it has a lien for rent and advances, and it was the property of plaintiff until said rent and advances were paid.

(4) That S. F. Cooper replevied the said tobacco and S. S. Puckett and J. M. Cooper signed the replevy bond as sureties, and the surety bond was also signed by the plaintiff, Never Fail Land Company, by F. W. Hancock, Jr., president.

(5) That the case of S. F. Cole *v.* S. J. Cooper came on for trial at February Term, 1925, of the Superior Court of Moore County, and the following issues were submitted to the jury, and their answers thereto:

"1. Is the defendant indebted to the plaintiff, if so, in what sum? Answer: Yes, the principal sum of $1,135, with interest from 13 January, 1922.

2. Did the defendant convert to his own use the tobacco described in the complaint, or any part thereof? Answer: Yes.

3. What is the value of the tobacco so converted? Answer: $1,400.

4. What was the value at the time of its seizure of the tobacco seized under claim and delivery and replevied by defendant? Answer: $700."

That the judgment at said term (part material for consideration of the case) was as follows: "It is further decreed, ordered and adjudged, that plaintiff further recover judgment against S. S. Puckett and Pineview Farms Company in the sum of $1,500, the penalty of the replevy bond in this action signed by them as sureties, to be discharged upon the payment of $700, the value of the tobacco replevied as fixed by the verdict of the jury, and the further payment of the costs of this action, to be taxed by the clerk. The judgment had no reservations for other and future directions of the court and transcripts were docketed in Moore and Harnett counties.

(6) That on 29 November, 1926, the plaintiff in the action entitled 'S. F. Cole *v.* S. J. Cooper,' filed a motion in the Superior Court of Moore County to set aside the judgment obtained in the said action at the February Term, 1925, for the purpose of having two additional issues submitted to the jury with respect to the identity of the tobacco seized by the sheriff under the claim and delivery writ and the ownership of said tobacco, to have the judgment resigned upon all the issues answered by the jury against the defendant and his sureties, and to have the judgment pronounced and rendered in favor of S. F. Cole, to the use of the Page Trust Company; that notice of the said motion was served on S. J. Cooper, the defendant in said action, on 29 November, 1926, but that no notice of said motion was served on the plaintiff, Never Fail Land Company; that the said S. J. Cooper accepted service of said notice and consented to the motion being granted.

(7) That in accordance with said motion, the said action of S. F. Cole *v.* S. J. Cooper was reopened at the December Term, 1926, of the Superior Court of Moore County, and the following issues were submitted:

'(1) Was the tobacco seized by claim and delivery in this proceeding and replevied by the defendant with S. S. Puckett and Never Fail Land Company, as sureties, a portion of the tobacco described in the mortgage set out in the complaint? Answer: Yes.

(2) Was the plaintiff the owner and entitled to the possession of all of the tobacco described in the complaint at the beginning of this action by virtue of the chattel mortgage therein described? Answer: Yes.'"

That at the December Term, 1926, of the Superior Court of Moore County, judgment was rendered in the said action, which said judgment is entitled "S. F. Cole (to the use of Page Trust Company) the plaintiff, *v.* S. J. Cooper, defendant." That the said judgment, among other

things, decrees as follows: "It is further decreed, ordered and adjudged, that plaintiff is the owner of the tobacco replevied by defendant with S. S. Puckett and Never Fail Land Company as his sureties on his replevy bond; and that he recover possession of the same; that plaintiff further recover judgment against S. S. Puckett and Never Fail Land Company, as sureties on defendant's replevy bond, the sum of $1,500, the penalty of the replevy bond in this action signed by them as sureties, to be discharged upon the delivery to the plaintiff of the tobacco described or upon the payment of $700, the value of the said tobacco replevied as fixed by the verdict of the jury, and the further payment of the costs of this action, to be taxed by the clerk. It being made to appear that Page Trust Company is the beneficial owner of this judgment, it is ordered that the recovery herein adjudged is for the use and benefit of Page Trust Company."

The defendants, in regard to the judgment at February Term, 1925, in their answer state: "That in drawing the judgment signed, the name of the corporate surety thereon was inadvertently set out as Pine View Farm Company."

Other material facts will be set forth in the opinion.

Marshall T. Spears for plaintiff.
Hoyle & Hoyle for defendants.

CLARKSON, J. This is an injunction proceeding.

In *Hyatt v. DeHart,* 140 N. C., at p. 271, the law as stated: "Ordinarily, the findings of fact by the judge below are conclusive on appeal. While this is not true as to injunction cases, in which we look into and review the evidence on appeal, still there is the presumption always that the judgment and proceedings below are correct and the burden is upon the appellant to assign and show error." *Seip v. Wright,* 173 N. C., 14; *Wentz v. Land Co.,* 193 N. C., 32.

In *Long v. Meares,* 196 N. C., 212-3, speaking to the subject of the principal binding a surety on a replevy bond, the following principle is laid down: "While, of course, it is fully recognized in this jurisdiction that extension of time granted to the principal or other acts which may result in substantial prejudice to the surety will discharge such surety; nevertheless, this principle does not apply to a replevin bond given in a pending suit in conformity with the provisions of the statute. The reason is that, in such cases, sureties on such bonds within the limits of their obligation are considered parties of record, and the defendant, their principal, becomes their duly constituted agent to bind them by compromise or adjustment or in any other manner within the ordinary and reasonable purview and limitation of the action. *McDonald v.*

McBryde, 117 N. C., 125, 23 S. E., 103; *Wallace v. Robinson,* 185 N. C., 530, 117 S. E., 508; *Trust Co. v. Hayes,* 191 N. C., 542, 132 S. E., 466." 2 R. C. L., p. 316.

It appears of record, and is not denied by defendants, that the notice to the principal in the judgment in Cole *v.* Cooper was made 29 November, 1926, and the original judgment was modified some twenty-two months after the rendition of said original judgment, and no notice of such motion was given to the plaintiff, Never Fail Land Company, the surety on the replevy bond.

The question presented for our decision: After a final judgment is rendered in an action against a principal and not against the surety on a replevy bond in claim and delivery, at Fall Term, 1925, can notice to the principal, but not to the surety, to modify the judgment made 29 November, 1926, and judgment taken against the principal and surety at December Term, 1926, some twenty-two months after, be binding on the surety? We think not.

Defendants in their brief say: "There can be no question that the judgment of February, 1925, Term, was a final judgment against Cooper until he consented to amend or correct it." This is true as to Cooper, but his agency as to Never Fail Land Company, his surety, was at an end.

C. S., 592, is as follows: "A judgment is either interlocutory or the final determination of the rights of the parties in the action." A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. *Sanders v. May,* 173 N. C., 47; *Simmons v. Dowd,* 77 N. C., at p. 157; *Polson v. Strickland,* 193 N. C., at p. 301.

In *Bunker v. Bunker,* 140 N. C., at p. 24, the following observations are made: "That this was a final judgment there can be no doubt. It possessed all of the elements and characteristics of such a judgment. It decided the case upon its merits, without any reservation for other and future directions of the court, so that it was not necessary to bring the case again before the court; and when it was pronounced, the cause was at an end and no further hearing could be had. *Flemming v. Roberts,* 84 N. C., 532; *McLaurin v. McLaurin,* 106 N. C., 331."

We think that when final judgment was taken at February Term, 1925, in the case of Cole *v.* Cooper, the agency of Cooper as a principal on a replevy bond to bind his surety was at an end. The judgment was a revocation of agency. 1 Freeman on Judgments (5th ed.), at pp. 340-1, states the matter thus: "In view of the broad power of the court to vacate, alter or amend a judgment during the term at which it was rendered, where that power exists notice would seem to be unnecessary to its valid exercise, and it has been so held. On the other hand, it has

been frequently said that notice should be given of proceedings initiated after the expiration of the term, even to correct a clerical error or to make the record speak the truth. This is certainly true with respect to an amendment in a matter of substance which changes the rights or liabilities of the adverse party. Such a change in a judgment, whereby it is made to grant relief different from that granted when it was rendered, is absolutely void as against a party having no notice of the application to thus amend it."

Plaintiff is standing on its strict legal rights. It was Cole's misfortune to inadvertently name the surety on the bond as Pine View Farm Company, instead of Never Fail Land Company, which was the surety on the bond. We see nothing in the record that estops plaintiff. The fact that it received the proceeds of the tobacco was nothing inequitable. The record discloses that S. J. Cooper was the subtenant of S. S. Puckett, who was the tenant of the Never Fail Land Company. The referee found "that the said tobacco so seized was raised by the said S. J. Cooper on the said lands so leased during the year 1922; that the said S. J. Cooper is indebted to the said S. S. Puckett, as his landlord, in the sum of $509.91 for rents and advancements for the year 1922; and that the said S. S. Puckett is indebted to the Never Fail Land Company as his landlord, in the sum of approximately $1,600 for rents and advancements for the year 1922."

The landlord's right to the crop to secure payment of rent is not impaired by the subletting of his tenant. The subtenant's crop may thereby be subjected to a double lien, that of the landlord and that of his immediate lessor, but the lien of the landlord is paramount. *Montague v. Mial,* 89 N. C., 137; *Moore v. Faison,* 97 N. C., 322, 324; *S. v. Crook,* 132 N. C., 1053, 1054. C. S., 2355.

In *Crook's case, supra,* any one aiding or abetting the subtenant in removing the crops from the land before the landlord's lien is paid, is guilty of a misdemeanor. The intent is immaterial. C. S., 2362.

The fact that the Never Fail Land Company did not intervene in the action of Cole *v.* Cooper is no estoppel under the facts disclosed in this case. The principal in a replevy bond may be deemed a statutory agent for the surety, and like any other agent, is bound to exercise the utmost good faith towards his surety; this is common honesty as well as law. In law as in morals "It may be stated that as a principle no servant (the agent) can serve two masters, for either he will hate the one and love the other or else he will hold to the one and despise the other." Luke XVI: 13, 21 R. C. L., at p. 827.

Cooper could have set up the superior lien of the landlord Puckett and the Never Fail Land Company, against the claim of Cole. The chattel mortgage of Cooper said "all my interest," etc. He could not,

and did not, give a lien superior to the landlord's. The referee found that Puckett owed the Never Fail Land Company approximately $1,600 for rent and advances. Cooper, under the Landlord Act, although a subtenant of Puckett, was bound for Puckett's rent and advances, which amounted to $1,600. Under all the evidence of record, it shows that the chattel conveyance to Cole, "all my interest," etc., amounted to nothing if the landlord's liens were paid.

The 2,500 pounds of tobacco seized was worth $700, according to the verdict of the jury, and judgment of the court at February Term, 1925. If the Never Fail Land Company got that amount, as found by the referee, it only got a part of what it was entitled to under the law. The law may be hard that the landlord can take the subtenant's crop for the tenant's rent and advances, but it is so written, and has long been the settled law of this jurisdiction.

On all the facts appearing of record, we think the injunction should have been made perpetual. For the reasons given, there is

Error.

W. S. RHODES AND D. G. MATTHEWS, TRADING AS SLADE, RHODES & COMPANY, v. HENRY TANNER, JOE PURVIS, AND HIS WIFE, LUCY PURVIS, JAMES R. PURVIS, ANNIE LEE PURVIS, ERNEST T. PURVIS, BOOKER T. PURVIS, OLLIE V. PURVIS, JOE PURVIS, JR., AND WHEELER MARTIN, GUARDIAN AD LITEM OF THE SIX DEFENDANTS LAST NAMED, WHO ARE MINORS.

(Filed 25 September, 1929.)

1. Appeal and Error G b—Exceptions not discussed in briefs are deemed abandoned on appeal.

Exceptions upon the trial and taken in the record on appeal are abandoned when they are not discussed in appellant's brief. Rule 28.

2. Fraudulent Conveyances A j—In action to set aside deed the innocence of grantees not material when they gave no consideration.

Where a father having a remainder in land after a life estate conveys by deed his interest in the land to his children, and in an action to set aside the deed for fraud against a creditor of the father the jury finds that there was no consideration for the deed, the fact that the children were not of sufficient age to have participated in the fraud is immaterial.

3. Limitation of Actions B b—Registration of deed for over three years does not bar action to set it aside under facts of this case.

The mere fact that a deed sought to be set aside by a creditor for fraud had been registered more than three years next preceding the time of action commenced is not alone sufficient to bar an action by a creditor to set it aside for fraud when the debtor remained in continuous possession

as owner and at the time of mortgaging the land to the creditor to secure a note given for the debt the debtor falsely represented that there were no encumbrances on his title, under such circumstances it not being required that the creditor receiving the mortgage search the record in the office of the register of deeds, there being nothing to put an ordinarily prudent man upon inquiry, and the question of imputed notice under the circumstances is for the jury. C. S., 441, sec. 9.

APPEAL by defendants other than Henry Tanner from *Moore, Special Judge,* at April Term, 1929, of MARTIN. No error.

Action to have two certain deeds executed by defendant, Joe Purvis, the first conveying the land described therein to the defendant, Henry Tanner, and the second conveying the same land to the other defendants, the wife and children of Joe Purvis, adjudged null and void, for that both said deeds were executed without consideration, and with the purpose to hinder, delay and defraud the plaintiffs, to whom the said Joe Purvis was indebted at the date of each deed.

The deed to defendant, Henry Tanner, was executed on 4 March, 1920; the deed to the other defendants was executed on 28 March, 1921. Both deeds were duly and promptly recorded. This action was begun against defendants, Henry Tanner and Joe Purvis on 14 May, 1926, against the defendant, Lucy Purvis, on 11 September, 1928, and against the other defendants on 4 December, 1928. Defendants other than Henry Tanner and Joe Purvis were made parties by an order entered while the action was pending.

The issues submitted to the jury were answered as follows:

1. In what amount, if any, was defendant, Joe Purvis, indebted to plaintiffs on 4 March, 1920? Answer: $1,547.57.

2. Was the deed from Joe Purvis and wife to Henry Tanner given for the purpose of delaying, hindering and defrauding plaintiffs in the collection of said debt, as alleged in the complaint? Answer: No.

3. Did the defendant, Henry Tanner, have notice of and participate in such fraudulent intent? Answer: No.

4. Is the action of plaintiffs barred by the statute of limitations? Answer: No.

5. In what amount, if any, was defendant, Joe Purvis, indebted to plaintiffs on 28 March, 1921? Answer: $3,096.89.

6. Was the deed from Joe Purvis to his wife and children given for the purpose of hindering, delaying and defrauding plaintiffs in the collection of said debt? Answer: Yes.

7. Did the defendants, Lucy Purvis and children, have knowledge of and participate in such fraudulent intent? Answer: Yes.

8. Is the action of plaintiffs barred by the statute of limitations? Answer: No.

In accordance with the verdict, judgments were rendered declaring that the deed from Joe Purvis and his wife to defendant, Henry Tanner, is valid, and that the deed from Joe Purvis to defendants, Lucy Purvis and her children, is null and void.

From the last judgment defendants, other than Henry Tanner, appealed to the Supreme Court.

B. A. Critcher and Elbert S. Pell for plaintiffs.
A. R. Dunning and S. J. Everett for defendants.

CONNOR, J. In 1911 the defendant, Joe Purvis, Simon Brown and Bennett Staton purchased a tract of land in Martin County containing about 100 acres. This land was conveyed to them as tenants in common. They paid only a part of the purchase money in cash; they executed their notes for the balance. In 1919, the notes for the balance of the purchase money having been paid, the land was divided among the three tenants in common. Lot No. 3, containing about 33 acres, was allotted to defendant, Joe Purvis, as his share of the land.

Since 1911 the defendant, Joe Purvis, has been a customer of the plaintiffs, who are merchants, engaged in business at Hamilton, in Martin County. Plaintiff knew that the land which defendants, Joe Purvis, Simon Brown and Bennett Staton had purchased in 1911, was conveyed to them as tenants in common, and that the land was divided in 1919. They knew that Lot No. 3 was allotted to Joe Purvis as his share of said land. During the years 1918, 1919 and 1920, plaintiffs made advancements to Joe Purvis to enable him to cultivate the said land. These advancements were secured by liens on the crops grown on said land, and by chattel mortgages executed by Joe Purvis. He failed to pay the amount due for said advancements, and on 4 March, 1920, was indebted to plaintiffs on account of said advancements in the sum of $1,547.57. After said date, further advancements were made by plaintiffs to defendant, Joe Purvis. The total amount due by him to plaintiffs on 28 March, 1921, was $3,096.89. No part of this amount has been paid.

On 30 March, 1921, plaintiffs secured judgments in a court of a justice of the peace of Martin County against Joe Purvis for a portion of his indebtedness to them, to wit, $1,700. On 9 February, 1922, plaintiffs caused executions to be issued on these judgments. While these executions were in the hands of the sheriff, as the result of negotiations between the defendants, Joe Purvis and his wife, Lucy Purvis, and the plaintiffs, the said Joe Purvis and wife executed a deed of trust, by which they conveyed to plaintiffs the land which had been allotted to Joe Purvis, and on which he then resided with his family. This deed of trust se-

cured eight notes executed by Joe Purvis and wife, payable to plaintiffs, aggregating the amount of the indebtedness of Joe Purvis to plaintiffs, to wit, $3,096.89. Plaintiffs accepted these notes in satisfaction of said indebtedness and thereby extended the time for the payment of the same. The deed of trust was duly recorded. During the negotiations which resulted in the acceptance by plaintiffs of said notes, in response to inquiries made by plaintiffs, defendant, Joe Purvis, represented that there was no claim on said land. At the date of said deed of trust, Joe Purvis was in possession of the land conveyed thereby. He has since at all times remained in such possession. Joe Purvis has paid the interest due on said notes for the years 1923 and 1924. He has made no other or further payments on said notes.

On 4 March, 1920, Joe Purvis and his wife, Lucy Purvis, conveyed the land allotted to him in the division among the tenants in common in 1919, to the defendant, Henry Tanner. This deed was duly recorded. Henry Tanner is the father of Lucy Purvis and the father-in-law of Joe Purvis. There was evidence tending to show that at the date of said deed, Joe Purvis was indebted to Henry Tanner for money advanced to him to enable him to pay part of the purchase money for the land, and that the deed was executed to Henry Tanner, conveying the land to him for his life, in payment of the indebtedness, and pursuant to an agreement between the said Joe Purvis and the said Henry Tanner at the time the money was advanced. The jury found from this evidence, under instructions which are free from error, that this deed from Joe Purvis and wife to Henry Tanner was not executed with a fraudulent intent. There was evidence to show that plaintiffs had no actual knowledge of this deed until within three years prior to the commencement of this action. Plaintiffs have not appealed from the judgment on the verdict declaring that this deed is valid. The deed of trust under which plaintiffs claim is therefore subject to the life estate of Henry Tanner in the land conveyed thereby.

On 28 March, 1921, Joe Purvis conveyed the land allotted to him in the division among the tenants in common to the defendants, Lucy Purvis and her children. This deed was duly and promptly recorded. There was evidence tending to show that at the time Henry Tanner advanced the money to Joe Purvis to enable him to pay the purchase money for the land he agreed, upon the demand of Henry Tanner, to convey the land to Henry Tanner for life and at his death to Lucy Purvis and her children, and that when Henry Tanner discovered on or about 28 March, 1921, that Joe Purvis had only conveyed to him, by the deed dated 4 March, 1920, a life estate in said land, and had not conveyed the remainder to his daughter, Lucy Purvis and her children, he demanded that Joe Purvis execute another deed, making such con-

veyance, and that the deed dated 28 March, 1921, was executed by Joe Purvis in compliance with this demand of Henry Tanner. Defendants relied upon his evidence to sustain their contention that the deed of 28 March, 1921, was for consideration, and was not executed with fraudulent intent, as alleged by plaintiff. These contentions were submitted to the jury under instructions which are in accord with the law as declared in decisions of this Court. *Aman v. Walker,* 165 N. C., 224, 81 S. E., 162. We find no error with respect to the trial of the 5th, 6th or 7th issues which involve the validity of the deed from Joe Purvis to defendants, Lucy Purvis and her children. Exceptions in the record pertinent to these issues are not set out in defendant's brief filed in this Court, nor are these exceptions discussed in the brief. They are therefore taken as abandoned. Rule 28. Defendants rely solely upon exceptions with respect to the 8th issue and contend on their appeal to this Court that plaintiffs' cause of action, having accrued more than three years prior to the commencement of this action against them, is barred by the statute of limitations. C. S., 441.

The deed from Joe Purvis to Lucy Purvis and her children were executed and recorded on 28 March, 1921. The jury has found that this deed was executed with intent to hinder, delay and defraud plaintiffs, who were at its date creditors of Joe Purvis in a large sum, and that the defendants, Lucy Purvis and her children, had knowledge of and participated in such fraudulent intent. If the deed was without consideration, as the jury evidently found, under instruction of the court, the answer to the 7th issue is immaterial. Therefore, the fact that the children of Lucy Purvis were all under the age of nine years, at the date of the execution of the deed to them, and for this reason incapable of participating in the fraud of their father and mother, presents no difficulty. *Aman v. Walker, supra.*

This action, however, was begun as against the defendant, Lucy Purvis, on 11 September, 1928, and as against the other defendants, her children, on 4 December, 1928. More than three years had elapsed from the date and registration of the deed to the date of the commencement of action against these defendants, and if the plaintiffs' cause of action accrued at the date of the fraud, the action is barred. The statute provides, however, that the cause of action "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." C. S., 441, sec. 9. All the evidence was to the effect that plaintiffs did not discover the fraud until some time in 1927. Defendants contend, however, that upon all the evidence it should be held as a matter of law that plaintiffs, by the exercise of reasonable diligence and ordinary business prudence should have discovered the fraud, within three years from the date of the deed, or at least more than three years

prior to the commencement of this action, by examining the records in the office of the register of deeds of Martin County, and that therefore the action is barred by the statute of limitations. This contention is presented by their assignment of error based upon their exception to the refusal of their motion for judgment as of nonsuit.

In *Ewbank v. Lyman,* 170 N. C., 505, 87 S. E., 348, a judgment of nonsuit was affirmed, upon the ground that all the evidence tended to show that the action was barred by the statute of limitations. Plaintiff's contention in that case that she had not failed to exercise reasonable diligence and ordinary business prudence to discover the fraud was not sustained, and it was held that her cause of action accrued more than three years before the commencement of her action. In that case it is said: "The authorities seem to hold, as plaintiff contends, that the three years statute is the law properly applicable to the facts presented. *Tuttle v. Tuttle,* 146 N. C., pp. 484-493; *Hooker v. Worthington,* 134 N. C., 283; *Day v. Day,* 84 N. C., 408; but the position of plaintiff concerning it cannot be sustained, for under authoritative decisions here and elsewhere construing this and similar statutes, it has been very generally held that these words, 'the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud,' etc., by correct interpretation mean until the impeaching facts were known or should have been discovered in the exercise of reasonable business prudence."

It is true that in the instant case the deed from Joe Purvis to his wife, Lucy Purvis, was recorded on 28 March, 1921, and that at this date plaintiffs were creditors of Joe Purvis. Joe Purvis, however, remained in possession of the land conveyed by the deed. There was nothing to put plaintiffs on notice of the fraudulent execution of the deed, or to require them as prudent business men to examine the records, and thus discover that the deed had been made. The deed was on record on 10 February, 1922, when Joe Purvis and his wife executed the deed of trust to plaintiffs; Joe Purvis, however, at the date of the deed of trust represented that there was no claim on the land. He was then in possession of the land, just as he had been since the land was allotted to him in the partition of the tract of land which had been conveyed to him and his cotenants in 1911. It cannot be held as a matter of law that upon the facts appearing from the evidence in this case, plaintiffs failed to exercise reasonable diligence and ordinary business prudence and, therefore, failed to discover the fraud more than three years prior to the date of the commencement of this action. The contentions of the parties with respect to this phase of the case were properly submitted to the jury. *Morrison v. Hartley,* 178 N. C., 618, 101 S. E., 375. The jury found from the evidence, under instructions of the court, that plaintiffs

had no actual notice of the fraud until some time within three years prior to the commencement of the action, and that there was no lack of diligence or reasonable business prudence on the part of plaintiffs in failing to discover the fraud at an earlier date. Upon this finding the action was not barred by the statute of limitations.

The judgment is affirmed. There is

No error.

CONCRETE STEEL COMPANY v. W. P. ROSE ET AL.

(Filed 25 September, 1929.)

Appeal and Error J e—Where ruling excepted to does not harm appellant a new trial will not be granted.

A new trial will not be granted on appeal when the action of the trial judge excepted to can by no possibility injure the appellant.

APPEAL by defendant, W. P. Rose, from *Grady, J.*, at April Term, 1929, of WAYNE.

Civil action to recover for steel fabricated by plaintiff and sold to the contractor for use in the construction of the Wilson County courthouse.

It is conceded that the general contractor, W. P. Rose, is liable to the plaintiff for the value of the steel fabricated and used in the construction of said courthouse. The only question in dispute is whether the plaintiff is liable to the contractor on his counterclaim for damages sustained by him on account of a change in the plans, necessitating less steel and more concrete than called for in the original drawings, which change was approved by the supervising architect, F. A. Bishop. The general contractor alleges that he was not notified of the change until it was too late to protect himself from loss. The trial court was of the opinion, and so held, that any claim which the general contractor may have for additional concrete would not be chargeable against the plaintiff, and rendered judgment accordingly.

No cause of action being stated against the other defendants, demurrers interposed by them were sustained.

The defendant, W. P. Rose, appeals, assigning errors.

Langston, Allen & Taylor for plaintiff.
Kenneth C. Royall and W. A. Finch for defendant.

PER CURIAM. Conceding, without deciding, that the judgment may have been irregularly entered, still it appears that the correct result has

been reached, and no harm can come from allowing the judgment to stand. Such was the course pursued in *Rankin v. Oates,* 183 N. C., 517, 112 S. E., 32. It would seem that as the appealing defendant is not entitled to recover against the plaintiff on his counterclaim, any error committed on the trial was harmless. *Cherry v. Canal Co.,* 140 N. C., 422, 53 S. E., 138. "A new trial will not be granted when the action of the trial judge, even if erroneous, could by no possibility injure the appellant." *Butts v. Screws,* 95 N. C., 215.

The action of the trial court in dismissing the counterclaim and awarding judgment in favor of the plaintiff will be upheld.

Affirmed.

J. T. NELSON v. FLORENCE MOORE NELSON.

(Filed 25 September, 1929.)

1. Appeal and Error J e—Error, if any, in the admission of certain evidence is cured by testimony of objecting party to same effect.

Objections to the admission in evidence of the contents of a letter alleged to have been lost upon the ground that a proper search for it had not been made is untenable when the objecting party has testified to the contents thereof on cross-examination.

2. Divorce D e—Instruction in this action for divorce held not to be at variance with provisions of C. S., 1662.

In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of C. S., 1662.

APPEAL by defendant from *Daniels, J.,* at March Term, 1929, of PITT. No error.

W. J. Bundy and Julius Brown for plaintiff.
Harding & Lee and Walter G. Sheppard for defendant.

PER CURIAM. The plaintiff brought suit against the defendant for divorce *a vinculo matrimonii,* alleging that they had been legally married; that the defendant had voluntarily left him; that they had lived separate and apart from each other since May, 1922; that he had continuously resided in the State since the separation, and that he is the injured party. The defendant filed an answer admitting the marriage and separation, denying that the plaintiff is the innocent party, and alleging that the separation was caused by the plaintiff's cruel and in-

humane conduct. Issues relating to the marriage, the separation, the plaintiff's residence, and the question of his innocence were answered in favor of the plaintiff. Judgment was rendered dissolving the bonds of matrimony, and the defendant appealed upon error assigned in her exceptions.

The complaint is based upon C. S., 1659, subsection 4, the action having been instituted before the enactment of chapter 6, Public Laws 1929.

The plaintiff was permitted to testify to the contents of a letter, said to have been lost, written him by the defendant to the effect that she "had gone home for good"; and the defendant excepted on the ground that there was no satisfactory evidence that a bona fide and diligent search had been made for the missing paper. Granting for the purpose of the argument, without deciding, that this position is correct, the objection is met by the defendant's admission in her testimony of the specific fact to which the plaintiff bore witness. The defendant said, "I wrote the letter referred to by Mr. Nelson and told him I was gone for good unless there was a change." It is immaterial that this was brought out on her cross-examination; it was not incompetent under the provisions of C. S., 1801.

The charge in reference to an admission of counsel that the evidence was sufficient to justify an affirmative answer to the issues involving marriage, separation, and residence, is not, in our opinion, at variance with the provisions of C. S., 1662. The judge did not direct a finding of the fact, but told the jury that the evidence was sufficient to warrant an affirmative finding. The third issue, which really determined the controversy, was submitted under proper instructions.

No error.

N. R. SKINNER v. C. C. COWARD, J. K. WORTHINGTON AND N. W. CLARK.

(Filed 2 October, 1929.)

1. *Negligence* H l—Subsequent judgment creditor must bring independent action to subject surplus after foreclosure to payment of debt.

Where the plaintiff has obtained a judgment in the court of a justice of the peace, and has had it recorded in the Superior Court, his remedy to have the surplus after the foreclosure of a prior mortgage subjected to the payment of the judgment is by independent action against the parties interested in the fund, and not by motion in the original cause to make the mortgagee show cause why this should not be done.

2. Same—Mortgagee is not fixed with notice of subsequent judgment in distributing surplus after foreclosure.

A mortgagee who has foreclosed his mortgage on lands and has a surplus beyond the mortgage debt is not required to search the record and is not fixed with notice of an existing judgment against the mortgagor duly recorded subsequent to the registration of the mortgage, and after a time he is presumed to have distributed the surplus according to law, and actual notice by the judgment creditor of the existence of the judgment, given seven years after the foreclosure sale, will not fix the mortgagee with liability therefor.

3. Mortgages H m—Purchaser at foreclosure sale takes title unaffected by judgment against mortgagor docketed after registration of mortgage.

The purchasers of land at a foreclosure sale of a mortgage thereon acquire title free from the lien of a judgment docketed subsequently to the proper registration of the mortgage.

APPEAL by plaintiff from *Midyette, J.*, at August Term, 1929, of PITT. Affirmed.

The following facts were found by the judge, trial by jury having been waived: On 15 November, 1920, C. C. Coward executed and delivered to N. W. Clark a mortgage on a certain tract of land in Pitt County to secure the payment of $1,000, and on the same day the mortgage was duly registered and indexed. The plaintiff recovered a judgment against the defendant, Coward, for $150, with interest, before a justice of the peace, on 29 January, 1921, and caused the judgment to be docketed in the office of the clerk of the Superior Court on the day it was secured. On the same day, 29 January, 1921, Coward and his wife conveyed the mortgaged land to J. K. Worthington, and inserted in the deed the following clause: "There is a claim against this land for one thousand dollars to N. W. Clark, which the said J. K. Worthington hereby assumes." This deed was registered 19 September, 1921. J. K. Worthington gave Coward a note for $700 and secured it by a mortgage on the land, which was duly recorded. Worthington failed to pay Clark the debt he had assumed, and on 27 December, 1921, the mortgage was foreclosed by a public sale, when J. T. and H. A. Worthington became the purchasers of the land at the price of $1,280. Thereupon Clark, as mortgagee, and the Bank of Craven, as his assignee, made the purchasers a deed dated 10 January, 1922, and registered 4 February, 1922. On 4 May, 1927, a motion purporting to have been made in the case of N. R. Skinner *v.* C. C. Coward was filed in the clerk's office, and a notice was issued to J. K., J. T., and H. A. Worthington to show cause why the land which had been mortgaged to Clark should not be sold to satisfy the plaintiff's judgment. Answering the notice they denied that the judgment was a lien on the land sold under the mortgage and denied that

they were responsible for the judgment or under any obligation to pay it. On 8 April, 1929, an amended petition was filed and Clark was notified to appear and show cause why the judgment should not be paid from the surplus remaining after the payment of his claim, which was admitted to be the first lien. The note and mortgage held by Clark had been assigned and transferred to the Bank of Craven and were in its hands when the sale was made under the Clark mortgage. It was contended by the plaintiff and denied by the defendant that there was a surplus of $170, but as to the exact amount there is no finding. Clark entered a special appearance and moved to dismiss on the ground that the plaintiff's relief, if he was entitled to relief, was by an independent action and not by a motion in the cause; and, reserving his rights under the special appearance, denied the plaintiff's right to relief and pleaded the three and the seven-year statute of limitations. The plaintiff alleged that on the day the land was sold under the mortgage he notified Clark of his judgment and of his claim to be paid out of the surplus; but Clark denied this, and there is no finding of fact in reference to the dispute.

Upon these facts Judge Midyette held that the plaintiff had no cause of action against the Worthingtons, and that his remedy against Clark, if he had one, was by an independent action, and that as to Clark the cause was barred by the statute of limitations. The plaintiff excepted and appealed.

S. J. Everett for plaintiff.
F. G. James & Son for J. K. Worthington.
S. O. Worthington for N. W. Clark.

ADAMS, J. It is important to note that the plaintiff seeks relief against all the respondents by a motion made before the clerk, presumably because the judgment recovered before a justice of the peace had been entered on the judgment docket of the Superior Court. The only parties to the judgment were N. R. Skinner as plaintiff and C. C. Coward as defendant. When the plaintiff made his motion he issued a notice to J. K. Worthington, and to Worthington's two sons who had purchased the land at the foreclosure sale, to show cause why the land should not be sold to satisfy the judgment. This notice did not make them parties to the original action. Afterward he issued a notice to N. W. Clark, mortgagee, to show cause why the plaintiff's judgment against Coward should not be paid out of the excess remaining after liquidation of the mortgage debt. The question raised by the appeal is whether the plaintiff is entitled to relief against the respondents or any of them in this proceeding.

First, then, as to Clark: As Coward's mortgagee he was also a trustee for the two-fold purpose of securing payment of the mortgage debt and of accounting for the excess to the mortgagor. *Kornegay v. Spicer,* 76 N. C., 95; *Vick v. Smith,* 83 N. C., 80; *Bobbitt v. Stanton,* 120 N. C., 253. But he assigned and transferred the note and mortgage to the Bank of Craven and the bank thereby became the owner. It became also a trustee. When the sale was made under the terms of the mortgage the deed was executed by Clark and by the bank. There is no finding that the purchase money was paid to Clark. We cannot assume that payment was made to him, because after the assignment he had no pecuniary interest in the proceeds. In the absence of a finding or admission that the money was paid to him we do not perceive how he can be liable to the plaintiff for the excess. But suppose he received the money; he would not be liable to the plaintiff for nonpayment of the excess for the reason that he had neither actual nor constructive knowledge of the plaintiff's judgment. He was under no obligation as mortgagee to examine the records for subsequent encumbrances before paying the surplus to the mortgagor in accordance with the terms of the mortgage. *Norman v. Hallsey,* 132 N. C., 6; *Barrett v. Barnes,* 186 N. C., 154; Jones on Mortgages (7 ed.), sec. 1930. The notice was served on Clark more than seven years after the sale had been made and the deed had been executed to the purchasers; meantime if he received the money he is presumed to have discharged his obligation to pay the surplus to the mortgagor or to the owner of the equity of redemption. 22 C. J., 146, sec. 82. It is therefore contended that the plaintiff's claim against Clark is without merit.

As to the purchasers it is apparent that they were strangers to the plaintiff's judgment; that between him and them no contractual relation existed; and that J. K. Worthington's assumption of the mortgage debt, or his failure to pay it, did not make him liable to the plaintiff as a subsequent judgment creditor. The sale under the first mortgage conveyed title to the purchasers, leaving the plaintiff to seek relief by an appropriate method for subjecting the surplus to the payment of his claim.

But the plaintiff has not chosen the appropriate remedy; he should have sought relief, not by a motion before the clerk, but by an action brought in the Superior Court in which all who were interested in the fund could have been made parties and given an opportunity to be heard. This procedure is discussed and clearly determined and approved in *Norman v. Hallsey, supra.* It is only by an independent action that the points raised in the appellant's brief could finally be settled.

The judgment dismissing the proceeding is

Affirmed.

EDWARD ALSTON v. COUNTY OF WARREN.

(Filed 2 October, 1929.)

Taxation B a—Note secured by title retaining contract of sale of timber is subject to taxation as a solvent credit.

Where the grantors in a timber deed retain title as security for the payment of the purchase price, and the deed provides for payment as the timber is cut and removed and for the execution of notes for the deferred payments which were to be unaffected by failure to cut and remove the timber: *Held*, the notes thus given, being unconditional promises to pay money are solvent credits and subject to taxation under the provisions of chapter 102, Public Laws 1925, chapter 71, Public Laws 1927, providing for the taxation of solvent credits under the authority of our State Constitution, Art. V, sec. 3.

APPEAL by plaintiff from *Barnhill, J.*, at January Term, 1929, of WARREN. Affirmed.

Action to recover sums of money paid by the plaintiff under protest to the defendant, the sheriff of Warren County. These sums of money were paid in discharge of taxes levied upon certain notes owned by plaintiff on 1 May, 1926, and 1 May, 1927. These notes were assessed for taxation, as solvent credits.

Plaintiff alleged that said notes were not solvent credits, and that they were, therefore, not subject to taxation.

From the judgment upon the facts agreed, that plaintiff take nothing by his action, and that he pay the costs to be taxed by the clerk, plaintiff appealed to the Supreme Court.

Murray Allen for plaintiff.

S. G. Daniel & Son, Williams & Banzet and Garland B. Daniel for defendant.

CONNOR, J. The only question presented by this appeal is whether there is error in the judgment rendered by the Superior Court, to which plaintiff duly excepted. This judgment was rendered in accordance with the opinion of the court that upon the facts agreed the notes executed by Adams & Graham, Inc., and owned by the plaintiff, a resident of Warren County, North Carolina, on 1 May, 1926, and 1 May, 1927, were solvent credits, and, therefore, subject to assessment for taxation, under the laws of this State.

The Constitution of this State provides that "laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and, also, all real and personal property, according to its true value in money." Section 3,

Article V, Const. of N. C. The General Assembly has from time to time enacted laws in accordance with this provision; such laws were in full force and effect on 1 May, 1926, and 1 May, 1927. Chapter 102, Public Laws 1925; chapter 71, Public Laws 1927. In each of these statutes the word "credits," as used therein, is defined as including "every claim or demand for money, labor, interest or valuable things, due or to become due, including money on deposit." Credits, as thus defined, are subject to assessment for taxation in the township in which the owner resides. It has been held by this Court that solvent credits are property, and like all other property are liable to taxation under our Revenue Laws. *Lilly v. Commissioners,* 69 N. C., 300. A note upon which the maker is personally liable for the payment of a sum of money to the holder, whether the note is due or to become due, or whether it is secured or unsecured, is a solvent credit, and as such is liable to taxation, under the Constitution and laws of this State.

The notes involved in this case were executed by Adams & Graham, Inc., and were owned by the plaintiff on 1 May, 1926, and 1 May, 1927. They were evidences of deferred payments, for which the said Adams & Graham, Inc., were liable to plaintiff, under the terms of a deed by which plaintiff and his sister had conveyed to the said Adams & Graham, Inc., certain timber, on land situate in Warren County, together with the right and privilege to enter upon said land and to cut and remove therefrom the said timber, at any time during a period of eight years from and after 6 March, 1926. The purchase price for the timber and rights and privileges conveyed by the said deed was paid, partly, in cash; it was agreed that the balance should be paid in sums and at dates set out in the deed, and that the deferred payments should be evidenced by notes. The notes owned by plaintiff and assessed for taxation were executed in accordance with this agreement.

The deed contains the following clauses:

"It is the purpose and intent of the parties hereto, and it is expressly understood that the timbers, right and privilege hereby conveyed shall be retained by the parties of the first part to secure and assure the payment of the notes mentioned herein, but the title to the timber cut and manufactured from such timbers shall be released in quantities equal to the payment then made under this contract upon the basis of $10 per thousand feet."

"Failure to cut and remove said timber within the time specified shall not in any way impair the validity of the notes given nor affect the liability of the makers thereof."

The effect of these clauses in the deed, construed in accordance with well settled principles and authoritative decisions of this Court, was, at most, to retain the legal title to the timber, and the rights and privileges

described therein, in the grantors, for the sole purpose of securing the payment of the notes executed by the grantee as evidence of its indebtedness to the grantors, and of its obligation to pay the balance due on the purchase price. *Stevens v. Turlington,* 186 N. C., 191, 119 S. E., 210, 32 A. L. R., 870. The notes, although thus secured, are clearly solvent credits, within the meaning of the statutes and of the Constitution of this State, and as such are liable to assessment for taxation. See *Rampton v. Dobson,* 156 Iowa, 315, 136 N. W., 682, 3 A. L. R., 569. In the instant case the deed is not an option to purchase, or a contract to sell; it is a conveyance of the property described therein, and passed title thereto to the grantee at the date of its execution. The grantee is liable for the payment of the balance due as the purchase price, in all events. The owner of the notes executed as evidences of the deferred payments to be made by the grantee, in accordance with the terms of the deed, has a claim or demand for money, which he may enforce against the maker. The notes are solvent credits, and as such are liable for taxation.

There is no error in the judgment, which is therefore

Affirmed.

GEORGE B. GREENE, COMMISSIONER OF COURT, v. H. STADIEM ET UX.

(Filed 2 October, 1929.)

1. Evidence A a—Judicial notice will be taken of appointment of special judge.

The Supreme Court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of chapter 137, Public Laws 1929.

2. Controversy without Action A a—Special judge is without jurisdiction to hear controversy when not holding term of court.

A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the provisions of C. S., 626, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, sec. 11; Public Laws 1929, ch. 137, and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed.

APPEAL by defendants from *Cowper, Special Judge,* at Chambers in Kinston, 18 May, 1929. From LENOIR.

Controversy without action, submitted as follows:

"The plaintiff and the defendants, having a question in difference which might be the subject of a civil action, agree upon the following

statement containing the facts upon which the controversy depends, and present a submission of the same to the court, as provided in section 626 of the Consolidated Statutes of North Carolina, and do hereby stipulate and agree that G. V. Cowper, judge of the Superior Court of North Carolina, residing in Kinston, may hear this controversy without action at Chambers in Kinston, and render judgment herein."

From the judgment rendered on the facts agreed, the defendants appeal.

Sutton & Greene for plaintiff.
F. E. Wallace for defendants.

STACY, C. J. The Court will take judicial notice of the fact that Hon. G. V. Cowper is one of the Special Judges appointed by the Governor under authority of chapter 137, Public Laws 1929. *Gross v. Wood,* 117 Md., 362, Ann. Cas., 1914A, 30, and note; 15 R. C. L., 1106. It is not suggested that he was designated or commissioned by the Governor to hold a regular or special term of the Superior Court of Lenoir County during the week of 18 May, 1929, when the judgment in the instant case was signed, but the contrary has been made to appear by certificate from the clerk of the Superior Court of said county. Indeed, the judgment on its face purports to have been rendered "at Chambers."

It is provided by Article IV, section 11, of the State Constitution that every judge of the Superior Court shall reside in the district for which he is elected, and shall preside in the courts of the different districts successively, but not in the same district oftener than once in four years, etc.; "and the General Assembly may by general laws provide for the selection of special or emergency judges to hold the Superior Courts of any county or district when the judge assigned thereto, by reason of sickness, disability, or other cause, is unable to attend and hold said court, and when no other judge is available to hold the same. Such special or emergency judges shall have the power and authority of regular judges of the Superior Courts, in the courts which they are so appointed to hold."

Pursuant to this provision of the Constitution the General Assembly of 1929, by general law, chapter 137, authorized the Governor to appoint six Special Judges of the Superior Courts for terms beginning 1 July, 1929, and ending 30 June, 1931, and to issue commissions accordingly.

Section 5 of the said act provides: "That such special judges during the time noted in their commissions shall have all the jurisdiction which is now or may be hereafter lawfully exercised by the regular judges of the Superior Courts in the courts which they are appointed or assigned

by the Governor to hold, and shall have power to determine all matters and injunctions, receiverships, motions, habeas corpus proceedings and special proceedings on appeal otherwise properly before them; but writs of injunction, orders to show cause, and other remedial or amendatory writs, orders and notices shall be returnable before them only in the county where the suit, proceeding or other cause is pending unless such judge is then holding the courts of that district, in which case the same may be returnable before him as before the regular judge of the Superior Court; and the same when issued by any such special judge, may always be made returnable by him before the resident or presiding Superior Court judge of each district to the same extent and in the same manner as any Superior Court judge might do in like cases."

Thus it will be seen that under the constitutional provision above mentioned, special or emergency judges are to have the power and authority of regular judges of the Superior Courts "in the courts which they are so appointed to hold." And under the act of their appointment, chapter 137, Public Laws 1929, they are to have all the jurisdiction exercised by regular judges of the Superior Courts "in the courts which they are appointed or assigned by the Governor to hold." It is further provided in said act that such special judges "shall have power to determine all matters . . . otherwise properly before them." But we find no authority for a special or emergency judge to determine a controversy without action at Chambers when he is not holding a term of court. *Dunn v. Taylor,* 186 N. C., 254, 119 S. E., 495. Nor do we apprehend that the Legislature, in excess of its own authority, undertook to clothe special judges with more power than the Constitution permits. If so, to the extent of such excess, the act would be wanting in constitutionality.

It is provided by C. S., 626, that parties to a question in difference which might be the subject of a civil action may agree upon a case containing the facts upon which the question depends, and present a submission of the controversy without action to any court "which would have jurisdiction if an action had been brought." *Drug Co. v. Lenoir,* 160 N. C., 571, 76 S. E., 480.

It follows, therefore, that as the special judge to whom the controversy was submitted, by agreement of the parties, had not been commissioned by the Governor to hold a court in Lenoir County at the time of signing the judgment, he was without authority to determine the matter. Hence the proceeding is a nullity, being *coram non judice,* and the judgment is void.

Dismissed.

STATE v. A. O. SCURLOCK ET AL.

(Filed 2 October, 1929.)

Receiving Stolen Goods D a—In prosecution for receiving stolen goods a verdict that does not find guilty knowledge is fatally defective.

Where under an indictment charging the defendant with receiving stolen goods the verdict does not find guilty knowledge of the defendant at the time of receiving them it is fatally defective, and upon application for *certiorari* when this defect is made to appear a *venire de novo* will be ordered.

APPLICATION by A. O. Scurlock for *certiorari* to review record in case of *S. v. Scurlock et al.*, tried at the September Term, 1928, of RANDOLPH.

It appears from the application and record that Charles Faircloth, Edgar Barbee, J. W. Garvin and Osley O. Scurlock were tried upon an indictment charging them (1) with the larceny of a Chevrolet roadster, valued at $564.00, the property of Johnson Chevrolet Company, and (2) with receiving said Chevrolet roadster, valued at $564.00, the property of Johnson Chevrolet Company, knowing it to have been feloniously stolen or taken in violation of C. S., 4250.

Verdict: "Not guilty as to John Garvin. Verdict as to Charlie Faircloth, E. B. Barbee and Odell Scurlock, guilty of having car in their possession, knowing it to be stolen."

Judgment: Imprisonment in the State's prison as to each of the defendants convicted for not less than five nor more than ten years at hard labor.

The defendants and each of them gave notice of appeal to the Supreme Court. E. B. Barbee alone perfected his appeal, *ante*, 248, though petitioner was under the impression that his appeal would be considered along with his codefendant's, as his counsel had so advised him.

Writ of *certiorari* ordered to issue.

Walter E. Brock for petitioner.

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

STACY, C. J. The petitioner's application for writ of *certiorari*, in lieu of an appeal, has been allowed in the instant case because it appeared on the face of the record proper in Barbee's appeal, *ante*, 248, that the verdict as rendered was not responsive to the indictment,

did not convict the defendants of a crime and was not sufficient to support a judgment. *S. v. Shew,* 194 N. C., 690, 140 S. E., 621.

The verdict fails to find that the defendants *received* the car in question, knowing at the time that the same had been feloniously stolen or taken. *S. v. Caveness,* 78 N. C., 484.

It is conceded by the Assistant Attorney-General, Mr. Nash, that the petitioner is entitled to a *venire de novo.* It is so ordered.

Venire de novo.

KNOTT WAREHOUSE COMPANY, J. T. HARRIS AND WIFE, AND R. E. BELCHER AND WIFE, v. W. R. WILLIS, TRUSTEE, AND CITIZENS BANK.

(Filed 2 October, 1929.)

1. Assistance, Writ of B a—Issuance of writ held proper in this case.

Where land has been sold by commissioners in foreclosure proceedings under a decree of court, and the sale duly confirmed, upon possession being withheld from the purchaser at the sale it is proper for the court in its equitable jurisdiction to order a writ of assistance to evict the wrongful possessor and to place the purchaser in possession of the lands.

2. Appeal and Error J a—Judgment authorizing writ of assistance is presumed correct on appeal—Pleadings.

Where the respondents in their answer to a petition for a writ of assistance allege that the petitioner has caused a subdivision of the property so as to convey land not described in the deed of trust under which the petitioner seeks his relief, and the allegations in respect thereto are not denied by the petitioner: *Held,* the allegations have reference to matters of defense which do not require denial, and on appeal when there is no finding in the record in regard thereto and no exception to the refusal of the court to make such finding, it is presumed that the judgment authorizing the issuance of the writ is correct and that the petitioner acquired only the land described in the deed of trust, in the judgment of the court, and in the commissioner's deed, and the judgment will be upheld.

APPEAL by R. E. Belcher and wife from a judgment of *Lyon, Emergency Judge,* at April-May Special Term, 1929, of PITT, authorizing a writ of assistance in behalf of Pitt County Insurance and Realty Company, purchaser of land at a judicial sale. Affirmed.

R. T. Martin for appellants.

John Hill Paylor and Albion Dunn for petitioner, appellee.

ADAMS, J. The facts are set forth in the judgment. On 23 January, 1922, R. E. Belcher and Lucy Belcher, his wife, executed to W. R.

Willis, as trustee, a deed of trust conveying real property described as follows: "The following lands, lying between Barrett and George streets on a certain map made by Harding and Rivers, known as subdivision of the Belcher property at Farmville, North Carolina, dated April, 1928, and being lots Nos. 4, 5, 6, 7, 8, and 9." In 1925 the trust was foreclosed and the property was sold to the petitioner, the Pitt County Insurance and Realty Company, at the price of twelve hundred dollars. The commissioners who had made the sale under a decree in equity, submitted their report recommending that the sale be confirmed. Thereafter the sale was confirmed, and the commissioners were authorized and directed to convey to the petitioner the specific property described in the deed of trust. They complied with this order on 20 July, 1925, the land conveyed being the lots described in the deed of trust and in the decree of foreclosure. The appellants refused to give the petitioner possession.

Upon consideration of the foregoing facts it was adjudged that the petitioner is the owner and entitled to the possession of lots 4, 5, 6, 7, 8 and 9, as they appear on the map referred to in the deed of trust, and that a writ of assistance be issued directing the sheriff to evict the appellants and to put the petitioner in possession of the property.

A writ of assistance is a form of process issued by a court of equity to transfer the possession of lands, the title or right of possession to which it has previously adjudicated, as a means of enforcing its decree. *Bank v. Leverette,* 187 N. C., 743; *Lee v. Thornton,* 176 N. C., 208; *Knight v. Houghtalling,* 94 N. C., 408. These and similar decisions sustain the judgment upon the facts found by the presiding judge.

In their answer to the petition the appellants allege that the map referred to was not in existence when the deed of trust was executed, and that the petitioner has caused a subdivision of the property so as to convey the land not described in the deed of trust; and in their brief they take the position, as we understand, that as their allegations are not denied they must be taken to be true. The allegations, however, are matters of defense which are deemed to be denied; and in the record there is no finding in reference to them and no exception to the court's refusal to find any facts relating to them. The only land acquired by the purchaser is that which is described in the deed of trust, in the judgment of the court, and in the deed of the commissioners. Judgment

Affirmed.

STATE v. ERNEST FOX.

(Filed 2 October, 1929.)

1. **Homicide G a—Evidence of defendant's guilt of murder in first degree held sufficient to be submitted to jury in this case.**

Circumstantial evidence of the prisoner's guilt of murder in the first degree is held under the facts of this case sufficient to be submitted to the jury.

2. **Criminal Law G d—In this case held: testimony as to telegram sent by defendant tending to show his uneasiness was competent.**

Testimony of a witness as to the contents of a telegram sent by the defendant while in the presence of the witness who heard the defendant narrate it to the telegraph operator and saw the operator write it down, which tended to show the defendant's anxiety as to the knowledge of another of "something on" him, is admissible with other circumstantial evidence of defendant's guilt of murder, as a circumstance tending to show guilt, the probative force being for the jury.

3. **Criminal Law G i—Expert testimony as to the position of the deceased when shot held admissible under the facts of this case.**

When the position of the deceased when killed is relevant to the inquiry it is competent for a physician who had examined the deceased and who has qualified as an expert, to testify that the killing was done with a 44 bullet while the deceased was lying down and explain the facts and circumstances upon which he based his opinion, and such testimony does not violate the rule that the issue of the defendant's guilt is exclusively for the determination of the jury.

4. **Criminal Law G l—Where a prior confession is inadmissible a subsequent confession made without fear or hope may be admissible.**

Where the confession of the defendant of his guilt of murder, made to an officer of the law, is excluded by the judge upon a *voire dire* on the ground that it was induced by fear or favor and therefore not voluntary, a later confession, made to another witness, is admissible when the judge finds upon sufficient evidence upon *voire dire* that it was not influenced by the causes which had induced the previous confession and that it was free and voluntary, and made without fear or favor.

APPEAL by defendant from *Small, J.*, and a jury, at June Term, 1929, of EDGECOMBE. No error.

The defendant was indicted for murder of one Jesse Taylor and convicted of murder in the first degree and sentenced to be electrocuted. The State's evidence tended to prove that Jesse Taylor was a young man about 20 years of age and was engaged in the grocery business in Rocky Mount, on East Grand Avenue. That on Saturday night Jesse Taylor was in the store a little after 12 o'clock checking up and counting his money. Jesse Taylor was a single man and customarily slept in his place of business, his father and family resided in another section of

the city, some distance from the store. On the next morning, Sunday, 26 May, the members of the family telephoned the store and received no response, one of his brothers went to the store, and after knocking and hollering, with no response, the brother with others forced an entrance by breaking the door of the store, which was locked on the inside. They found Jesse Taylor on a cot dead, with blood on his head. The two brothers and the father of Jesse Taylor identified a 41 caliber Colt revolver as the property of J. H. Taylor, father of Jesse Taylor, which he had loaned to Jesse Taylor, his son, with instructions by the father to keep same in his store. Neither his father nor brother was able to place the said Jesse Taylor in the possession of the revolver they identified inside of two weeks prior to the time of Jesse Taylor's death. The father, brothers nor did any State's witness see defendant enter or leave the store either on Saturday, 25 May or Sunday, 26 May.

Louis Perry's testimony was to the effect that he had known defendant three or four years, and knew where his father lived on 26 May. He saw defendant Thursday, 23 May, at Jesse Taylor's store at an early hour, about five minutes of six o'clock. That Jesse Taylor and two white men and defendant Fox were in the store and were so dressed as to indicate that they had slept in Jesse Taylor's store the night before.

E. A. Pittman: Knew Jesse Taylor; he ran a store on East Grand Avenue, No. 600, and rented the store next door to him, No. 602, to Taylor, and then Taylor moved across the street to another building. "The night before Jesse Taylor was killed, Saturday night, Ernest Fox, the defendant, entered my store at about eleven-thirty p.m., and stayed there until I cleaned up and begun to close up. It was a quarter to one when I got cleaned up and closed. While Fox was in the store he just sat at the window in the corner of the building, looking out the window, and didn't have anything to say. The window he was sitting at was on the street side—the west side of the street looking west. There is nothing on the other side but the store where Jesse Taylor kept. Fox was employed at one time by Jesse Taylor. He stopped work about three weeks before Jesse Taylor's death. I saw another delivery boy working for Mr. Taylor afterwards. On the morning of 26 May, I opened my place of business, as near as I can get at, about seven o'clock. Jesse Taylor's body was found about ten o'clock. I went over. The body was lying with the head to one side, and I saw blood here and here (indicating), and I went right back."

Clarence Taylor testified: "I identified this book on yesterday as my brother's bank book. I know my brother's handwriting. Yes, that is his handwriting and his figures. I found that deposit slip on Sunday morning that my brother was found dead in the store on the counter near the cash register. I forget what day we found the book, but it was found

in the desk where the money bag was. I saw my brother make out the deposit slip that Saturday night before he was found dead Sunday morning. (State offers in evidence the deposit slip and bank book and the pistol and two bullets about which Dr. Large testified.) I saw my brother checking up Saturday night, but didn't know how much he had until I seen the deposit slip. I never saw that before Sunday morning. I was looking at my brother when he made out the slip and put it in the bank book. I was three or four feet from him. I do not know the exact figures. I found it a little after ten o'clock Sunday morning. I left the store Saturday night around one or one-fifteen. He put the money in the bank book in a bag and tied it up. I don't know what my brother did in respect to the slip after I left. I know what the slip called for. I didn't count the money and couldn't tell you. That is the bag. He had a key ring on his belt and the door key was on there, but what was on the other keys I don't know. I never saw them but one time. I have made a search in the store for them, but have been unable to find them. (State offers in evidence the bag.) I found the bag in the desk Wednesday morning, I believe."

George Planter: That he lived on Atlantic Avenue in Rocky Mount and made hogsheads. He identified the 41 caliber Colt revolver—the gun previously identified by the father and two brothers of Jesse Taylor which the father had loaned Jesse Taylor; that defendant came to his house Sunday morning before last between 3 and 4 o'clock and knocked on the door; he was in bed. After some conversation, he pulled out the revolver and handed it to him and said keep it until he called for it. Later on the same morning he tried to buy the pistol on credit from Fox. The revolver had five bullets in it and six chambers, but there was no empty shell in it. Defendant did not tell where he got it or why he wanted him to keep it. The first time he came in a Hudson car like Ben Johnson drives; the second time in an open Ford.

Ben Johnson: "Was taxi driver and lived in Rocky Mount. Had known defendant two or three years. He was parked on the morning of 26 May at Douglass Drug Store. Fox said he wanted him to take him home. He carried defendant to various places, one Frank Williams accompanying the defendant: (1) To defendant's home on Pennsylvania Avenue; (2) about five minutes afterwards to George Planters; (3) to Easter Ricks' house; (4) to Wimberly's Pressing Club; (5) to Myrtle Avenue; (6) to Rosa B. Ellis' house, then to Douglass Drug Store, and he and Williams got out. That was about 3:30 o'clock. Fox, when he went to the Pressing Club, got some dresses and carried them to Rosa B. Ellis'. He did not know Planter and heard no conversation between them. He was paid $1.05 for the trip."

John Jones: "Lived in Rocky Mount and worked for the Dodge people. He knew defendant, and on Saturday morning, 25 May, defendant came by and wanted to buy an old automobile from him. He for several months was after him to buy an old car. I told him there was an old Ford he could have for $20. He looked at it and liked it, and said he would come after it when he got the money. Told him he had better hurry, as he could not have it unless he came by 6:30 that evening. At ten minutes to six he came back and said he didn't have the money, but expected to get it pretty soon. Next morning about 5:30 he came to witness' house and awoke him and everybody else in his house, and asked if he could get the car that morning. Witness said he thought so, and asked him if he had the money, and he said 'Yes,' and pulled out two ten dollar bills—$20.00. They went over to the foreman's, and he told them he would get down at the place of business about 8 o'clock, and that defendant could get the car. In going to the foreman's defendant went by the police station and through the public streets of Rocky Mount, where he could be seen by both white and colored, and the officers of the law. He did not seem excited, nor did he try to hide or conceal himself. Defendant had a little liquor in his pocket when he came to me that morning, and I told him he had better throw it away because my Boss didn't like liquor, and I didn't want him to see any around. When he came to my house at five-thirty he didn't look like he had drunk a drop."

Clarence Griffin: "Drove a transfer in Rocky Mount. About seven o'clock, 26 May, in front of Dunbar's Cafe, defendant hired witness to take him across town to Rosa B. Ellis' house. He stayed there about five minutes, and he brought him back to the transfer shed and put him off at Burnette's Drug Store. He paid him 75 cents, and that was all the money he saw him have; went through the heart of Rocky Mount, colored section, and could be seen by them. Went in public places, and defendant acted perfectly natural; didn't seem in a hurry or scared. He was not flourishing money around like a man that had plenty of it."

Alexander Grant: "Lived in Rocky Mount, and had known defendant three or four years. Met defendant Sunday morning, 26 May, at Douglass' Drug Store, and had just come out of Dunbar's Cafe and had a lunch wrapped up. Drove up and asked me if I wanted to go to Wilson. Told him yes, but I had no money, and defendant said he would take care of that part. He and another colored boy went in the Ford that defendant told him he had bought that morning for $20.00. Left Rocky Mount ten minutes to eleven o'clock. Before they left Rocky Mount defendant showed him and the boy $7.00; before they got to Sharpsburg defendant showed them $55.00; said he got the money from his mother, who had sold some Liberty bonds. Said he was going to his aunt's to

get some money left him by a relative, and he had just come of age and could get it. Stopped at Sharpsburg on the way to Wilson. Went to Stantonsburg and Paul Chapel, where defendant's aunt lived. They went to service. Left the chapel about 4:30 p.m., and went to Snow Hill. Returned to Wilson at 7:30; ate supper in a cafe. After supper defendant called up Rosa B. (Ellis) over phone at Rocky Mount. That Fox afterwards told witness that the girl said, 'I know something on you,' and that Fox asked her to meet him at Elm City; that they went to Elm City, but that Rosa B. did not meet them; that they stayed in Wilson that night; that they were having constant car trouble. They stayed that night in a hotel. That on Monday morning they decided to go to Greenville. On the way to Greenville they stopped in Farmville. At Farmville they parked the car near a telegraph office, and that witness sent a telegram to his mother at Rocky Mount; that the other party sent another telegram to some one in Rocky Mount; that Ernest Fox sent a telegram to Rosa B. at Rocky Mount. 'I seen the man write it.' (Question) What did he say to her? (Defendant objects.)

By the Court: Did you hear Fox tell the man what to say in the telegram? Answer: Yes, sir.

Q. Was that in the telegram what Fox said? Answer: He said 'I like to know what you are talking about,' and said to wire him back in care Greenville Western Union. This was about eleven o'clock Monday morning. We then struck out for Greenville. We drove around town, and he got out and parked his car about a block from the Western Union, and went to the Western Union to see if the telegram came. It was twenty minutes to twelve o'clock then, and the telegram hadn't come. He had a suit pressed. Witness then proceeds to tell Fox's movements around Greenville, and about the witness and the witness' companion, aside from Fox, spending Monday night in an automobile in Greenville. The next time we saw him he was under arrest in Greenville. That was the next morning—Tuesday."

Dr. H. Lee Large was admitted to be a medical expert. He examined the body of Jesse Taylor on the Sunday morning near eleven o'clock. "The body was on a cot in the northwest corner of the store building. The body was lying on the cot on the right side. He had a bullet wound which entered on the left side or under the left side of his jaw, barely missed the jaw-bone; ran slightly backward and across to enter the base of the skull between the ears. (The witness is here qualified and the court finds as a fact that the witness is an expert in judging the caliber of a pistol and the size of a pistol ball.)

Question: Have you an opinion satisfactory to yourself on this question, as to whether or not Jesse Taylor, the wound which was found in his neck, was inflicted while he was lying or standing up? (Defendant

objects; objection overruled, and defendant excepts.) Answer: Yes, sir, my opinion is that he was lying down.

Question: I ask you to explain so far as you can why you say that? (Defendant objects; objection overruled, and defendant excepts.) Answer: First the range of the bullet from its point of entry to its final point of lodging in the head of this man was such that would have made it impossible for a man to have been in a standing position when the shot was fired; and, secondly, the condition of the body was such as to indicate that the body, in other words, this man had never made any voluntary movement from the time the shot was fired, and it is borne out by the wound. The wound was such as would have caused immediate paralysis of the body, after the bullet was fired. There was no other wound on his body."

Dr. Large further produced the bullet taken from Jesse Taylor's body and testified it was in three pieces and was a 41 caliber bullet.

Witnesses *P. C. Zimmerman* and *R. O. Watson,* police officer, of Rocky Mount and deputy sheriff, respectively, were examined as witnesses for the State. When interrogated relative to an alleged confession of the defendant, the defendant objected; whereupon, said witnesses were examined in the absence of the jury with a view of determining the competency of their testimony relative to said confession. Upon the evidence elicited, in the absence of the jury, the court found as facts: That the statements alleged to have been made by the defendant, both written and oral, in the nature of a confession, were induced either by fear or hope, and that such statements as so alleged to have been made by the defendant were not voluntary in their nature. Upon such findings by his Honor, upon motion of defendant, the evidence of witnesses Zimmerman and Watson, relating to the alleged confessions, were excluded.

In the absence of the jury, the following witnesses were examined: George T. Sugg, defendant Ernest Fox, R. O. Watson, S. P. Marler, to determine the competency or incompetency of the witness George T. Sugg.

Upon the conclusion of the evidence the court below found that as a fact the statement made by the witness George T. Sugg, while said witnesses were inspecting the jail along with other grand jurors, was a voluntary statement and rules the same admissible in evidence. (Defendant objects; overruled; defendant excepts.)

In the presence of the jury:

George Sugg: "I was a member of the grand jury during the present six months. I came on the first of January and go through the year. I went to the jail on Monday afternoon and made an inspection. I saw this fellow here, but I didn't know who he was. *I asked him what he was doing in there and what he was in there for, and he told he was in there*

for killing a man, and I said, 'For what?' and he said, 'For his money.' I asked him had he been in trouble before, and he said two or three times. I didn't ask him anything else. I did not put him in any fear to tell. I did not know who he was when I asked him that; I did not know that he was the man that was alleged to have killed Jesse Taylor. I had been upstairs. I went into all the rooms. All of the grand jury came in the cell where Ernest Fox was confined, that could get in at one time. I am not sure about that, though. Some of the grand jury were ahead of us; we were going all over the house. I don't remember who was with me at the time of the conversation. There were eight or ten or twelve people in there. We did not communicate to Ernest Fox what we were in there for. I did not have any idea that this was the man that was accused of the Rocky Mount murder. *That's what he said, 'For killing a man,' and I said 'For what?' and he said, 'His money.'* I asked other prisoners in the jail what they were in there for, some white and some colored. I knew nothing about the previous conversations other people had with Ernest Fox. I had never seen him before that day. We were in there about four o'clock. That was all he said to me. I don't remember when I first told what transpired between us. I haven't told an officer, because I left here and went home. I did not communicate this conversation to any officer. The sheriff served subpœna on me this morning."

P. C. Zimmerman's testimony was a narrative of a conversation he had with defendant as to his whereabouts on the night of the killing. About 12 o'clock defendant and Frank Williams had purchased a half gallon of whiskey for $2.50 from Dancy Ward on Langley Road the other side of the A. C. L. Company's pump station. He paid $1.75, Williams the balance, and they came to town to the Douglass Building, went in Wimberly's Pressing Club, got some clothes, and Ben Johnson took him home at 2 o'clock Sunday morning, and was there until 6 o'clock and went to Douglass Building; went about 9:45 to Wilson. He then narrated where defendant told him he went. "I asked him what he paid for the car and he said $20.00. I asked him where he got the money to buy the car and he said he won it gambling, and I asked him where, and he said 'Langley Road in a tobacco barn.' I asked him how much money he had when he bought the car, and he said $43, and I asked him how much he had when he entered the game, and he said $8.00; and I asked him how much he won, and he hesitated and I said, 'Did you win $35.00?' and he said 'Yes.' And I asked him how much money did he have in his pocket after he bought that automobile, and he said '$43.00,' and then I asked him where did he get the money to buy the car, and he said Jim Whitley gave him $4.00, his brother, Harvey Fox, Jr., who is just a small fellow, gave him $8.00, and he said he had $8.00 at the

house he had saved for the purpose of buying a car. I then asked him if he had any more money from Sunday morning until the time he was arrested except the $43.00 in question, and he said 'No,' that was all he had. . . . I asked him where he was at 12 o'clock and he said at Dancy Ward's buying whiskey. I asked him where he was at 1:30, and he said 'In a tobacco barn, Langley Road, gambling.' I asked him who was in the game, and he said 'Nathan Speight and Charles Woodard and four others.' I asked him where he was at 2:15, and he said 'In the tobacco barn gambling.' I asked him where he was at 3:30, and he said he was still in the tobacco barn gambling. I asked him where he was at 5 o'clock, and he said he was at home. I asked him what time he got up, and he said about 6 o'clock. I then asked him if he knew Jesse Taylor, and he said he did, and I asked him did he ever work for him and he said he did. I asked him how long, and he said three weeks. I asked him did he ever see Jesse's gun, and he said he did before he moved from Pittman's store to the place where he died. I asked him if he had ever spent the night in the store with Jesse Taylor on a pallet on the floor, and he said he absolutely had not; that he had never spent a night in there. There were some more questions, but I can't recall them right now."

The defendant introduced no evidence.

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

George M. Fountain and T. T. Thorne for defendant.

CLARKSON, J. The evidence, from the record, is sufficient, with or without the confession of defendant, to be submitted to the jury to sustain a verdict of murder in the first degree. *S. v. Miller, ante,* 445.

The defendant excepts and assigns error to his Honor's permitting the witness Grant to testify as to the contents of the telegram sent by defendant Fox to Rosa B. Ellis. The witness, however, was standing by and heard what Fox said. Not only this, but he saw the man write down on the blank what Fox said: "I seen the man write it." He said, "I like to know what you are talking about," and to wire him care of Greenville Western Union. It was no doubt introduced as some evidence to show Fox's anxiety as to what Rosa B. Ellis meant when she told him over the telephone that "I know something on you." This was admissible for what it was worth—the probative force was for the jury.

The defendant further excepts and assigns error: That it was incompetent "to permit State's witness, Dr. Large, to testify that the deceased, Jesse Taylor, was, in his opinion, lying down when he received the fatal wound, and to further testify as to his reasons, as it invades the province of the jury." We cannot so hold.

In *S. v. Jones,* 68 N. C., at p. 444, it is said: "The only point made was as to the competency of the opinion of the physician who was examined for the State, as to the cause of death of the deceased, and of his posture and position at the time he was shot. It was not denied that the opinion was competent as to the cause of death, but it was insisted that it was incompetent as to the posture and position. We suppose an expert might express an opinion of the posture and position from the range of the shot, and other circumstances."

In *McManus v. R. R.,* 174 N. C., at p. 737, the following observations are made: "It was also urged for error that Dr. McCoy, a witness for plaintiff, who had made a professional examination of the intestate at the time, was allowed, over defendant's objection, to testify that 'from the nature, condition and position of the wounds, he was of opinion that the intestate was lying down at the time the same was inflicted.' It will be noted that this witness, admitted to be an expert, spoke from a professional and personal examination of the intestate, and the answer, to our minds, was clearly within the domain of expert opinion. Both question and answer are approved and upheld, we think, in *Ferebee v. R. R.,* 167 N. C., 290; *Parrish v. R. R.,* 146 N. C., 125; *S. v. Jones,* 68 N. C., 443." *Shaw v. Handle Co.,* 188 N. C., 222; *Butler v. Fertilizer Works,* 195 N. C., 409; *Street v. Coal Co.,* 196 N. C., 178; see *S. v. Carr,* 196 N. C., 129.

The most serious contention of defendant was the admission of the testimony of Grand Juror Sugg, who visited the jail for the purpose of inspection. The defendant's confessions to the officers, made prior to that time, were ruled out on the ground that defendant was induced to make them from fear or hope. The court below, on the *voir dire,* found that they "were induced either by fear or hope, and that such statements as so alleged to have been made by defendant were not voluntary in their nature." These confessions to the officers were, from the findings of the court, properly excluded, and the court below gave the rule that is followed in all civilized nations.

In *S. v. Roberts,* 12 N. C., at pp. 261-2 (1 Dev., 259), relied on by defendant, the law is thus stated by *Henderson, J.:* "Confessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and which, it is said, in the perfectly good man, cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear, are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected. It seems to be admitted in this case, that the confessions first made, were of that character, and were therefore

rejected; but that being repeated to the same person some time afterwards, they lost their original character, assuming that of free and voluntary ones, and became evidence of the truth. But for what reason I am at a loss to conceive. How or whence does it appear, that the motives which induced the first confession had ceased to operate when it was repeated? It is not incumbent on the prisoner to show that they resulted from the same motives. It is presumed that they did, and evidence of the most irrefragable kind should be produced to show that they did not. It is sufficient that they may proceed from the same cause (4 Starkie, 49)."

In *S. v. Fisher,* 51 N. C., p. 478, *Battle, J.,* shows that the reference made by *Henderson, J.,* to Starkie, was from Ed. 1824, p. 49. The learned judge says that "In a subsequent edition (that of 1842, p. 36), Starkie somewhat modifies the rule, and says, 'where a confession has once been induced by such means, all subsequent admissions of the same, or like facts must be rejected if they have resulted from the same influence.'" *S. v. George,* 50 N. C., 233; *S. v. Lowhorne,* 66 N. C., 638; *S. v. Ellis,* 97 N. C., 447; *S. v. Harrison,* 115 N. C., 706; *S. v. Winston,* 116 N. C., 990; *S. v. Rodman,* 188 N. C., 720; *S. v. Whitener,* 191 N. C., 659; 7 A. L. R., 420; *S. v. Newsome,* 195 N. C., 552.

In *S. v. Lowhorne, supra,* at p. 640, we find: "It is true, that in the case of *S. v. Roberts* (1 Dev., 259), the confession was made to the same person, but that, we think, can make no difference."

In *S. v. Drake,* 113 N. C., at p. 628, *Burwell, J.,* in regard to confessions, said: "It is a well settled rule that if promises or threats have been used, it must be made to appear that their influence has been entirely done away with before subsequent confessions can be deemed voluntary, and therefore admissible. And hence, it having been found that an improper influence was used to obtain the confession that was excluded, and it not having been made to appear that that influence had been in any way removed, the confession made on the journey to jail to one of the crown should also have been excluded. *S. v. Drake,* 82 N. C., 592." *S. v. Page,* 127 N. C., 512; *S. v. Bohanon,* 142 N. C., 695; *S. v. Whitener, supra.*

"Confessions are to be taken as prima facie voluntary and admissible in evidence, unless the party against whom they are offered allege and show facts authorizing a legal inference to the contrary." *S. v. Sanders,* 84 N. C., at p. 730; *S. v. Rodman, supra.*

This Court, through *Dillard, J.,* speaking to the subject in *S. v. Sanders, supra* (84 N. C.), at p. 730, said: "Under the objection made, the admissibility of the confession depended on the facts accompanying it and the legal inference therefrom, the facts being matter for the decision of the judge and conclusive, and the sufficiency or insufficiency thereof to warrant the admission or exclusion of the evidence being matter of law reviewable in this Court. *S. v. Andrew,* Phil. (61 N. C.), 205;

S. v. Whitfield, 70 N. C., 356. If from the facts the legal inference be that the confession was voluntary, then the evidence was receivable, otherwise, not." *S. v. Whitener, supra; Smith v. Kron,* 96 N. C., at p. 396.

The confessions made to the officers having been ruled out as incompetent, induced either by hope or fear, it must be made to appear that that influence has been done away with or removed before subsequent confessions can be deemed voluntary and therefore admissible. When objection is made, the competency or incompetency must be heard on the *voir dire.* "*Voir dire*—to speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror, where his competency, interest, etc., is objected to." Black's Law Dic., p. 1212.

The court below on the *voire dire* heard all the evidence introduced, including that of defendant, and found that the statement made to the grand juror was voluntary and admissible in evidence. There was evidence to sustain this ruling, therefore the testimony of the grand juror was properly admitted as evidence, in this we can see no error. From the whole record we can find

No error.

LEON WEST, MINOR, BY HIS NEXT FRIEND, ED WEST, v. W. B. MURPHY.

(Filed 2 October, 1929.)

1. **Wills E b—Devise to B. so long as she should live and if no children then to C. gives a child of B. a remainder after B.'s life estate.**

Where the owner of the fee devises his land to his granddaughter so long as she should live, and if no children, then to her brother by name, the granddaughter being but a child at the date of the will: *Held,* upon the granddaughter dying leaving her surviving a child, the child takes a remainder in the lands by implication as purchaser under the will, the granddaughter having but a life estate, and her brother taking no interest in the land, the contingency upon which his estate was to be divested having happened. C. S., 1737.

2. **Wills F b—A remainderman by purchase under a will is not estopped by deed of the life tenant and contingent remainderman.**

Where the interest of a contingent remainderman under a will has been divested by the happening of the contingency, the remainderman who takes the lands by purchase under the will is not estopped by a deed of the life tenant and the contingent remainderman from setting up his title as against the grantee therein.

3. **Wills E a—General rules for the construction of wills.**

In construing a will effect will be given to the intention of the testator as gathered from the written instrument unless in contravention of some

rule of law, and wherever possible effect will be given to every clause and every word, and a devise of real property will be construed as a devise in fee simple unless the will or some part of it shows an intent to convey an estate of less dignity, C. S., 4162.

4. Same—Presumption against intestacy.

In construing a will there is a presumption against intestacy.

5. Same—An estate under a will may be created by implication.

By will an estate may pass by mere implication from the language used, without any express words to direct its course, but the implication must be necessary, or highly probable, and not merely possible.

APPEAL by defendant from a judgment of *Daniels, J.*, given upon an agreed statement of facts, heard at Chambers by consent of parties. From GREENE. Affirmed.

Bryant Mooring, a resident of Greene County, died 28 March, 1911, leaving a will which was duly admitted to probate. Item 5 is as follows: "I give and bequeath and devise to my granddaughter, Bertie Hill, the following piece or parcel of land bounded and described as follows: 'Beginning at a stake ....., containing 20 acres, more or less, and being known as lot number three in a plat made by R. E. Beaman for Bryant Mooring, dated 3 May, 1904, to her so long as she should live, and if no children, then to her brother, Frank Hill." Bryant Mooring was seized in fee of this property at the time of his death.

Bertie Hill, after her marriage with Ed West, died on 27 June, 1923, leaving Leon West, the plaintiff, surviving her as her only child and heir at law. On 7 June, 1920, after the birth of the plaintiff, Bertie West, joined by her husband, and her brother, Frank Hill, executed a deed purporting to convey to W. B. Murphy, the property described in item five of the will of Bryant Mooring, which is duly recorded in the registry of Greene County. The defendant has been in possession of the lot in controversy since the day this deed was executed. The plaintiff brought suit to recover the land on 17 November, 1923.

It was adjudged upon the agreed facts that Bertie Hill took an estate for life in the devised lot, and that upon her death the plaintiff, her only son and heir at law, became the owner of the fee in remainder. The defendant excepted to the judgment and appealed.

Teague & Dees and J. Faison Thomson for plaintiff.
J. Paul Frizzelle and George M. Lindsay for defendant.

ADAMS, J. If under the fifth item of her grandfather's will Bertie Hill acquired a defeasible fee which became absolute when she died leaving issue, the plaintiff, her son, would be deemed to have taken by descent from his mother and not as a purchaser by implication under the

will. *Whitfield v. Garris,* 134 N. C., 24. In this event he would be estopped by his mother's deed. *Crawley v. Stearns,* 194 N. C., 15. But if the devise be construed as a gift to the granddaughter for her life with remainder by implication to her son, the latter will be regarded as a purchaser and will not be denied the right to assert his title. The first question, then, is whether Bertie Hill was given a life estate or a defeasible fee. The answer must be sought in the testator's intent as set forth in his will; for under the accepted rules of construction the written and not the unexpressed intent must control. *Pilley v. Sullivan,* 182 N. C., 493; *McIver v. McKinney,* 184 N. C., 393; *Williams v. Best,* 195 N. C., 324.

A defeasible or determinable fee is one which may continue forever, but is liable to be determined by some act or occurrence limiting its duration or extent. Because of the possibility of its continuing forever it is called a fee; it is said to be determinable or defeasible because its continuance may be defeated or avoided by the happening of the prescribed act or contingency.

Unless the will, or some part of it, shows an intent to convey an estate of less dignity, a devise of real estate will be construed to be a devise in fee simple. C. S., 4162. A gift to a person absolutely, with a provision that if he die without leaving children the property shall go to another, vests in the primary devisee a common-law fee conditional, which is defeasible upon his death without leaving a child. *Sadler v. Wilson,* 40 N. C., 296; *Whitfield v. Garris, supra; Dawson v. Ennett,* 151 N. C., 543; *Perrett v. Bird,* 152 N. C., 220; *Smith v. Lumber Co.,* 155 N. C., 389. In the cited cases the devisees took an estate in fee defeasible upon the happening of a subsequent event; but the principle upon which they are founded has no application to devises in which by the terms of the will the first taker acquires only a life estate. To this rule there is an exception. A life estate thus given may be enlarged into a fee when the particular disposition is to be determined, not as a rule of construction, but, as in *Shelley's case,* as a rule of law or a rule of property, regardless of an intent to the contrary appearing in the will. *Reid v. Neal,* 182 N. C., 192; *Nobles v. Nobles,* 177 N. C., 245. But as shown in many of our decisions the exceptions serve to clarify and impress the rule. For example, a father having devised to his daughter Mary an estate during her natural life and to the heirs of her body, on condition if she had no heirs of her body the estate should go to his son, it was held that Mary took a life estate. *Bird v. Gilliam,* 121 N. C., 326. In *May v. Lewis,* 132 N. C., 115, it was held that Benjamin May was given a life estate by the following devise: "I loan unto my son Benjamin May my entire interest in the tract of land . . . to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee

simple forever; and if he should die without heirs, said land to revert back to his next of kin." In a later case the following clause was construed: "I leave Martha Morgan, wife of James Morgan, 48½ acres of land . . . during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." The Court said that Martha thereby acquired an estate for her natural life. *Puckett v. Morgan,* 158 N. C., 344. On this point the following cases of later date are equally conclusive: *Jones v. Whichard,* 163 N. C., 241; *Blackledge v. Simmons,* 180 N. C., 535; *Wallace v. Wallace,* 181 N. C., 158; *Reid v. Neal, supra; Welch v. Gibson,* 193 N. C., 684. The principle pervades all the recent decisions in which the question is discussed; and, indeed, so rigidly is it applied that a devisee for life with power of disposition takes an estate, not in fee, but only for his natural life. *Chewning v. Mason,* 158 N. C., 578; *Roane v. Robinson,* 189 N. C., 628. It is obvious, therefore, that Bertie Hill was given only a life estate under the fifth item of the will.

In the fourth and sixth items the devise is to the first taker so long as he or she lives, and then to his or her children; but in the fifth, to the first taker so long as she should live, and if no children then to her brother. The appellant argues that the testator intended by the fourth and sixth items to give the first taker a life estate with remainder in fee to the children, and by item five to give the first taker a fee in the event she should die leaving children.

This construction would not only strike out the words "so long as she should live," and disregard the rule that wherever possible effect must be given to every clause and every word; it would run counter to the principle uniformly maintained in the decisions to which we have referred. Morever, the difference in verbiage is not unfavorable to the plaintiff, whose mother was unmarried and apparently a mere child when the testator died. The uncertainty of Bertie Hill's leaving surviving children was the contingency which the testator had in mind and for which he made express provision.

What interest did the plaintiff get under item five? If the first taker had died leaving no surviving child, her brother would have taken the fee as contingent remainderman. But the plaintiff survived his mother, the first taker. The remainder was not given him in express terms. Was it given him by implication? That an estate may be created by implication from the language used by a donor in a written instrument is unquestionable. "By a will an estate may pass by mere implication, without any express words to direct its course, . . . and where implications are allowed they must be such as are necessary, or highly probable, and not merely possible." 3 Bl., 381. But in *Hauser v. Craft,* 134 N. C., 319, it is said that where the devise is in the first instance to the parent

for life and then over to ulterior devisees if the parent die without leaving children, the law will raise an estate in remainder by implication in favor of surviving children upon *slight indication* of an intention to to that effect. In the clause there construed Katherine Scott was given certain property which was to be hers during her natural life only, "and should she die without leaving any child or children the property was to be divided among the rest of the testator's heirs." She died leaving children. The Court held in an exhaustive opinion written by *Walker, J.*, that she took a life estate and that her surviving children took an estate in remainder at her death by implication.

The language used in item five is substantially the same as that which was construed in *Hauser v. Craft.* Construed in the light of the testator's manifest intention it should read, "to her (Bertie Hill) so long as she shall live, and, if she die leaving no children, then to her brother, Frank Hill." C. S., 1737; *Willis v. Trust Co.*, 183 N. C., 267; *Vinson v. Gardner,* 185 N. C., 193. This interpretation conforms to settled principles. Bertie Hill's interest ceased at her death. Frank Hill took nothing because his contingent interest was dependent upon the death of his sister leaving no children. There is a presumption against intestacy, and unless the plaintiff has the remainder the fee is in abeyance or must revert to the testator's heirs. We have not discovered any indication of such an intent in Bryant Mooring's will. The judgment is

Affirmed.

L. D. ROEBUCK AND WIFE, HANNAH ROEBUCK, v. J. J. CARSON AND J. L. GURGANUS, TRUSTEE.

(Filed 2 October, 1929.)

Appeal and Error J a—In injunction proceedings Supreme Court may review evidence, but it is presumed that the judgment is correct.

While the Supreme Court may review the evidence and findings of fact by the court below upon appeal in injunction proceedings, the presumption is that the judgment of the lower court is correct, with the burden of showing error on the appellant, and where the court does not find the facts and there is no request therefor, it is presumed that he found the proper and necessary facts, and the judgment will be affirmed.

CIVIL ACTION, before *Moore, Special Judge.* From MARTIN. Heard at Chambers 4 May, 1929.

This case was considered by the Court upon a former appeal reported in 196 N. C., 672, 146 S. E., 708. The only difference in the facts in the present case and upon the former appeal is that it is alleged in the

present case that "after the execution and delivery of the notes and deed of trust . . . there was an agreement between plaintiffs and defendant Carson as to the extension of time of payment of the notes above referred to; . . . that the defendant Carson promised and agreed that if the plaintiff, L. D. Roebuck, would pay him the sum of $500 that he (defendant) would extend the time for the payment of the notes above referred to for and during the term of . . . Carson's natural life," etc. Plaintiffs secured a temporary restraining order, returnable before *Clayton Moore, Special Judge,* on 4 May, 1929.

Upon hearing the motion, the following judgment was rendered:

"After considering the pleadings the court is of the opinion and doth adjudge that the restraining order heretofore issued be, and the same is hereby dissolved."

From the foregoing judgment the plaintiffs appealed.

B. A. Critcher for plaintiffs.
Elbert S. Peel for defendants.

PER CURIAM. The judge dissolved the restraining order, but found no facts. It does not appear that either party requested a finding of facts. In such cases the determinative principle of law is thus stated in *Wentz v. Land Co.,* 193 N. C., 32. "In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct." *Angelo v. Winston-Salem,* 193 N. C., 207, 136 S. E., 489; *Lineberger v. Cotton Mills,* 196 N. C., 506, 146 S. E., 215. The theory upon which these decisions rest is that it is to be presumed, nothing else appearing, that the judge found the proper and necessary facts to support the judgment.

Affirmed.

NEILL MCK. SALMON, WILLIAM E. SALMON AND FRANCES SALMON ATKINS v. W. F. MCFARLAND.

(Filed 2 October, 1929.)

Injunctions D b—Judgment in this case continuing restraining order to final hearing affirmed.

Where upon the hearing the court finds that the defendant failed to comply with the terms of his contract for the purchase of certain lands and had abandoned the contract, and had thereafter trespassed upon

the lands and cut and removed timber therefrom, and that the defendant is insolvent, a judgment continuing a temporary restraining order to final hearing will be affirmed on appeal.

CIVIL ACTION, before *Midyette, J.* From LEE. Heard at Chambers on 24 May, 1929.

The plaintiffs alleged that they were the owners of and in possession of a tract of land in Lee County, containing about 900 acres, and that the defendant, without any claim, title or license, had "at divers times entered upon the said premises and cut and removed timber therefrom, and is now cutting and removing from said land certain timber of great value." The plaintiffs pray for a restraining order. The defendant filed an answer, alleging that he had purchased the land in controversy and had made extensive improvements thereon, and was ready, able and willing to comply with the contract of purchase. A temporary restraining order was issued and made returnable before Midyette, J., who found that "the plaintiffs are the owners of and in possession of the land, and that the defendant has failed to comply with any of the terms or conditions stipulated in said contract; that he has neither paid, offered to pay or tendered any portion of the consideration named in said contract, and that the whole of the consideration named therein became due prior to the institution of this action." It was further found as a fact "that subsequent to the execution of said contract the defendant abandoned the same and possession claimed thereunder; that the defendant has during the past several months at divers times, entered and trespassed upon the land described in the complaint, and cut and removed valuable trees and timber therefrom. . . . That the defendant is insolvent and unable to respond in damage for the injury to plaintiffs' land," etc.

Thereupon it was ordered and adjudged that the temporary restraining order "be, and the same is hereby continued to the final hearing of this cause," etc.

From the foregoing judgment the defendant excepted and appealed.

No counsel for plaintiffs.
Baggett & McDonald for defendant.

PER CURIAM. The facts found by the trial judge are definite and specific, and fully support the judgment continuing the injunction to the final hearing.

Affirmed.

H. L. EDWARDS AND EMMA G. EDWARDS, HIS WIFE, v. H. D. SPENCE.

(Filed 2 October, 1929.)

Mortgages H b—Plaintiff must pay amount admitted to be due in order to enjoin foreclosure until issue of usury is determined.

The plaintiff in a suit to enjoin the foreclosure of a mortgage on his lands upon the ground that he does not owe the entire amount claimed in that usury was charged in the notes secured by the mortgage, must pay the amount admitted to be due with six per cent interest, or the temporary restraining order theretofore issued will be dissolved upon the principle that one seeking equity must do equity.

APPEAL by plaintiffs from an order of *Grady, J.*, at Chambers on 19 April, 1929. Affirmed.

Shaw & Jones for plaintiffs.
Whitaker & Allen for defendant.

PER CURIAM. In Judge Grady's order the recitals are the execution by the plaintiffs to the defendant of two notes, each in the sum of $2,000, secured by a mortgage on lands, an allegation by the plaintiffs that the loan made them by the defendant was only $3,500, and that $500 was charged as a bonus or as usury. These allegations were denied. The plaintiffs asked that a sale of the land under the mortgage be enjoined until the issues joined could be determined by a jury. The order required the plaintiffs who sought equity to do equity by paying the amount admitted to be due and interest thereon at six per cent. They failed to comply with the order and the restraining order was dissolved. Under these circumstances the judgment must be affirmed. *Waters v. Garris,* 188 N. C., 305.

Affirmed.

PIEDMONT ELECTRIC COMPANY v. VANCE PLUMBING & ELECTRIC COMPANY, STEVENSON THEATRES, INC., AND S. S. STEVENSON.

(Filed 9 October, 1929.)

Laborers' and Materialmen's Liens C a—Amount of subcontractor's lien extends only to amount owed contractor at time of notice.

The right of a subcontractor to recover for material furnished the owner of a building is out of the funds due the original contractor by the owner at the time notice is given by the subcontractor, and under the provisions of our statutes is enforceable by suit into the contract between the owner and the original contractor, and where the original contractor has

abandoned his contract and the owner has been forced to spend more money to complete the contract than was due the original contractor under its terms, the subcontractor can recover nothing in his action against the owner for material furnished, there being nothing due the original contractor. C. S., 2437, 2439, 2442.

APPEAL by plaintiff from *Barnhill, J.*, at March Term, 1929, of VANCE. No error.

S. S. Stevenson owned a lot in the city of Henderson. He leased it for a term of years to Stevenson Theatres, Inc., who after erecting on it a building comprising a store, a theater, and offices, made a contract with the Vance Plumbing & Electric Company to do plumber's work, to provide for heating the building and for putting in electrical wiring. The Vance Company gave Stevenson Theatres, Inc., a bond in the penal sum of $4,530, with the Metropolitan Casualty Insurance Company of New York as surety, conditioned to indemnify the obligee from pecuniary loss. The plaintiff furnished the Vance Company electrical material, wiring, fittings, and fixtures, which were used in the building, at the price of $592.54. Sometime prior to 5 February, 1927, the Vance Company abandoned its contract; and on 5 February, 1927, it delivered to Stevenson Theatres, Inc., invoices for material furnished the Vance Company by the plaintiff. Before these invoices were delivered the Vance Company, being insolvent, went into the hands of a receiver. The contract price of the work to be done by the Vance Company was $9,228. The contract provided that the first payment was not to be due before 14 June, 1926, and that subsequent payments should be made every thirty days thereafter, and that each payment, except the last, should include not more than 85 per cent of all labor and materials in the buildings or on the grounds. Stevenson Theatres, Inc., retained 15 per cent (or $1,161.13) of all estimates approved in accordance with the contract; it had in its hands also an additional sum, part of the contract price, when the Vance Company abandoned its contract.

The plaintiff brought suit against the defendants for $592.54, alleging that upon filing its itemized bills for material with Stevenson Theatres, Inc., the latter became indebted to it just as it would have been indebted if the contract had been made between these two parties. The verdict was as follows:

1. Is the Vance Plumbing & Electric Company indebted to the plaintiff for material furnished in the construction of the building upon the premises described in the complaint? If so, in what amount? Answer: $592.54, with interest.

2. If so, did Piedmont Electric Company give notice to the defendants of the existence of said debt prior to the completion of said contract? Answer: Yes.

3. If so, what part, if any, of the contract price was then unpaid? Answer: $2,648.43.

4. Was any part of said contract price then due the contractor? If so, in what amount? Answer: No.

5. Did any part of the unpaid balance on contract price thereafter become due the contractor, and if so, in what amount? Answer: No.

There was no exception to the issues. Judgment for defendants and appeal by plaintiff upon assigned error.

J. H. Bridgers for plaintiff.
Thos. W. Ruffin for defendants.

ADAMS, J. Although the Vance Plumbing and Electric Company, Stevenson Theatres, Inc., and S. S. Stevenson are named as defendants, the only answer appearing in the record is that of Stevenson Theatres. The first issue, it will be observed, is restricted to the controversy between this defendant and the plaintiff, and the answer to it was entered by consent. As the answer to the second was not seriously contested, it is apparent that the last two issues are addressed to the decisive matters in dispute. It is well to bear in mind that the building for which the materials were furnished was not erected by a county, city, town, or other municipal corporation and is not one of those to which C. S., 2445 applies. It is private property; and the bond given in evidence was executed, not by Stevenson Theatres for the benefit of the plaintiff, but by the Vance Plumbing and Electric Company to save the Stevenson Theatres from pecuniary loss resulting from a breach of the contract. The surety on the bond is not a party to the action.

The Vance Company had become insolvent and had gone into the hands of a receiver before the plaintiff gave notice of its claim to Stevenson Theatres. The jury found, in response to the third issue, that of the contract price for which the Vance Company had agreed to do the work, $2,648.43 was then unpaid. The plaintiff contends that out of this amount its debt should be paid; Stevenson Theatres, Inc., contends that because of the insolvency of the Vance Company it was compelled to complete the work at a cost in excess of the unpaid part of the purchase price, and that it was therefore not indebted to the Vance Company when the plaintiff's notice was served.

The statute which gives to subcontractors and laborers who furnish labor or material for building, repairing, or altering any house, a lien on the house and real estate, provides, also, that the sum total of all liens due subcontractors and material men shall not exceed the amount due the original contractor at the time the notice is given. C. S., 2437. In section 2438 it is provided that the owner of the real estate, after

notice is given him, shall "retain out of the amount due the said contractor under the contract as much as is due or claimed by the subcontractor, laborer, or material man, and that no payment to the contractor shall be a credit on or discharge of the lien." Section 2439 makes it the duty of the contractor, before receiving any part of the contract price, to furnish the owner an itemized statement of the amount owing by the contractor, and likewise makes it the duty of the owner thereupon to retain from the money due the contractor a sum, not exceeding the price contracted for, which shall be sufficient to pay the laborer, artisan, mechanic or material man.

These statutes, considered in connection with those which immediately follow them, contemplate the enforcement of a lien by the contractor, laborer, or material man, after due notice, when the owner neglects or refuses to retain an adequate sum or a proportionate part thereof (C. S., 2442) out of the amount "due the contractor under the contract." Accordingly, it was said in *Clark v. Edwards,* 119 N. C., 115, that the lien is good only for the amount due the contractor, laborer, or material man and that the subcontractor, who can only sue into the contract, can be put in no better condition. See *Building Supplies Co. v. Hospital Co.,* 176 N. C., 87. And in *Mfg. Co. v. Blaylock,* 192 N. C., 407: "The policy of the lien law is to protect subcontractors and laborers against loss for labor done and materials furnished in building, repairing or altering any house or other improvement on real estate, to the extent of the balance due the original contractor at the time of notice to the owner of the claims therefor, but it is not provided that the owner shall be liable in excess of the contract price, unless he continue to pay after notice of claim from the subcontractor or laborer, and these only to the extent of such payments after notice."

Stevenson Theatres, Inc., had the right under the terms of the contract to retain 15 per cent of the contract price until the completion of the work; and if, as found by the jury, the cost of completing the work exceeded the unpaid part of the contract price, there was no amount due the contractor, in contemplation of law, out of which the plaintiff's claim should be paid, at the time its notice was given; and the plaintiff would be entitled to no relief by claiming to be substituted to the rights of the contractor.

It is not necessary to review the cases cited in the appellant's brief, for the reason that the controlling facts in them differ from those in the case under consideration. It may be noted, however, that the first paragraph in the syllabus prefixed to *Lumber Co. v. Hotel Co.,* 109 N. C., 658, seems to be at variance with the fact that "at the time of such notification the defendant owed the said Sanford, as contractor, the sum of $9,025." We find

No error.

LARRY DAWSON AND D. G. WHITE, TRADING AS DAWSON & WHITE, v. NATIONAL BANK OF GREENVILLE, N. C., ET AL.

(Filed 9 October, 1929.)

1. **Bills and Notes I a—Upon payment of check without endorsement the drawee bank makes acceptance and is liable to payees.**

   While a bank is not ordinarily liable to the payee of a check it may become liable to him upon its acceptance or certification of the check, and where the bank has paid the check otherwise than to the payees or some person authorized by them to receive payment and has charged the amount to the drawer, the bank has accepted the check and the payees may hold it liable thereon. C. S., 3171. In this case the drawer having authorized payment as if made to bearer is estopped from holding the bank liable, and had agreed to save the bank harmless in the action.

2. **Same—Burden of showing proper payment is on the bank.**

   In an action by the payees of a check against a bank for paying the check otherwise than to them or to some person authorized by them to receive payment, the burden is on the bank admitting acceptance to show proper payment.

3. **Same—Where check is payable to two payees payment to one without authority of the other does not relieve bank of liability.**

   Where a check is payable to two or more persons as payees, or to their order, the amount of the check must be paid to both payees or upon the order of both, and payment to one of the payees or to the order of one without the authority of the other, does not discharge the bank of its liability unless the payees are partners, and evidence of payment to one of the payees is properly excluded. C. S., 3022.

4. **Same—Evidence of local custom of payment of checks as if drawn to bearer is incompetent in bank's defense.**

   Evidence of a local custom of paying checks of tobacco warehousemen as if made to bearer, is properly excluded in an action by the payees of a check, after acceptance by the bank, against the bank for paying the check to others without their authority or endorsement, title to a check being transferable only by endorsement and delivery. C. S., 3010.

APPEAL by defendants from *Daniels, J.*, at March Term, 1929, of PITT. No error.

Action by the payees to recover of the drawee bank the amount of a check, payable to their order. The check was presented for payment by a holder, without the endorsement of the payees. The bank paid the amount of the check to said holder, and charged said amount to the account of the drawers.

The drawers of the check had authorized the bank to pay said check, although drawn payable to the order of the payees named therein, as if it had been drawn payable to bearer. They admitted that the drawee bank was not liable to them for the amount of the check, and agreed

that in the event plaintiffs recover judgment in this action against the drawee bank, the said bank is entitled to judgment against them for the amount which plaintiffs shall recover of the said bank.

There was no evidence tending to show that the payees knew, when the check, payable to their order, was issued to them by the drawers, in payment of tobacco sold by the drawers as warehousemen for the plaintiffs, that the drawers had authorized the drawee bank to pay said check without their endorsement, as if the check had been drawn payable to bearer.

The issues submitted to the jury were answered as follows:

1. Did the defendant National Bank pay the proceeds of the check in controversy to the plaintiffs or to any person authorized by the plaintiffs to receive payment? Answer: No.

2. Is the defendant National Bank indebted to plaintiffs and, if so, in what amount? Answer: $359.03, with interest from 21 October, 1926.

From judgment on the verdict, defendants appealed to the Supreme Court.

Albion Dunn for plaintiffs.
J. C. Lanier for defendants, Moye & Gentry.
F. G. James & Son for defendant, National Bank.

CONNOR, J. This action was first tried at May Term, 1928, of the Superior Court of Pitt County. From judgment rendered at said trial, dismissing the action, as upon nonsuit, at the close of the evidence for plaintiffs, plaintiffs appealed to this Court. On said appeal, the judgment was reversed. *Dawson v. Bank,* 196 N. C., 135, 144 S. E., 833. In the opinion it is said: "The law in this State, both by statute and by authoritative decisions of this Court, is to the effect that the payee of a check cannot maintain an action upon the check against the bank on which the check is drawn, unless and until the check has been accepted or certified by the bank. C. S., 3171. *Trust Co. v. Bank,* 166 N. C., 112, 81 S. E., 1074."

Ordinarily, when the drawee bank declines to pay the check, or has paid the amount of the check to one who is not entitled to receive said amount, only the drawer of the check can maintain an action against the drawee bank, on the check, or for its amount. *Land Bank v. National Bank, post,* 526.

In this case, however, it was held that upon the facts which the evidence offered by plaintiffs tended to show, plaintiffs, as payees of the check, are entitled to recover of the defendant bank, unless said bank can satisfy the jury by evidence, that the amount of the check had been paid by it to the payees, or to some person authorized by them to receive

payment. The drawers of the check had authorized payment of the check to a holder without the endorsement of the payees, and were therefore estopped from contending that the bank was in any aspect of the case liable to them for the amount of the check. They have agreed to save the bank harmless in this action.

It was held on the former appeal that the action of the bank was in effect an acceptance of the check, and rendered the bank liable to the owner of the check for its proceeds. Payment of the proceeds to one who was not the owner of the check did not discharge the bank of liability to such owner. When the bank accepted the check, and charged its amount to the account of the drawers, it impliedly undertook to pay the proceeds of the check to the true owner.

Defendants' contention on this appeal that there was error in the ruling of the trial judge that the burden of the issue was on the defendant bank, and not on the plaintiffs, cannot be sustained. This ruling was correct on principle, and is in accord with the authorities both here and elsewhere. The burden was on the bank which admitted that it had accepted the check, and charged same to the account of the drawers, to show that it had paid the amount of the check to the payees, or to some person authorized by them to receive payment. *Land Bank v. National Bank, supra.*

There was no error in excluding evidence tending to show a custom, at Greenville, N. C., in accordance with which checks issued by tobacco warehousemen for the payment of tobacco sold by them for farmers, although such checks were drawn payable to the order of payees named therein, were paid by the drawee banks of said city, upon their presentment, to holders without the endorsement of the payees, just as if said checks were drawn payable to bearer. This custom, if it existed, could not affect the rights of payees of checks, drawn payable to their order, under the laws of this State. The title to a check payable to the order of the payee can be transferred only by the delivery of the check, with the endorsement of the payee thereon. C. S., 3010. The title to such check, and the right to its proceeds, when the check has been accepted for payment by the drawee bank, remains in the payee, until he has transferred the check by endorsement and delivery and thereby directed payment to be made to another. Payment of such check to one who is not a holder under the endorsement of the payee, is at the risk of the drawee bank.

Defendants offered evidence which they insist tended to show that the amount of the check was paid to one of the payees. This evidence was properly excluded upon objection by the plaintiffs. Defendants concede that they had no evidence tending to show that payment to one of the payees was authorized by the other payee. Where a check is payable to

two or more persons as payees, or to their order, the amount of the check must be paid to both payees or upon the order of both. Payment to one of the payees or to the order of one payee without the authority of the other payee, does not discharge the drawee bank of its liability for the amount of the check, unless the payees are partners. C. S., 3022.

We find no error in the trial of this action. The judgment is affirmed.

No error.

J. A. PERRY, ADMINISTRATOR, ET AL., V. ZONNIE WIGGINS ET AL.

(Filed 9 October, 1929.)

1. Judicial Sales B a—Under facts of this case action of trial court in setting aside deed under judicial sale is affirmed.

The purchaser at a judicial sale of land under proceedings for partition may, by motion when the matters are *in fieri*, have the court to exercise its equitable discretion to set aside the deed when it appears that his title is substantially defective and that the parties may be put in *statu quo* and the action of the court in so doing when the proper findings of fact are supported by the evidence will be upheld on appeal.

2. Judicial Sales C a—Caveat emptor does not apply to judicial sales under order of court.

The doctrine of *caveat emptor* does not apply to judicial sales under orders of court in its equitable jurisdiction, and where under such order an entire tract of land is to be sold the purchaser at the sale has a right to rely upon the court to give him a good title to the whole tract, nothing appearing to put him on notice that a less estate would be offered at the sale.

APPEAL by plaintiffs from *Small, J.*, at February Term, 1929, of NASH. Affirmed.

The court below found the facts and rendered judgment as set forth in the record. The plaintiffs made numerous exceptions and assignments of error to the findings of fact by the court below and the judgment rendered, and appealed to the Supreme Court.

J. S. Manning and L. T. Vaughan for plaintiffs.
Cooley & Bone for petitioner, C. H. Bunn.

CLARKSON, J. The question involved is whether or not the court below in its equitable discretion rightfully exercised its power to set aside a deed executed under order of the court at a judicial sale, the deed purporting to, but did not, convey a fee-simple title to the whole land? We think, under the facts and circumstances of this case, the court

below in its exercise of equitable powers rightfully set aside the deed. There was sufficient evidence for the court below to base its findings of facts, briefly, as follows:

A special proceeding was instituted by plaintiffs against the defendants for the partition of certain lands. A sale was ordered and the land, on 3 May, 1926, exposed for sale at public auction and C. H. Bunn became the last and highest bidder at the price of $705.00. Bunn complied with the terms of sale and, in accordance with the decree in the cause, the commissioners made him a deed purporting to convey a fee-simple title for the whole land. It was discovered, before the decree was confirmed, that the title was defective in that four certain parties who owned an interest in the land had not been served with summons, but this was done after the decree and after the deed purporting to convey fee-simple title to the whole land was executed. One of the new parties filed an answer asking that her interest in the property be not sold. The purchase money paid by Bunn is still in *custodia legis* except the advertising cost has been paid. The payment of the rent money was held up awaiting the orders of the court. Some of the parties interested in the property are in possession and have never surrendered same and the said Bunn has never been put in possession or received any rent and has never had a perfect title. That the title is substantially defective in that the purported deed of the commissioners does not convey a fee-simple title to the whole of said property. That the purchase money has been held by the court for over two years and the purchaser has received no interest nor any revenue therefrom. That the title has never been perfected. The court below on these facts was of the opinion that all the parties should be restored to their original *status quo,* and so ordered. C. H. Bunn, the purchaser at the commissioners sale, after notice by motion and petition in the cause setting forth the facts, prayed that the parties be put in *status quo.* Since this motion and petition, the defendants *now* put in an answer, and their prayer is as follows:

"Wherefore, the defendants pray the court that they may be heard upon the merits of this action, that any purported sale or other proceedings affecting the title to the above described tract of land be set aside, vacated and declared void and of no effect, and that such order as may be necessary shall be made to restore to herself and her brothers and sisters and their legal representatives such interest in the above described tract of land as they originally acquired by reason of the death of their brother, O. Z. Wiggins."

It appears from the record that this partition proceeding was interlocutory—*in fieri*—and the purchaser Bunn was not negligent or estopped from making the application by motion and petition in the cause.

In 16 R. C. L. (Judicial Sales), at p. 121, the law is stated: "However, in its modern application to judicial sales, the rule of *caveat emptor* has been somewhat relaxed; and it is now generally conceded that a purchaser at a judicial sale is entitled to expect and obtain a sound and marketable title to the property sold. The purchaser should therefore not be compelled to accept a defective or doubtful title, or to complete the sale or pay the purchase money until the defect is obviated. He is entitled to a good and marketable title and one that is free from equities, encumbrances and all reasonable doubt. Furthermore a person who, in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable."

In *Edney v. Edney,* 80 N. C., at p. 85-6, speaking to the subject, it is said: "It is settled in this State, that in judicial sales, a good title is to be deemed as offered, and the purchaser will not be compelled to pay his money and take a title substantially defective, unless the sale be made of an estate or interest short of the entire title, and so expressly mentioned on the face of a decree, or clearly implied from the nature of the sale. *Shields v. Allen,* 77 N. C., 375. To this rule we fully assent as material to establish a confidence in sales made by authority of the court, and as conducing to beget fair competition of bidders. And we agree that the doctrine of *caveat emptor* should not apply to such sales, unless there be something on the face of the decree indicating a sale of some estate or interest defective, or less than a whole title, and thereby putting the purchaser on his guard and at his own risk."

In *Carraway v. Stancill,* 137 N. C., at p. 476, it is said: "Courts of equity do not knowingly offer a disputed and litigated title for sale to the public, and especially by decree in the very action in which one of the defendants sets up a bona fide title to the land. Bidders and purchasers at execution sales have to look out for themselves, and they get only such title as the sheriff can convey. They may get something; they may get nothing; they know this when they bid. Judicial sales are decreed and conducted upon entirely different principles. Under such sales the purchaser has a right to look to the court to protect him. If the title fails and the money is still in *custodia legis,* the court will refund it or make such orders and decrees as are necessary and proper to perfect the title, if that be practicable."

The record discloses that the title to the land deeded by the commissioners to Bunn was substantially defective. The purchase money was held by the careful commissioners in *custodia legis*—they realizing that if they paid out the money with the uncertainty as to the true owners, some of whom were not served with summons, that they might

be personally liable. The title has never been perfected. In fact, after the proceeding was *in fieri* and title not perfected, the record discloses that the defendants themselves do not *now* desire the property sold for partition. On the present record it appears that it is doubtful if a good fee-simple title to the whole land could ever be made. A purchaser at a judicial sale is not required to wait indefinitely until a defective title of a substantial nature is cured. The court below, exercising its equitable power, decreed that the parties be restored to their original *status quo*. In this we think there was no error. The judgment below is

Affirmed.

NORFOLK SOUTHERN RAILROAD COMPANY v. RAPID TRANSIT COMPANY, R. E. RICKS, RECEIVER.

(Filed 9 October, 1929.)

Trespass A b—Use of land beyond license constitutes trespass ab initio.

The permission of a carrier by rail to its patrons to store cotton on its platform confers upon them the right to remove the cotton, but does not extend to the right to permit a competitive carrier to do so for the purpose of transporting the cotton over its own line, and the competitor's acts in so doing is trespass *ab initio*.

CIVIL ACTION, before *Lyon, J.*, at May Special Term, 1929, of PITT.

The plaintiff is a corporation operating a line of railway in North Carolina as a common carrier of freight and passengers, and in connection with such business is the owner of a lot of land in the town of Greenville, North Carolina, bounded on the north by Ninth Street; on the east by the right of way of plaintiff company; on the south by Tenth Street, and on the west by the warehouse property of F. V. Johnson. Several years ago the plaintiff constructed a platform upon said property and has permitted various persons to store cotton thereon pending shipment, and has also permitted the public cotton weigher of the town of Greenville to go upon said platform and weigh cotton. The defendant is the owner of a cotton platform in the town of Greenville some distance from plaintiff's property, which said platform has been used for storing cotton.

The evidence further discloses that the defendant is engaged in the business of operating trucks for transporting cotton and other commodities from Greenville to other points in this State. In November, 1927, the defendant, through its agents and employees, went upon the platform of plaintiff and removed therefrom cotton for the purpose of

transporting or shipping said cotton to other points. In procuring the cotton the defendant used a truck and trailer. The plaintiff notified the defendant to stay off its premises, as it was a competitor and had no right to come upon plaintiff's property with trucks and trailers to remove cotton from its platform. The defendant refused to remain off plaintiff's land and platform, but persisted in coming there and removing and shipping cotton, contending that the owners of cotton had authorized the entry upon plaintiff's land for the purpose aforesaid. Whereupon plaintiff applied for an injunction to restrain further trespass upon its property by the defendant and its agents. Thereafter the restraining order was dissolved and the plaintiff appealed. The appeal was disposed of in 195 N. C., p. 305, 141 S. E., 926. Subsequently the question came on for hearing upon its merits. The following issues were submitted to the jury:

"1. Did the defendant commit a trespass in going upon the premises of the plaintiff railroad company and hauling away the cotton of Speight & Company, and others, as alleged?"

"2. What damage has the defendant Rapid Transit Company sustained by reason of the injunction issued and continued against said defendant?"

The trial judge directed the jury to answer the first issue "Yes," and the second issue "No."

From judgment upon the verdict the defendant appealed.

F. G. James & Son for plaintiff.

J. Con Lanier and Albion Dunn for defendant.

BROGDEN, J. The cotton platform owned by the plaintiff was private property, and so far as the evidence discloses, was not subject to any public duty or obligation. Various parties in Greenville had been permitted by the plaintiff to bring cotton to the platform where the official weigher was stationed. The cotton weigher was employed by the county and there was no contract between the county and the plaintiff for using the platform, but such platform was used merely by the license and permission of plaintiff. Certain cotton dealers of Greenville purchased cotton upon the platform and thereafter authorized the defendant to proceed to the platform with a truck and trailers to remove said cotton, not for the purpose of delivering same to the owners, but for the purpose of shipping and transporting it as a competitor of the plaintiff.

The plaintiff relies upon the rule of law declared by a majority of the courts to the effect that a railroad company, so long as it affords reasonable accommodation to the public, may grant to one person the

exclusive privilege of entering its stations and grounds for the purpose of soliciting patronage. The principle is tersely expressed in *Delaware L. & W. R. Co. v. Town of Morristown,* 276 U. S., 182, 48 Supreme Court Reporter, 276: "There was no duty upon petitioner to accord to other taxicabmen the use of its lands simply because it had granted Welsh the privileges specified in its contract with him. Petitioner is not bound to permit persons having no business with it to enter its trains, stations or grounds to solicit trade or patronage for themselves; they have no right to use its property to carry on their own business." *Black & White Taxi. & T. Co. v. Brown & Yellow Taxi. & T. Co.,* 276 U. S., 518, 48 Supreme Court Reporter, 404; *Thompson's Express & Storage Co. v. Mount,* 111 Atlantic, 173, 15 A. L. R., 351. These decisions, of course, have a general application to the question involved in this appeal, but do not decide the exact point presented. The controlling question upon this record is whether the owner of cotton can send an agent to the platform of the plaintiff and remove the cotton for shipment to other points, when the agent so selected is himself a competitor of the plaintiff. Obviously, this would amount to permitting the competitor to use plaintiff's property in order to carry on his own business. Furthermore, the evidence tends to show that the plaintiff permitted the owners of cotton to use the platform for storing the same which, of course, conferred the right upon such owners to enter the premises and remove the property. Clearly, this was a mere license. Therefore, when the defendant entered upon the premises of the plaintiff not for the purpose of delivering the cotton to the owner, but for the purpose of shipping and transporting it as a competitor of the plaintiff, there was an abuse of the license, for the reason that the license was extended to a point far beyond that which was essential to the enjoyment of the right conferred by the railroad upon the owners of the cotton. In this aspect of the law the defendant became a trespasser *ab initio.* Thus in *Bear v. Harris,* 118 N. C., 476, the defendant purchased the cargo of a vessel upon condition that the same should be removed within thirty days. Thereupon the defendant moved the vessel about two miles down the river in order to procure a more convenient landing place for the cargo. The vessel was caught in a storm and damaged. The plaintiff brought suit against the defendant for damages, and the defendant took the position that as he had a right to enter the vessel and remove the cargo, he was not a trespasser, and therefore not liable. The Court said: "The right to enter the boat at the wharf within thirty days and remove the cargo was not an implied license to remove the schooner to another place for convenience and unload. It was not a necessity, but was the abuse of a legal license, and made the defendant a trespasser

ab initio." Again in *Gardner v. Rowland,* 24 N. C., 247, the plaintiff gave to the defendant permission to enter his land and remove some corn, directing that the defendant enter the land through the gate. Instead of doing this defendant pulled down the fence. The Court held that the defendant was a trespasser. *Gaston, J.,* writing the opinion, said: "Now it is not reasonable, and therefore not legal, to presume a more extensive license than is essential to the enjoyment of that which was expressly granted."

Upon the record, the instruction of the trial judge was correct and the judgment is

Affirmed.

J. J. WALLER AND EVA WALLER, HIS WIFE, AND MARIE ELIZABETH DAVIS AND CHARLIE DAVIS, v. GEORGE O. BROWN ET AL.

(Filed 9 October, 1929.)

Deeds and Conveyances C c—In this case held: deed conveyed life estate to B. with remainder to his children living at his death.

Under a deed of gift to the grantor's son, using the words "lend to him during his life, and after his death to his children," with *habendum* "to them and their heirs in fee simple," the word "lend" will be construed as a word of conveyance to effectuate the intent of the grantor as expressed in the instrument, and the son takes a life estate in the lands with remainder over to his children living at the time of his death, and the deed does not operate as a conveyance directly to the children living at the time the deed was made, reserving a life estate to the son, and they do not take to the exclusion of the children born thereafter.

APPEAL by plaintiffs from *Nunn, J.,* at June Term, 1929, of LENOIR. Affirmed.

Controversy without action on an agreed statement of facts. On 30 January, 1884, Haywood Waller and his wife executed and delivered to Andrew Waller a written instrument, the material facts of which are as follows:

"This deed made this 30 January, 1884, by Haywood Waller and wife, Charlotte Waller, of Lenoir County, and State of North Carolina, of the first part, to Andrew Waller, of Lenoir County, and State of North Carolina, of the second part, witnesseth:

"That the said Haywood Waller and wife, Charlotte, in consideration of the love and affection which we bear our son, Andrew J. Waller. We do lend to him during his life a tract of land to the said Andrew J. Waller, and after his death we give the land to his children, all the right, title, interest and estate, a tract of land in Lenoir County, State

of North Carolina, adjoining the lands of Jesse Nobles, Woodley Decton and Acy Waller and others bounded as follows, containing 46 acres. . . .

"To have the use of said land during his life, and after his death we give the land to his children, only excepting the use of timber for ourselves.

"To have and to hold to them and their heirs in fee simple forever the aforesaid tract of land, and all privileges and appurtenances thereto belonging to the said Andrew J. Waller's children, their heirs and assigns, to their only use and behoof forever."

When the deed was executed Andrew Waller had three living children; the two plaintiffs J. J. Waller and Marie Elizabeth Davis, and Viola Hall, one of the defendants. After the execution of the deed there were born to Andrew Waller and his wife the following children: James H. Waller, Henry J. Waller, Tiffany Waller Smith, Essie Waller Brown, and Ellen Waller Smith. Andrew Waller took and held possession of the land as life tenant until his death in 1929. All his children survived him, except Ellen Waller Smith, who died 5 March, 1920, survived by her husband and six children, who are defendants. On 22 February, 1923, prior to the death of Andrew Waller, the plaintiff J. J. Waller conveyed a one-eighth interest in the land to M. F. Waller, and on the same date James H. Waller and Henry J. Waller each conveyed a one-eighth interest to M. F. Waller. On 10 July, 1926, M. F. Waller died intestate survived by his widow and several children. All the parties in interest are parties to this proceeding.

The plaintiffs, two of the three children who were living when the deed was executed to Andrew Waller, brought an action against the defendant to recover possession of the land (except as to the one-eighth interest they had conveyed), and damages, claiming that the whole title vested in the children who were living when the deed was executed and that the children born thereafter had no interest in the land. The defendants denied the plaintiff's allegations and pleaded tenancy in common and asked that the land be partitioned among the tenants.

It was adjudged at the hearing that upon the death of Andrew Waller and the termination of his life estate in the lands the interest in remainder vested in his children as a class living and in being at the time of his death, that the children of Ellen Waller Smith, grandchildren of the grantor, had no legal interest in the land. The prayer of the plaintiffs was denied and the cause was remanded to the clerk for proceedings in partition. The plaintiffs excepted and appealed.

Shaw & Jones for plaintiffs.

Whitaker & Allen and Powers & Elliott for defendants.

ADAMS, J. The appellants argue *in limine* that the grantors in the deed conveyed the land therein described directly to the living children of Andrew Waller, reserving to him the use of the land for his life without the creation of an intervening estate of freehold; that as there is no conveyance to Waller there can be no remainder vested or contingent; and that the children born after the execution of the deed can have no interest in the property. This argument, we presume, is founded on the phraseology of the deed; more particularly, no doubt, on the words, "We do lend to him during his life."

An effective deed must, of course, contain operative words of conveyance—words which indicate the grantor's intention to convey his property; but the absence either in deeds or in wills of technical operative words will not usually be regarded as adequate cause for defeating an intention which is found upon examination of the whole instrument to be plainly though untechnically expressed. It was remarked in *Elliott v. Jefferson,* 133 N. C., 207, 214, that no rule can be invoked, no matter how correct in its general application, that tends to defeat the intention of the grantor. Henry Waller and his wife no doubt regarded the word "lend" as synonymous with the word "convey," their manifest purpose being to convey to Andrew Waller an estate for his life. This is the meaning frequently given the word in the construction of wills. *Smith v. Smith,* 173 N. C., 124; *Robeson v. Moore,* 168 N. C., 388. It is the meaning given it by this Court in the construction of a deed. *Edgerton v. Aycock,* 123 N. C., 134.

Andrew Waller having taken a life estate, our decision involving the controversy of the remaindermen will be controlled by the case of *Powell v. Powell,* 168 N. C., 561. In its distinctive features the deed there construed is almost identical with the one now under consideration, the difference being a provision in the former that in the event of the death of any one of the remaindermen during the existence of the life estate his interest should go to his surviving child or children—a provision similar to that in *Mercer v. Downs,* 191 N. C., 203, and in *Trust Co. v. Stevenson,* 196 N. C., 29. The absence of this provision in the deed before us does not affect the construction or the decisive point. The decision in *Powell v. Powell, supra,* is based upon the law as stated by *Pearson, C. J.,* in *Dupree v. Dupree,* 45 N. C., 164, 168: "A bequest or use limited to the children of A. passes only to such children as A. has at the time (and we will suppose that a child *en ventre* would be included); but a bequest or use limited to the children of A., after an estate to her for life, remains open, so as to take in all the children she may have at her death. And this class of cases is put on the ground, that by reason of the life estate, it does not become necessary to fix the legal ownership until the death of the taker of the first estate."

It was accordingly held in an opinion written by *Allen, J.,* that all the children who were living at the termination of the life estate had an interest as remaindermen, whether born before or after the execution of the deed. This decision, supported by the authorities therein cited, is conclusive on the question now under discussion. The judgment is

Affirmed.

C. G. CARAWAN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF MONETARY DELAMAR, WINNIE DELAMAR, RANDOLPH ALLEN, LUTHER ALLEN, MAUDE ALLEN, ANNIE PHELPS AND MARIE HARRIS BAUM, v. HORTENSE BARNETT.

(Filed 9 October, 1929.)

Municipal Coporations G c—Assessments for public improvements are enforceable only against the land assessed.

An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of C. S., 93, as to the order of payment of debts of the deceased has no application.

APPEAL by plaintiffs from *Daniels, J.,* at April Term, 1929, of PAMLICO. Affirmed.

Z. V. Rawls for plaintiffs.
Ward & Ward for defendants.

CLARKSON, J. The only question involved is whether or not a street assessment on a particular piece of land or lot abutting on a street in a municipality, duly and properly made according to law, should be paid by the personal representative of the party whose piece of land or lot is assessed or out of the land or lot? We think the land or lot bears the burden of the street assessment.

After alleging the facts "the petitioners pray the court for its direction as to the payment of the balance due on said street assessment, which balance, to date is $167.87 with interest." *Trust Co. v. Stevenson,* 196 N. C., 29.

The will of Monetary Delamar was made and executed on 14 January, 1927. After her death, C. G. Carawan duly qualified as administrator of her last will and testament and entered upon the discharge of

his duties. The necessary items of the will of Monetary Delamar for the decision of this action, are as follows:

"Item 2. I give and bequeath to my beloved daughter-in-law, Winnie Delamar my house and lot in the town of Oriental where I reside, to have and to hold during her natural life, at her death to be sold, the proceeds to go to the Methodist Orphanage, at Raleigh, N. C., etc.

"Item 3. I give and bequeath to my beloved sister Hortense Barnett all my wearing apparel and all money and all notes due me and a watch which was my mother's."

Prior to Monetary Delamar's death, there had been according to law, a street assessment on the house and lot devised to her daughter-in-law, Winnie Delamar, during her natural life and at her death to be sold and the proceeds to go to the Methodist Orphanage at Raleigh, N. C., by the town of Oriental. The assessment by the town of Oriental was confirmed on 28 March, 1927, and the amount of the assessment was $186.52. From confirmation the assessment became a lien superior to all other liens and encumbrances on the land. C. S., 2713. The testatrix, Monetary Delamar, had the option to pay same either in cash or on the 10 equal annual installment plan, as she desired. C. S., 2716. Prior to her death she paid, on 28 April, 1927, one-tenth, being $18.65, leaving a balance of $167.87 to be paid on the installment plan.

In *Morganton v. Avery,* 179 N. C., p. 551, speaking to the subject, it is said: "The assessment is not a personal liability of the defendant, and could not be collected out of her personalty by execution. It is a liability created solely by statute, and does not arise *ex contractu.* It is not a personal liability of the owner of the land to be collected by execution, it is a statutory charge upon the land itself, and must be collected by proceedings *in rem* in a court having equitable jurisdiction unless some other legal method is provided by the statute. If the land benefited is insufficient in value to pay the assessment in full, the remainder cannot be collected out of the other estate of the landowner. *Canal Co. v. Whitley,* 172 N. C., 102; *Commissioners v. Sparks, post* (179 N. C.), 581; *Raleigh v. Peace,* 110 N. C., 33." *Pate v. Banks,* 178 N. C., 139; assessment not collected out of other property of delinquent, see C. S., 5362.

In *R. R. v. Ahoskie,* 192 N. C., at pp. 259-60, it is said: "An assessment 'as distinguished from other kinds of taxation, are those special and local impositions upon the property in the immediate vicinity of municipal improvements which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom.' (Black's Law Dictionary); *Raleigh v. Peace,* 110 N. C., 32." *Goode v. Asheville,* 193 N. C., 134; *Drainage District v. Cahoon,* 193 N. C., 326.

In *Coble v. Dick*, 194 N. C., 732, it is held—that the assessment is an encumbrance as contemplated or included in the warranty in a deed containing full covenants and warranties against all encumbrances whatsoever.

A different rule applies in drainage assessments, premised on the language of the different statutes.

In *Taylor v. Commissioners*, 176 N. C., 217, this Court held: "The drainage tax becomes a lien, just as the benefits accrue, *i. e.*, annually. . . . It is a lien *in rem*, accruing annually and resting upon the land into whosesoever hands it may be at that time." *Branch v. Saunders*, 195 N. C., at p. 178.

C. S., 93, order of payment of debts of the decedent, has no application. The classes under that section apply to certain taxes and dues to the United States and State of North Carolina and debts *ex contractu*, not assessments. C. S., 93, *supra*, was passed at session of the General Assembly 1868-69. See chap. 113, sec. 24. The local improvement act, C. S., 2703, *et seq.*, was passed at session of the General Assembly, 1915, chap. 56.

The court below rendered the following judgment: "It is thereupon considered by the court, and adjudged from the facts so found that the part of the estate of the testatrix bequeathed to the defendant is not liable for any part of the unpaid assessment made against the lands devised by item 2 to the plaintiff, Winnie Delamar, for life and to the Methodist Orphanage at Raleigh in remainder, and that the defendant go without day and recover of the plaintiffs and the surety for their prosecution bond, the costs to be taxed by the clerk."

We see no error in the judgment of the court below. The judgment is Affirmed.

STATE v. F. H. CRAWFORD.

(Filed 9 October, 1929.)

Criminal Law I a—Prisoner may not waive his right to trial by jury when plea of not guilty has been entered.

Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. I, sec. 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law.

STATE *v.* CRAWFORD.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1929, of WAKE.

Criminal indictment charging the defendant with a violation of chapter 62, Public Laws 1927, generally known as the "Bad Check Law." The defendant's plea was "not guilty."

The following is taken from the record: "It is agreed that the court should, upon the facts agreed upon by the solicitor for the State and counsel for the defendant, say whether or not the defendant was guilty, and thereupon, after considering the facts the court orders that a verdict of guilty be entered."

From a judgment, pronounced on the above finding, that the defendant pay a fine of $25.00 and the costs, he appeals, assigning error.

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

Gulley & Gulley for defendant.

STACY, C. J. We have a number of decisions to the effect that when a defendant in a criminal prosecution, on trial in the Superior Court, enters a plea of "not guilty" to the charge preferred against him, he may not thereafter, without changing his plea, waive his constitutional right of trial by jury. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629; *S. v. Rogers,* 162 N. C., 656, 78 S. E., 293. And this applies to misdemeanors as well as to felonies. *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394.

Special verdicts are permissible in criminal cases, but when such procedure is had, all the essential facts must be found by a jury. *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075. They may not be referred to the judge for decision even by the consent of the accused or his counsel. *S. v. Holt,* 90 N. C., 749; *S. v. Stewart,* 89 N. C., 563. The parties are not permitted to change the policy of the law and substitute a new method of trial in criminal prosecutions for that of trial by jury as provided by the Constitution: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal." Const., Art. I, sec. 13. See, also, *S. v. Beasley,* 196 N. C., 797, 147 S. E., 301.

The case will be remanded to the Superior Court for trial by a jury as the law provides; none has yet been had.

Error.

C. W. SEARS ET AL. v. MRS. ALICE S. BRASWELL ET AL.

(Filed 9 October, 1929.)

1. Lost or Destroyed Instruments A a—Execution of lost instrument may be proven by ancient documents.

Where in an action to recover lands the plaintiffs introduce certain ancient deeds in order to show a common source of title, and it is claimed by the defendants that the deceased's common source of title made a contract to convey the lands to the one under whom they claim upon the payment by him of certain notes for the purchase price, and that this contract had been lost and could not be found after due diligence, and the defendants introduced an inventory of the administrator of the deceased and relies upon such inventory and the recitations in the deeds introduced by the plaintiffs: *Held*, the deeds and inventory so introduced, made *ante litem motam* and against the interest of the original owner, which tend to establish the contract to convey under which the defendants claim, are competent evidence of the execution of such contract and the payment of the consideration thereunder under the ancient document rule, and the plaintiffs are not entitled to have such evidence restricted to the purpose of showing a common source of title.

2. Ejectment C b—A defective deed is competent evidence of an equitable interest in lands.

The recitations in a deed made by the administrator of the deceased's common source of title, that the grantee therein had paid the full purchase price, though the deed is void because of the lack of proper registration under the provision of our statute, C. S., 91, it is competent in evidence to show an equitable title in the grantee therein.

3. Limitations of Actions A a—Where one has possession and equitable and legal titles to land he is not barred by statute of limitations or laches.

Where the purchase price in a contract to convey lands has been paid in accordance with its provisions, the purchaser has the equitable title which merges with the legal title, and the vendor and those claiming under him are merely naked trustees, and when the purchaser has been in continued peaceful possession from that time neither the statute of limitations nor laches will bar his right to have the claim of the devisees of the vendor removed as a cloud upon his title.

4. Estates C b—Upon the payment of the purchase price the legal and equitable titles merge in the purchaser.

Upon the payment of the purchase price of certain land according to the terms of a contract to convey it, the legal and equitable titles merge in the purchaser.

5. Estates A b—An equitable estate is descendible and alienable.

An equitable estate in lands is descendible and alienable in the same manner as legal titles.

6. Same—Equitable rights are not abolished by abolition of distinction between suits and actions.

Under our Constitution equitable rights are not destroyed, but are administered in one court, though the distinction between actions at law and suits in equity is abolished.

7. Quieting Title A b—Suit to remove cloud on title may be maintained in counterclaim.

The defendant in an action to recover lands may maintain a counterclaim and ask that the plaintiff's claim be removed as a cloud on his title.

APPEAL by plaintiffs from *Small, J.*, and a jury, at February Term, 1929, of NASH. No error.

Material Facts: In the course of the trial it was admitted of record by all parties:

(a) The land in controversy is the identical tract of land described in the deed from Robert D. McIlwaine and others to Wells Draughan, recorded in Book 26, page 559, Nash County registry, and described in the seventh item of the will of Wells Draughan, recorded in Will Book 9, page 277, of the clerk's office in Nash County, and is the same land as described in the deed from James W. Draughan, executor, to Richard H. Jones, recorded in Book 28, page 246, Nash registry, and in deeds from Richard H. Jones and wife, to Thomas P. Braswell, Bock 28, page 11, and to H. E. Odom, Book 26, page 602, and from H. E. Odom, trustee, to Thomas P. Braswell, Book 38, page 46, of Nash County registry.

(b) That Thomas Sears, mentioned in the seventh item of the will of Wells Draughan above referred to, died on the ..... day of April, 1926, never having married and never having had any lawful issue or heir of his body.

(c) That the plaintiffs in this action are all surviving heirs of Delphia Sears, deceased.

(d) That the interest of Thomas P. Braswell in the above described land passed by his will, recorded in the clerk's office of Nash County, to his three sons, M. C., M. R., and J. C. Braswell, and that by deed of M. R. and J. C. Braswell to M. C. Braswell, 140 acres of said land was conveyed, and the remaining 45 acres continued to be held in common; that upon the death of M. C. Braswell, intestate, in 1922, his interest in all the aforesaid land, the entire 185 acres, descended to the defendants, Vivian Braswell, Mattie May Gorham, Alice Bryan Braswell, and Elizabeth Braswell, subject to the dower of Mrs. Alice S. Braswell, widow of M. C. Braswell, deceased, the defendants in this action.

Upon evidence introduced by both sides, the following issues were submitted to the jury, the first four being answered by the jury and the last two by the court, to wit:

"1. Did Wells Draughan enter into a contract in writing binding himself, his heirs and assigns, to convey the lands in question to said Richard H. Jones, as alleged in the answer? Answer: Yes.

2. Did Richard H. Jones contemporaneously with the execution of said contract execute and deliver to Wells Draughan purchase money notes for the purchase price of said land, as alleged in the answer? Answer: Yes.

3. Did Richard H. Jones subsequently pay said purchase money notes to the legal holder thereof? Answer: Yes.

4. Have defendants and those under whom they claim, been in quiet and undisturbed possession of said land since 1872 under said contract? Answer: Yes.

5. Is defendants' counterclaim to remove plaintiffs' claim as a cloud upon their title, barred by the statute of limitations? Answer: No. (Answered by the court.)

6. Are plaintiffs the owners of and entitled to possession of lands described in the complaint? Answer: No. (Answered by the court.)"

(e) The seventh item of the will of Wells Draughan is as follows: "I give and devise unto Thomas Sears child of Charles E. Sears and Delphia Sears, his heirs and assigns, a tract of land situated in Nash County on the north side of Swift Creek which I purchased of McIlwaine and Company, of Petersburg, Virginia, formerly owned by Colonel Rowland. Richard Jones now lives on said land. In case the said Thomas Sears should die without lawful heirs of the body the said tract of land shall be divided among the surviving heirs of the said Delphia Sears."

(f) Plaintiffs introduced in evidence the following:

Deed from James W. Draughan, executor, to Richard H. Jones, recorded in Book 28 at page 246, Nash County registry, which reads as follows:

"This indenture made this 13 November, A.D. 1872, between James W. Draughan, executor of Wells Draughan, deceased, of one part, and Richard H. Jones of the other part, witnesseth that whereas the late Wells Draughan gave the said Richard H. Jones an obligation binding him the said Wells Draughan his heirs, executors and administrators to execute and deliver to said Richard H. Jones, his heirs and assigns a good and fee simple deed to the following described tract of land, upon the payment to him the said Wells Draughan or his executors or administrators of three separate notes of five hundred dollars each, bearing interest from 1 January, 1870, and due respectively 1 January, 1871, 1 January, 1872, and 1 January, 1873; and whereas the said R. H. Jones has paid off and satisfied said notes: Now this indenture further witnesseth, that in consideration of the payment of said notes with

interest on same to the said J. W. Draughan, executor aforesaid, he, the said James W. Draughan has this day sold and conveyed and delivered and by these presents does sell, convey and deliver to said Richard H. Jones, his heirs and assigns forever, the land above mentioned and described as follows, being situated in the county of Nash and State of North Carolina, on or near the road leading from Hilliardston to Battleboro, adjoining the lands of Dr. R. H. Marriott, E. Boddie Hilliard, the lands of late Joseph Turner and others, containing one hundred and eighty-five acres, more or less, being the land purchased by W. H. Rowland, of Jas. Turner, and by H. G. Williams of said Rowland and by A. H. Williams of said H. G. Williams, and by McIlwaine & Co. of said A. H. A. Williams, to have and to hold the same unto him the said Richard H. Jones, his heirs and assigns forever, and the said James W. Draughan, as executor aforesaid hereby warrants and defends unto said Jones and his heirs a good right and title to said land against the claims of any and all persons whatsoever.

In witness whereof the said James W. Draughan has hereunto set his hand and seal, the day and date above written.

JAMES W. DRAUGHAN, *Executor.* (Seal.)

Witness: H. G. WILLIAMS.

Nash County. In the Probate Court, 10 February, 1874.

The execution of the foregoing deed was duly proven before me by the oath of H. G. Williams, the witness thereto. Register it.

Registered 13 June, 1874.

J. P. JENKINS, *Probate Judge.*
WILLIAM T. GRIFFIN, *Register of Deeds.*"

Deed from Richard H. Jones and wife to Thos. P. Braswell, recorded in Book 28 at page 11, Nash County registry. The material parts of this deed are as follows: Dated 13 November, 1872; acknowledged 15 November, 1872; recorded 6 May, 1873. Consideration $500, containing by estimation 140 acres, more or less, and being a part of the McIlwaine tract. "The following described tract or parcel of land situate in the county of Nash, State of North Carolina, being a part of the tract purchased by said Jones of Wells Draughan, deceased, the whole of which tract was purchased by said Wells Draughan of McIlwaine." (The tract in controversy.) Contains general warranty.

Mortgage, Richard H. Jones to H. E. Odum, recorded in Book 26, at page 602, Nash County registry. The material parts of said mortgage are as follows: Dated 13 November, 1872, acknowledged 27 November, 1872, and recorded 2 January, 1873; mortgage recites: "Witnesseth,

that whereas, said H. E. Odom is security for Richard H. Jones on a certain bond due James W. Draughan for the purchase of the following described tract or parcel of land given this day and due 1 January, 1874, and bearing interest from 1 January, 1873, the amount of principal of said bond being seven hundred and seventy dollars, and whereas the said Richard H. Jones and Harriet A. are desirous of securing and saving the said H. E. Odom on account of said securityship, so that he will not be loser thereby," etc.

Containing 45 acres, more or less, and being the balance of the McIlwaine tract. This description begins "The tract of land on which R. H. Jones now resides purchased by him of the late Wells Draughan with the exception of that part sold to Thos. O. Braswell this day, the part hereby conveyed and sold to said Odom being bounded as follows." The land described is part of the land in controversy.

Deed, H. E. Odom, mortgagee or trustee, to Thos. P. Braswell, Book 38, page 46, Nash County registry.

The evidence was introduced by plaintiffs to show defendants' chain of title from a common source.

Plaintiffs' counsel dictated to the record the following statement: "All of the evidence introduced showing defendants' chain of title was introduced for the purpose of showing title from common source, and that plaintiffs' title from that source is superior to defendants' title from that source, and evidence restricted to that purpose." Motion by defendants to strike from record the above statement and restrictions. Motion allowed; (1) plaintiffs except and assign error.

Defendants' evidence, in part:

Defendants introduced in evidence a certified copy from Edgecombe Superior Court, of the qualification of James W. Draughan, executor of Wells Draughan, deceased.

"TARBORO, N. C., 24 September, 1872.

In the Matter of the Will of the late Wells Draughan of this county:

The last will and testament of the late Wells Draughan of this county having this day been admitted to probate in this county, and James W. Draughan having applied for leave to qualify as one of the executors mentioned therein—

It is ordered by the court that he have leave to do so . . . and thereupon the said James W. Draughan did by taking and subscribing to the oath prescribed by law for the qualification of executors . . . and letters testamentary are issued accordingly.

24 September, 1872.

J. NORFLEET, *Judge of Probate.*"

Defendants offered in evidence the following instrument, to which plaintiffs objected, not on account of form, but on account of substance; objection overruled, (2) plaintiffs except and assign error.

Instrument admitted in evidence reads as follows:

"Inventory of land, belonging to Wells Draughan, deceased. (There are nine tracts of land mentioned other than the one below, of which no description or number of acres are requested.)

(180) One hundred and eighty acres in Nash County bought of McIlwaine & Company, Petersburg, Va., given by will to Thomas Sears, son of Charles E. Sears, afterwards sold to Richard Jones on condition of the money being paid to Thomas Sears or his guardian. Note endorsed to Thomas Sears. JAMES W. DRAUGHAN.

Sworn to and subscribed before me, by Jas. W. Draughan, 3 April, 1875.

JOHN NORFLEET, *Judge of Probate.*

Book of Inventories and Accounts, 1867-1881, Edgecombe County, office clerk Superior Court."

Defendants admit in open court that plaintiffs are the only lawful heirs of Delphia Sears; that the defendants do not claim title to the lands in controversy by adverse possession against the plaintiffs, but under the alleged contract between Wells Draughan and Richard H. Jones followed by payment of the purchase price specified in said contract and possession thereunder; it is further admitted that Tom Sears mentioned in paragraph 7 of the will of Wells Draughan died without leaving lawful heirs of his body; never had any children. The foregoing admissions are made with the understanding that the court in rendering its judgment shall consider said admissions as of the same effect and force as if found by a jury upon proper issues submitted.

The defendants relied upon the following evidence:

(a) The recitals in the various deeds pleaded and introduced by the plaintiffs, together with a record of the inventory of Wells Draughan, by executor, filed in Edgecombe County Superior Court, all more than thirty years old and treated as ancient documents.

(b) Continuous possession of the land consistent with their claim under the contract and consistent with the existence of the contract.

(c) The loss of the original contract and the diligent search for it, the exhaustion of every reasonable effort to locate it, and their inability to produce it. No notice was served on the plaintiffs to produce it because in their reply to the amended answer they denied the existence of it. No demand was ever made on defendants for the possession of the land until after the death of Thos. Sears, which was in April, 1926.

All the exceptions of the plaintiffs relate to the competency of the evidence upon which the defendants relied and upon the legal effect thereof. Among the allegations in defendants' answer, they say: "That the plaintiffs, as executory devisees under the will of Wells Draughan, are asserting a claim of title to the land herein described; that the claim of the plaintiffs constitutes a cloud upon the title of the lands in question, which are now and have been for the past fifty-six years in possession of these defendants and those under whom they claim, adversely to the plaintiffs and those under whom they claim; that the defendants are entitled to a conveyance of the land from the plaintiffs." And for a further reply to the affirmative defense set up by the defendants, the plaintiffs allege:

1. That the defendants' cause of action, if any they have, growing out of the alleged contract between Wells Draughan and Richard H. Jones, accrued more than ten years prior to the commencement of this action and the filing of the defendants' pleading, and therefore barred by the ten-year statute of limitations, which is hereby specifically pleaded in bar of the defendants' right to enforce the same, or to recover upon it.

2. That the defendants' cause of action, if any they have, growing out of the alleged contract between Wells Draughan and Richard H. Jones, accrued more than three years prior to the commencement of this action, and the filing and pleading, and the same is therefore barred by the three-year statute of limitations, which said statute is hereby pleaded in bar of their right to enforce the same, or to recover anything by reason thereof.

3. That if there was any contract and any trust created as alleged by the defendants, which is specifically denied by the plaintiffs, the defendants, and all of them, are guilty of laches and unreasonable delay in enforcing the said trust and by their conduct in this respect they are now estopped to assert any rights under such alleged contract and trust.

Other material facts will be set forth in the opinion.

Cooley & Bone and L. L. Davenport for plaintiffs.
J. P. Bunn and Battle & Winslow for defendants.

CLARKSON, J. From the admission of defendants, the plaintiffs were entitled to the possession of the land in controversy unless the defendants' contentions were correct, and there was competent evidence to support them.

The main contentions of plaintiffs, as we interpret them, are:

(1) "All the evidence introduced showing defendants' chain of title was introduced for the purpose of showing title from common source, and that plaintiffs' title from that source is superior to the defendants' title

from that source, and evidence restricted to that purpose." The court below refused to restrict the evidence, and in this we think there was no error.

(2) The contention of plaintiffs was also to the effect that the inventory of James W. Draughan, executor of Wells Draughan, introduced by defendants was incompetent as bearing on the written contract as set up by defendants by Wells Draughan to Richard H. Jones and his heirs and assigns; that upon payment of the purchase money notes to Thomas Sears, a conveyance would be made to Richard H. Jones and his heirs and assigns. This evidence was admitted by the court below, and in this we think there was no error.

The inventory was filed by the executor under the provisions of chapter 113, Laws 1868, which required the executor under oath within three months to return to the clerk an inventory of the real estate, etc.

The recitals in the conveyances, and other evidence, tend to show: That Wells Draughan, who owned the land in controversy, made a will which bears date of 17 February, 1870 (codicils 8 March, 1870, and 11 May, 1871). Said will and codicils were duly probated 24 September, 1872.

The seventh item of his will devised the land in controversy to Thomas Sears and his heirs and assigns, but "in case the said Thomas Sears should die without a lawful heir of the body, the said tract of land shall be divided among the surviving heirs of the said Delphia Sears." Thomas Sears died without lawful heirs in April, 1926. The plaintiffs in this action are the surviving heirs of Delphia Sears. The defendants admit that the deed of James W. Draughan, the executor of Wells Draughan, conveying the land in controversy is inoperative, as it purports to do, to pass title to Richard H. Jones and his heirs and assigns. The bond for title was not recorded. C. S., 91; *Taylor v. Hargrove,* 101 N. C., 145.

That a written contract or bond for title, as required by law, was made by Wells Draughan before he died to convey the land in controversy to Richard H. Jones and his heirs and assigns upon the payment of certain purchase-money notes, which were to be paid by Jones to Thomas Sears, who, under section 7 of the will, as above set forth, would have had an interest in the land in controversy. That there was an ademption of the legacy *(King v. Sellars,* 194 N. C., 533), by the bond for title being made by Wells Draughan before he died and after his will was made, to Richard H. Jones and the notes were endorsed to the grandson, Thomas Sears, mentioned in Item 7 of the will in lieu of the legacy. That the notes came into the hands of the executor, who collected them and turned the proceeds over to Thomas Sears and made

the deed set forth in the statement of facts which is inoperative as the written contract or bond for title was never recorded as required by law.

That Richard H. Jones, and those who claim under him, have been in the quiet and undisturbed possession of the land in controversy since 1872 under the written contract or bond for title. That diligent search was made for the written contract or bond for title, which could not be found. The defendants' counterclaim is to remove plaintiffs' claim as a cloud upon defendants' title, which is not barred by the statute of limitations, and the plaintiffs are not the owners and entitled to the land in controversy.

The jury found that the contract or bond for title was made as the defendants alleged, that the notes were executed as the defendants allege; that the purchase money was paid to the legal holder of the notes as the defendants alleged; that the defendants have been in quiet and undisturbed possession of the land since 1872 under the contract. On these findings the court below found that the defendants' counterclaim to remove cloud on title was not barred by the statute of limitations, and that the plaintiffs were not the owners of the land.

The principle is well settled in this State and elsewhere that where both parties claim title under the same grantor, it is sufficient to prove a title derived from him without proving his title, as neither party can deny such title. The plaintiffs, in attempting to prove their own title, and in order to connect defendants' title with a common source, introduced the James W. Draughan, executor, deed and the other conveyances set forth in the record, which contained certain recitals. Plaintiffs contend that the evidence should be restricted.

We said in *Cook v. Sink,* 190 N. C., at p. 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"; *Adams v. Wilson,* 191 N. C., at p. 395.

The deed from James W. Draughan, executor, dated 13 November, 1872, to Richard H. Jones, and his heirs and assigns, introduced by plaintiffs, have these recitals: "Witnesseth, that whereas the late Wells Draughan gave the said Richard H. Jones an obligation binding him, the said Wells Draughan, his heirs, executors and administrators to execute and deliver to said Richard H. Jones, his heirs and assigns a

good and fee-simple deed to the following described tract of land, upon the payment to him the said Wells Draughan or his executor or administrator of three separate notes of five hundred dollars each, bearing interest from 1 January, 1870, and due respectively 1 January, 1871, 1 January, 1872, 1 January, 1873; and whereas the said R. H. Jones has paid off and satisfied said notes."

The recitals in the other conveyances introduced by plaintiffs, speak of the land "being a part of the tract purchased by said Jones of Wells Draughan, deceased," and "the tract of land on which R. H. Jones now resides, purchased by him of the late Wells Draughan, with the exception of the part sold to Thomas P. Braswell this day."

Item 7 of the will of Wells Draughan says "Richard Jones now lives on said land."

We will not discuss whether the recitals in the conveyance introduced by plaintiffs to connect defendants' title with a common source was an estoppel as to them, as defendants made certain admissions of record and the action was tried out on the theory that the recitals were some competent evidence in ancient documents, and the competency of these recitals seems to be the crux of this action.

We think that the recitals in these deeds and the inventory return competent evidence under the ancient document rule. *Davis v. Higgins,* 91 N. C., 382; *Sledge v. Elliott,* 116 N. C., 712; *Nicholson v. Lumber Co.,* 156 N. C., 59; *Thompson v. Buchanan,* 195 N. C., 155; *Davis v. Gaines,* 104 U. S., 386; *Wilson v. Snow,* 228 U. S., 217, 6 A. L. R., 1445 *et seq.*

In *Buchanan's case, supra,* at p. 161, it is said: "The hearsay rule gives way to the ancient (document) doctrine rule and is admissible ordinarily at least as prima facie evidence of the truth of the contents."

"Even if it be conceded that the deed was not of itself a valid conveyance, which the executor was authorized to make, the recitals were admissible to establish the truth of the facts recited. The deed was ancient; the parties to the transaction were dead; the recitals were against the interest of the party making them as he was one of the heirs of John S. Sydnor, and are consistent with every known fact connected with the title." *Sydnor v. Texas Savings Asso.,* 42 Tex. Civ. Ap., 138, 94 S. W., 451.

The executor's deed in the present action was void because the bond for title was not recorded. Yet the evidence discloses that Richard H. Jones paid the purchase price. We think the principle laid down in *Thompson v. Lumber Co.,* 168 N. C., at p. 229, analogous: "The deed to Prichard, which was objected to, is void, as contended by the defendant, because the grantee named was dead at the time of its execution *(Neal v. Nelson,* 117 N. C., 406), but upon proof of payment of the purchase

price bid at the sale an equitable estate would be vested in the heirs of the purchaser, and it is well settled in this State that an action may be maintained on an equitable title *(Condry v. Cheshire,* 88 N. C., 375; *Brown v. Hutchinson,* 155 N. C., 207); and in our opinion there was circumstantial evidence of payment." See *Cedar Works v. Shepard,* 181 N. C., 13. Defendants in this action are the successors in title from Richard H. Jones.

In the present action the alleged ancient original bond for title was lost. Under the evidence introduced by defendants, which we think competent, diligent search was made as required by law. "To show a writing is lost or destroyed, in general terms, without showing a reasonable search or inquiry for it, has never been regarded as sufficient to admit secondary or parol evidence of its contents. The best evidence is the paper-writing, when a matter is required to be put in writing, or the paper-writing is in issue or the subject of the controversy. *McKesson v. Smart,* 108 N. C., 17; *Avery v. Stewart,* 134 N. C., 287; *Sermons v. Allen,* 184 N. C., p. 127; *Chair Co. v. Crawford,* 193 N. C., 531. The exception to the rule is where the contents of the writing is collateral to the controversy or issue. *Herring v. Ipock,* 187 N. C., p. 459." *Harris v. Singletary,* 193 N. C., at pp. 586-7.

Plaintiffs' third contention is that defendants are barred by the statute of limitations, ten years, etc., and laches. We cannot so hold. Defendants contend that Richard H. Jones, through whom they claim, had a written contract or bond for title, as required by law, from Wells Draughan; that upon the payment of certain notes a deed in fee simple was to be made him for the land in controversy. Under the bond for title in 1872, Jones went into possession of the land in controversy and the relationship of vendor and vendee existed, and the defendants claim title through him. When the notes were paid, he and those claiming under him became the equitable owners of the land and the devisees of Wells Draughan are mere naked trustees with no beneficial interest, and the claim of plaintiff is a cloud on defendants' title. We think defendants' contentions correct.

The principle is thus enunciated in *Jennison v. Leonard,* 21 Wall, 302 (22 Law Ed., 539): "This is one of the sales of real estate by contract, so common in this country, in which the title remains in the vendor and the possession passes to the vendee. The legal title remains in the vendor, while an equitable interest vests in the vendee to the extent of the payments made by him. As his payments increase, his equitable interest increases, and when the contract price is fully paid, the entire title is equitably vested in him, and he may compel a conveyance of the legal title by the vendor, his heirs or assigns. The vendor is a trustee of the legal title of the vendee to the extent of his payment."

"The equitable estate of the vendee is alienable, descendible, and devisable as real estate held by a legal title." *Lewis v. Hawkins,* 23 Wall, 119, 23 Law Ed., p. 113.

In *Cherry v. Power Co.,* 142 N. C., at p. 410, it is said: "As the purpose of the trust was fully accomplished, the necessity and reason for keeping the legal and equitable estates separate no longer existed, and by operation of the statute of uses, aptly called 'parliamentary magic,' the use becomes executed and the legal estate vested in the plaintiffs. *McKenzie v. Sumner,* 114 N. C., 425; *Perkins v. Brinkley,* 133 N. C., 154."

Under our Constitution, the distinction between actions at law and suits in equity and the forms of all such actions and suits are abolished, but this did not destroy equitable rights and remedies nor merge legal and equitable rights. In one action the legal and equitable rights of the parties can be tried out. *Waters v. Garris,* 188 N. C., 305.

Under C. S., 1743, defendants pray that their title be quieted. In *Plotkin v. Merchants Bank, etc., Co.,* 188 N. C., 711, 715, the Court said: "*Walker, J.,* in *Christman v. Hilliard,* 167 N. C., 4, speaking of the statute, says: 'The beneficial purpose of this statute is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion.'" *Johnson v. Fry,* 195 N. C., 832.

From a careful inspection of the record, the numerous exceptions and assignments of error made by plaintiffs cannot be sustained. It appears to us that the action was unusually well tried by the learned judge who presided and the attorneys for the litigants.

No error.

VIRGINIA-CAROLINA JOINT STOCK LAND BANK v. THE FIRST AND CITIZENS NATIONAL BANK OF ELIZABETH CITY, N. C., ET AL.

(Filed 9 October, 1929.)

1. Trial F a—Issues submitted in this case held sufficient.

Where the issues submitted to the jury fully present all phases of the controversy and fully determine the rights of the parties, they are sufficient, and the court's refusal to submit other issues tendered will not be held for reversible error.

2. Bills and Notes I a—Under the facts of this case the check sued on was competent evidence.

In an action to recover of the drawee bank for the payment of a check when it was not properly endorsed, and the question of whether the en-

dorsement was proper, is the sole matter at issue under the pleadings and admissions upon the trial, the introduction of the check in evidence by the plaintiff showing payment and endorsements, is competent over the objection of the drawee bank.

3. Bills and Notes B b—Endorsement in this case held invalid.

Where the plaintiff has agreed to lend money to a borrower upon security of a deed of trust on lands, and has sent its check payable to the borrower and to the attorney in order that the title to the lands be unencumbered before the money should pass to the borrower, an endorsement by the attorney for himself and as agent, for the borrower, is an improper endorsement for the borrower.

4. Bills and Notes I a—Upon the payment of improperly endorsed check the drawee bank is liable to the drawer.

Where the drawee bank has received through the course of collection from other banks and paid a check with an improper or unauthorized endorsement which has not been subsequently ratified by the payee of the check, the relation of debtor and creditor exists between the drawer of the check and its drawee bank, and the drawee bank is liable to the drawer of the check upon the unauthorized payment.

5. Same—Drawee bank has burden of proving proper payment.

The obligation of a bank to pay the check of a depositor from the moneys on deposit rests upon the relationship of debtor and creditor, the bank being required to make payment to the drawer's payee upon proper presentment and endorsement of the check, with the burden of proof on the drawee bank to show a proper payment when this is at issue, and in the absence of evidence thereof its motion for judgment as of nonsuit will be denied.

6. Bills and Notes I b—Banks in course of collection are not liable to drawer upon wrongful payment of check by drawee bank.

Where banks in the course of collection of a check have successively guaranteed all prior endorsements of a check, each of such banks is responsible only to its immediate endorsee upon an invalid endorsement by the payee under the separate contracts or agreements among themselves, and the drawer of the check is not entitled to a judgment against them all for the amount of the loss.

APPEAL by defendants other than James Squire, from *Devin, J.*, at December Term, 1928, of PASQUOTANK. No error in trial; remanded for modification of judgment.

Civil action by the drawer to recover of the drawee bank, the amount of its check, paid by said bank without the valid endorsement of the payees, and charged to the account of the drawer; and also to recover said amount of the endorsers of said check who had guaranteed an endorsement on the check, purporting to be the endorsement of the payees, but which was invalid.

On 22 January, 1927, plaintiff issued its check for the sum of $6,185.86, drawn on the defendant, the First and Citizens National

Bank of Elizabeth City, N. C., and payable to the order of "E. A. Matthews, atty., and James Squire, bwr."

Prior to said date plaintiff had agreed to lend to the said James Squire the amount of said check, upon the execution by him of a note for said amount and a deed of trust, conveying to a trustee certain land in Halifax County, North Carolina, to secure the payment of said note. The note and deed of trust had been executed by the said James Squire, and both had been delivered to plaintiff by him, in accordance with said agreement. A certificate signed by E. A. Matthews, an attorney at law, residing at Roanoke Rapids, N. C., with respect to the title of the said James Squire to said land, accompanied said note and deed of trust, when they were delivered to the plaintiff. This certificate was required by plaintiff before its acceptance of the note and deed of trust. Upon its receipt of the note, the deed of trust, and the certificate as to the title to the land, plaintiff issued its check payable to the order of both E. A. Matthews, as attorney, and James Squire, as borrower, in order that all claims and liens on the land should be satisfied and discharged by the said James Squire, the borrower, under the supervision of the said E. A. Matthews, as attorney, before the proceeds of the check were paid to the said James Squire. By pursuing this method of completing the transaction with respect to the loan, plaintiff was assured that its note would be secured by an unencumbered title to the land conveyed by the deed of trust. The entire transaction between James Squire as borrower, and the plaintiff as lender of the money, was conducted by mail.

After the issuance of said check, the same was subsequently presented for payment to the defendant, the First and Citizens National Bank of Elizabeth City, N. C., the drawee bank, by the defendant, Federal Reserve Bank of Richmond, Va., as holder under endorsements of the check by the defendants, Commercial National Bank of Raleigh, N. C., and First National Bank of Roanoke Rapids, N. C. At the date of such presentment, the check was also endorsed as follows: "E. A. Matthews, atty., James Squire, bwr., by E. A. Matthews, atty." This last endorsement was guaranteed to the drawee bank, by each of the other defendant banks.

Upon presentment of the check to it, for payment, the defendant, the First and Citizens National Bank of Elizabeth City, N. C., charged its amount to the account of plaintiff, and marked the check "paid"; the said defendant thereafter remitted said amount to the defendant, Federal Reserve Bank of Richmond, Va.; the said Federal Reserve Bank thereafter remitted said amount to the defendant, Commercial National Bank of Raleigh, N. C.; the said Commercial Bank, in its answer, admits the receipt of said amount, and alleges that it holds the same to the credit of the defendant, First National Bank of Roanoke Rapids,

N. C., or subject to the judgment in this action; the said defendant, First National Bank of Roanoke Rapids, N. C., had received the check from E. A. Matthews, and had paid to him its amount; at the date of such receipt and of such payment, the check bore the following endorsement: "E. A. Matthews, atty., James Squire, bwr., by E. A. Matthews, atty." The said check was thereafter forwarded by the said First National Bank of Roanoke Rapids, N. C., with its endorsement, and with its guarantee of all prior endorsements, to the defendant, Commercial National Bank of Raleigh, N. C., for collection. It was thereafter forwarded by the said Commercial National Bank, with its endorsement and with its guarantee of all prior endorsements, to the defendant, Federal Reserve Bank of Richmond, Va., for collection. It was thereafter forwarded by the said Federal Reserve Bank, with its endorsement and with its guarantee of all prior endorsements, to the defendant, the First and Citizens National Bank of Elizabeth City, N. C., for payment. The said defendant, the First and Citizens National Bank, relying upon the endorsements thereon, charged the check to the account of plaintiff, as drawer and remitted its amount to the defendant, Federal Reserve Bank of Richmond.

Plaintiff alleges that the endorsement on the check, purporting to be the endorsement of the payees is invalid, for that same was made without the authority of James Squire, one of the payees. The defendants deny this allegation; each alleges that said endorsement was authorized by the said James Squire, or if not, that same was subsequently ratified by him.

After the commencement of the action, James Squire was made a defendant on the motion of the defendant, First National Bank of Roanoke Rapids, N. C. In his answer, the said James Squire denied that he had authorized the endorsement of the check in his name by E. A. Matthews, as attorney; he also denied that he had ratified the said endorsement, by accepting from the said E. A. Matthews any part of the amount of the said check, or otherwise. He prays judgment only that he go without day and recover his costs. He makes no claim to the check, now in the possession of the drawer, marked "paid" by the drawee bank, or to the amount of the check paid by said drawee bank to the holder, without the valid endorsement of the payees.

No evidence was offered at the trial showing or tending to show that James Squire had authorized the endorsement of the check in his name by E. A. Matthews, as attorney, or that he had ratified said endorsement, as alleged in the answers of the defendant banks.

Each of the defendant banks, although denying its liability to plaintiff in this action, prayed judgment that in the event it should be held liable to the plaintiff, or to any of its codefendants, it recover of such

of its codefendants as were endorsers, and guarantors of prior endorsements on the check, when the same was received by it, the amount which it should be required to pay on the judgment rendered against said defendant.

Issues submitted to the jury were answered as follows:

"1. Did the defendant banks pay out to others than the payees named in the check described in the complaint, and upon an unauthorized endorsement thereof, funds of the plaintiff, as alleged in the complaint? Answer: Yes.

2. Are the defendant banks indebted to the plaintiff, and if so, in what amount? Answer: $6,185.86."

Judgment was rendered on the verdict (1) that plaintiff recover of the defendants, First National Bank of Roanoke Rapids, N. C., Commercial National Bank of Raleigh, N. C., Federal Reserve Bank of Richmond, Va., and the First and Citizens National Bank of Elizabeth City, N. C., the sum of $6,185.86, with interest and costs; (2) that each of said defendant banks recover of its immediate endorser such sum as it shall be required to pay to plaintiff, or to its immediate endorsee, on account of the judgment herein against it, and in favor of the plaintiff; and (3) that the defendant, James Squire, go without day, and recover his costs to be taxed by the clerk, against the defendant, First National Bank of Roanoke Rapids, N. C.

From this judgment all the defendants, except James Squire, appealed to the Supreme Court.

Worth & Horner and Thompson & Wilson for plaintiff.

Ehringhaus & Hall for The First and Citizens National Bank of Elizabeth City, N. C.

M. G. Wallace for Federal Reserve Bank of Richmond, Va.

C. A. Gosney for Commercial National Bank of Raleigh, N. C.

Geo. C. Green and McMullan & LeRoy for First National Bank of Roanoke Rapids, N. C.

CONNOR, J. We find no error in the trial of this action for which either of the appellants is entitled to a new trial.

The objection of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., to the introduction in evidence of the check, with endorsements thereon, and with the perforation showing that the check had been paid by said defendant, was properly overruled. The exception to the ruling of the court on this objection is not sustained. The check was competent as evidence by reason of admissions made by the defendant in its answer. These admissions were offered as evidence against this defendant by the plaintiff. Neither of the other defendants objected to the introduction of the check. The check and the admis-

sions tended to sustain the allegations of the complaint, relied upon by plaintiff as constituting its cause of action against the defendant, the First and Citizens National Bank of Elizabeth City, N. C.

There was no error in the refusal of the court to submit to the jury the issues tendered by the defendants. Plaintiff did not allege in its complaint, or contend at the trial that it was the owner of the check, nor is its cause of action as set out in the complaint founded upon such allegation or contention.

Plaintiff's cause of action against the defendant, the First and Citizens National Bank of Elizabeth City, N. C., is founded upon its relationship to said defendant as a depositor; it alleges that said defendant has on deposit to its credit and subject to its check, a sum of money which said defendant refuses to pay to it or to its order; that said defendant denies liability to plaintiff for said sum of money, upon its contention that it has paid out said sum on a check drawn by plaintiff on said defendant. Plaintiff controverts this contention, and demands judgment that it recover of said defendant the amount of its deposit.

Plaintiff's cause of action against the other defendants is founded upon the guarantee by each of said defendants of an endorsement appearing on the check, purporting to be the valid endorsement of the payees, but which plaintiff contends is invalid. Plaintiff contends that each of these defendants by reason of its endorsement and guarantee of the void endorsement in the names of the payees is liable to it, as drawer of the check, for the amount which the drawee bank has, without its authority, charged to its account.

It is true that there are allegations in the complaint which are appropriate to a cause of action for the conversion of money belonging to plaintiff. Plaintiff did not rely upon these allegations for its recovery in this action; it offered no evidence at the trial to sustain them. Its recovery, at least of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., is not dependent upon the truth of these allegations. It has recovered of said defendant upon a cause of action founded upon its contractual rights as a depositor of said defendant. It is immaterial whether the cause of action set out in the complaint be classified as a cause of action on a contract, or as a cause of action on a tort. *Estates v. Bank,* 171 N. C., 579, 88 S. E., 783. There are allegations in the complaint which construed liberally and with a view to substantial justice (C. S., 535), are sufficient to constitute a cause of action on contract. Other allegations may be regarded as surplusage. Exceptions to the refusal of the court to submit issues tendered by defendants are not sustained.

The issues submitted by the court to the jury arise upon the pleadings. They are sufficient in form and substance for the submission to

the jury, for its determination, of the contentions of the parties with respect to the essential question in controversy, to wit: Whether the amount charged to the account of plaintiff, as a depositor of the drawee bank, was paid by said bank to the payees, or to a holder claiming title to the check under a valid endorsement by the payees? It has been held by this Court that where issues submitted by the court to the jury are sufficient in form and substance to present all phases of the controversy between the parties, there is no ground for exception to the same. *Bailey v. Hassell,* 184 N. C., 450, 115 S. E., 166; *Potato Co. v. Jeanette,* 174 N. C., 236, 93 S. E., 795; *Power Co. v. Power Co.,* 171 N. C., 248, 88 S. E., 349. A new trial will not ordinarily be granted by this Court where it appears that the issues submitted to the jury presented for their determination the essential questions in controversy, although other questions not determinative of liability are also included in the issues. The liability of the defendants in this case to the plaintiff and to each other is dependent solely upon the answer to the question involved in the first issue, to wit: Was the endorsement on the check, purporting to have been made by the payees, authorized or ratified by James Squire, one of the payees named in the check, to whose order alone the check was payable? It is conceded in the answer of each of the defendants that if plaintiff is entitled to recover in this action of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., the drawee bank, then each of the other defendants, by reason of its endorsement of the check, and of its guarantee of all prior endorsements thereon, is liable to the drawee bank, to its immediate endorsee, and to subsequent holders, under said endorsements, for such amount as plaintiff shall recover of the drawee bank, who paid out such amount upon the faith of said endorsements and guarantees. It does not appear that either of the defendants have any valid ground for its exception to the issues submitted to and answered by the jury.

There was no error in the refusal of the court to dismiss the action, as upon nonsuit, at the close of the evidence, or in the instructions of the court to the jury. Neither of defendants offered evidence in support of the allegations of its answer. Each relied upon its contention that the burden was on the plaintiff to prove that the endorsement on the check of the name of James Squire, one of the payees, by E. A. Matthews, atty., was neither authorized nor ratified by the said James Squire. This contention cannot be sustained; upon the admissions in the pleadings and the facts shown by the evidence offered by plaintiff, the burden was on the defendants to offer evidence to show that the endorsement was either authorized by James Squire, or ratified by him, as alleged in their answers. *Bell v. Bank,* 196 N. C., 233, 145 S. E., 241.

It is a well settled principle that the relationship between a depositor and his bank, with respect to his general deposit, is that of a creditor and debtor. It has been so held by this Court. *Graham v. Warehouse,* 189 N. C., 533, 127 S. E., 540; *Reid v. Bank,* 159 N. C., 99, 74 S. E., 746; *Boyden v. Bank,* 65 N. C., 13. Where money has been deposited in a bank, on general deposit, the bank impliedly undertakes to pay out said money only to the depositor himself, or to such person as he may direct payment to be made. *Goodloe v. Bank,* 183 N. C., 315, 111 S. E., 516; *McKaughan v. Bank,* 182 N. C., 543, 109 S. E., 355. The deposit, in the absence of a special agreement to the contrary, creates a debt; this debt can be discharged only by a payment or by payments made to the creditor, or to his order. The burden is on the bank as debtor, to show payment to the depositor as creditor or to a person or persons to whom the depositor has authorized payment to be made. *Harmon v. Taylor,* 98 N. C., 341, 4 S. E., 510.

Where it is admitted or established by evidence that at a certain date, a depositor had on deposit with his bank, to his credit and subject to his check, a sum of money and the bank contends that it has been discharged of liability by reason of such deposit, either in whole or in part, by the subsequent payment of a check drawn by said depositor on said bank, the burden is on the bank to show that the amount of the check was paid to the payee named in the check, or if the check is payable to bearer, that said amount was paid to a holder in possession of the check, or if the check is payable to the order of the payee, that said amount was paid to a holder claiming title to the check under a valid endorsement of the check by the payee. In the absence of evidence showing such payment, the bank remains liable to the depositor, notwithstanding payment of the amount of the check to a stranger and notwithstanding the check has been marked "paid" by the bank, and charged on its books to the account of the drawer.

This principle is recognized in *Bell v. Bank,* 196 N. C., 233, 145 S. E., 241. In that case, however, it was held that the drawer was not entitled to recover of the drawee bank, for the reason that although the amount of the check payable to the order of the payee was paid to a holder without the endorsement of the payee, said amount had been paid subsequently to the payee by such holder, as the drawer of the check intended. The plaintiff had therefore suffered no loss, for the amount of the check had been applied as a payment on her indebtedness to the payee.

In *Dawson v. Bank,* 196 N. C., 134, 144 S. E., 833, the payees and not the drawers were plaintiffs. It was held that upon the facts which the evidence tended to show in that case the plaintiffs were entitled to recover of the drawee bank, the amount of the check payable to their

order and paid by the drawee bank to a holder without their endorsement. There the drawers by special agreement had authorized the drawee bank to pay their checks, although drawn payable to order, as if they had been drawn payable to bearer. In the instant case the payees make no claim on the drawee bank for the amount of the check, which the drawee bank has paid to a holder without their valid endorsement. By virtue of the provisions of C. S., 3022, the endorsement of the check by one of the payees, in his own name, and in the name of the other payee, without the authority of the latter, was invalid and passed no title to the check to the endorsee or to subsequent holders. Payment of the check to a holder, without the valid endorsement of the payees, did not discharge the drawee bank from liability to the drawer for its deposit.

Upon the verdict in this case, it was properly adjudged that plaintiff recover of the defendant, the First and Citizens National Bank of Elizabeth City, N. C., the amount of its check, charged to its account by said defendant. Said amount was not paid to the payees, or to their order, as plaintiff directed when it issued its check.

Plaintiff is not entitled, however, to judgment against the other defendants. These defendants sustained no contractual relation to the plaintiff, by reason of which they are liable to plaintiff upon the verdict in this action. Endorsers of a check are liable only to their immediate endorsees, to subsequent holders, and to the drawee bank. The judgment should be modified to the end that the drawee bank shall recover of each of the other defendants the amount which it shall be required to pay to plaintiff in satisfaction of its judgment; and to the end that each of the defendants may recover such amount as it shall be required to pay by reason of its endorsement of the check, and its guarantee of prior endorsements thereon, of its codefendants, prior endorsers of said check. In order that the judgment may be modified in accordance with this opinion, the action is remanded to the Superior Court of Pasquotank County.

No error.

CLAYTON BANKING COMPANY v. GEO. C. GREEN, TRUSTEE, JOE E. TALTON, MRS. LENA TALTON, W. B. JOHNSON AND ETHEL TALTON BRANNON.

(Filed 9 October, 1929.)

Mortgages H o—Where under agreement with clerk the deposit for an upset bid is mailed, the deposit is made as of time of mailing.

While the clerk of the Superior Court is without authority to order a resale of lands foreclosed under mortgage without an increase bid filed with him under the provisions of C. S., 2591, and the payment of the

deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect the mortgagor, and when within the statutory time limit the offerer has communicated with the clerk of the court by phone and offered to come from an adjacent town and make a sufficient deposit, and is informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check is accordingly mailed, a substantial compliance with the statute has been made, though the check was received by the clerk after the expiration of the time limit of the statute.

CIVIL ACTION, before *Midyette, J.*, at June Term, 1929, of JOHNSTON.

The trial judge found the facts and such findings may be summarized as follows:

On 6 October, 1921, Joseph S. Talton executed and delivered to the defendant, George C. Green, trustee, a deed of trust to secure a note or notes payable to the Metropolitan Life Insurance Company, which deed of trust was duly recorded. Thereafter said notes were duly transferred to Dr. W. B. Johnson, who is now the owner and holder of same. Joseph S. Talton died and his son, Joe E. Talton, and wife, Mrs. Lena Talton, defendants, executed and delivered to the plaintiff bank a mortgage on the undivided interest of said Joe E. Talton in the lands of his father, Joseph S. Talton, deceased, to secure a note of $2,000 payable to said plaintiff. Default was made in the payment of the note made by Joseph S. Talton, deceased, secured by the deed of trust to the defendant Green, and thereupon the holder of said note made demand upon Green, trustee in said deed of trust, to advertise the property described therein. Advertisement was duly made under said deed of trust and the land offered for sale on 25 April, 1929, at which sale the defendants, Joe E. Talton and Mrs. Ethel T. Brannon, heirs at law of Joseph S. Talton, became the last and highest bidders for said lands at the sum of $6,600. A report of the sale was duly made by the trustee within a day or two after the sale. The defendant, Joe E. Talton, told the cashier of plaintiff bank that he was making arrangements to pay off the indebtedness of $2,000 held by said bank. Whereupon said cashier informed Joe E. Talton that if such arrangement were made the bank would not raise the bid on the land, but that said bank would raise the bid unless the matter was adjusted. Within a period of ten days the cashier of plaintiff bank communicated with the clerk of the Superior Court of Johnston County and informed the clerk that said bank desired to place an increased bid on the purchase price of said property if Talton did not make payment. The clerk of the Superior Court further informed the cashier of plaintiff bank that the tenth day after the sale would be 5 May, 1929, but that in view of the fact that such date was on Sunday, that Monday, 6 May, 1929, would be the final date for raising the bid. In the early afternoon

of 6 May, 1929, the cashier of plaintiff bank called the clerk of the Superior Court at Smithfield and inquired "if said bid had been raised or if the said Joe E. Talton had deposited with the clerk an amount sufficient to cover the indebtedness of the Clayton Banking Company, . . . and the clerk of the Superior Court informed the said cashier that neither had been done; that thereupon the said cashier informed the clerk of the Superior Court that the Clayton Banking Company desired to raise the bid for said lands, and that he, the said cashier, would come over to Smithfield immediately and bring a cashier's check for $330, representing five per cent of the previous bid; that the clerk of the Superior Court thereupon informed said cashier that it was not necessary for him to come over to Smithfield, a distance of twelve miles, for that purpose, but that it would be sufficient if he, the said cashier, would on that date, 6 May, 1929, place a cashier's check for $330 in a stamped envelope and mail the same to the clerk of the Superior Court, and that if such was done that he would consider it as a deposit made as of that date, and that upon such deposit an order of resale would be entered for said lands; that upon such information, the cashier of the Clayton Banking Company, about 3:30 p.m., 6 May, 1929, mailed or placed a duly executed cashier's check in an envelope, in the postoffice at Clayton, N. C., stamped and addressed to H. V. Rose, clerk of the Superior Court of Johnston County, Smithfield, which envelope containing said check was mailed as aforesaid, at the postoffice in the town of Clayton, N. C.; that later in the same afternoon, 6 May, 1929, F. H. Brooks, attorney for said bank, at the request of said bank, went to the office of the clerk of the Superior Court and again informed said clerk on the part of the Clayton Banking Company, that the said Clayton Banking Company desired a raise of bid, and offered to give the said clerk his personal check for the amount of said raise; that the said clerk informed the said F. H. Brooks that he had already discussed the matter with the said cashier over the telephone and notified him that it would be sufficient if the cashier would mail him a check, and that the cashier had done so, and that he would consider that a raise of bid, and that an order of resale would be made, and that it was not necessary for the said F. H. Brooks to put up his personal check on behalf of the bank. On the morning of 7 May, 1929, the said cashier's check in the amount of $330 was duly delivered to the clerk of the court by letter, in an envelope bearing clearly the Clayton post mark, under date of 6 May, 1929; that said check was in due form and was collectible, and the clerk of the court accepted the same as a raise of bid on said land, pursuant to his understanding with the cashier of the Clayton Banking Company; that on the morning of 9 May, 1929, the deputy clerk of the Superior Court of

Johnston County, under instructions from the clerk, wrote on said sale book an order for resale as of 6 May, 1929, but said order of resale was not actually signed by the clerk of the court until 16 May, 1929; that theretofore Joe E. Talton, one of the bidders at the original sale, informed the trustee that he had assigned his bid to his wife, Lena Talton, and the said Lena Talton, as assignee, with Ethel T. Brannon, the other bidder at said sale, made demand upon the trustee for a deed. . . . That the trustee, being of the opinion that there was no valid increase of bid, undertook in pursuance of the demand of said bidders and assignee to deliver a deed as trustee to the said bidders, but before delivery of such deed, said trustee was . . . restrained from delivering said deed to the said purchasers."

Upon the foregoing facts the trial judge was of the opinion and so adjudged "that the deposit of said cashier's check, mailed at Clayton, N. C., on 6 May, 1929, in an amount representing five per cent of said bid, and under the circumstances as existed and as found by the court, constituted a valid and sufficient raise of bid for said lands, under the provisions of the statute, and that the clerk of the Superior Court was acting within his authority in so accepting such payment, and that an order of resale was and is a valid and proper order," etc.

From the foregoing judgment the defendants appealed.

E. J. Wellons, F. H. Brooks and Biggs & Broughton for plaintiff.
W. P. Aycock, W. H. Lyon and N. Y. Gulley for defendants.

BROGDEN, J. Was there a valid increase of bid under the circumstances set forth in the facts found by the trial judge?

The correct answer to the question of law presented involves a construction of C. S., 2591. This section has been construed in many decisions of this Court, notably *Wise v. Short,* 181 N. C., 320, 107 S. E., 134; *In re Sermon's Land,* 182 N. C., 122, 108 S. E., 497; *Pringle v. Loan Association,* 182 N. C., 316, 108 S. E., 914; *In re Ware,* 187 N. C., 693, 122 S. E., 660; *Trust Co. v. Powell,* 189 N. C., 372, 122 S. E., 660; *Briggs v. Developers,* 191 N. C., 784, 133 S. E., 3; *Newby v. Gallop,* 193 N. C., 244, 136 S. E., 610; *Cherry v. Gilliam,* 195 N. C., 233, 141 S. E., 594.

However, it does not appear that the exact point raised in the case at bar has been determined. It is clear from the decided cases that the statute confers no power on the clerk to make orders in the cause with respect to a resale unless the bid is increased. It is also clear that an order of sale or of resale made *nunc pro tunc* is valid. *Lawrence v. Beck,* 185 N. C., 196, 116 S. E., 424.

The statute requires that the money representing an increased bid is to be "paid to the clerk of the Superior Court." Does this language mean that the money must be actually placed in the hands of the clerk by the person desiring to raise the bid, or is it sufficient to pay the money within a period of ten days to a duly authorized agent of the clerk?

It is familiar learning that the delivery of a deed is ordinarily necessary to pass title to land. In *Lynch v. Johnson,* 171 N. C., 611, 89 S. E., 61, this Court held that, if a deed properly executed, was placed in an envelope, properly stamped and addressed and deposited in the mail, that thereupon title to the property described in the deed vested in the purchaser named in the instrument. The theory upon which this principle rests is that the grantor had parted with possession and control of the paper-writing by placing it in due course of delivery to the grantee. In *Pringle v. Loan Association, supra,* it was stated by the Court that "in all such cases if the prescribed amount of the raise in bid is guaranteed, or paid, to the clerk he shall require the mortgagee or trustee to advertise and resell on 15 days notice." A strict construction of this language would indicate that if the increased bid is guaranteed, the requirements of the statute would be met. However, it is not necessary to place this decision upon that ground. In *Briggs v. Developers, supra,* an increased bid of two per cent was deposited with the clerk. This deposit, of course, was not in strict compliance with the statute, but the increased bid was held to be valid. This case is direct authority for the position that substantial compliance with the statute with respect to the payment of the increased bid is fully recognized. The reason is that as the statute was enacted for the protection of mortgagors it must be construed liberally when reasonably necessary to effectuate that purpose.

The facts disclose that the clerk of the Superior Court of his own motion selected the United States mail as the agency for transmitting the money to the court. If the clerk of the Superior Court had sent his deputy from Smithfield to Clayton to receive the money and the deputy had actually received the money, but did not report to the clerk until next morning, it could not be successfully contended that the money had not been paid. Furthermore, it appears that the attorney for the plaintiff went in person to the clerk's office on the afternoon of 6 May, and offered to pay the money, but was informed by the clerk that the bid had already been raised and that an order of resale would be made in due course. Under these circumstances we are of the opinion and so hold, that the increased bid of plaintiff was duly filed and that the order of resale was valid.

The defendants rely upon *Wooley v. Bruton,* 184 N. C., 438, 114 S. E., 628. An examination of that case, however, discloses that the

opinion was based upon the particular wording of the statute to the effect that the license must be "delivered to him as required by law," etc. The word "delivered" was construed to mean manual delivery. We cannot hold that the *Bruton case* is determinative of the legal principle involved in the case at bar.

Affirmed.

SIMPSON HARPER AND H. D. WILLIAMS v. VIRGINIA LUMBER AND BOX COMPANY.

(Filed 9 October, 1929.)

Contracts B e—In order to recover upon a contract for the division of profits, profits or bad faith must be shown.

In an action to recover upon a contract for the division of profits from the sale of timber by the defendant, the defendant to sell "to the best of his ability," the burden is on the plaintiff to show that a profit had been made or that the defendant had acted in bad faith in the sale in order to recover, and evidence as to profits made by other like manufacturers is immaterial.

APPEALS by both plaintiffs and defendant from *Grady, J.*, at March Term, 1929, of DUPLIN. No error in either appeal.

This is an action to recover the purchase price of certain timber conveyed to defendant by plaintiffs, by their deed dated 6 September, 1924. It was agreed that the said purchase price should be paid after said timber had been cut and manufactured into lumber by defendant, and after said lumber had been sold.

The said timber had been cut, and the lumber manufactured therefrom had been sold, prior to the commencement of this action. The action arose out of a controversy between the parties as to the terms of the contract in accordance with which the purchase price should be ascertained and paid. During the progress of the trial, plaintiffs consented that the jury might find that said terms were as alleged in the answer, and not as alleged in the complaint.

The issues submitted to the jury were answered as follows:

"1. Was the contract entered into between the plaintiffs and the defendant as follows:

Defendant was to advance to plaintiffs a basic price of three dollars per thousand feet, and then cut, remove and manufacture the timber on the Philips and Malpass tracts, and sell the same to the best of its ability, and in the event there was a profit from said operation over and above the expenses incident to the cutting, manufacture and marketing of said timber, and the basic price of three dollars per thousand feet, such net profits should be divided equally between the parties?

Answer: Yes, by consent.

2. If so, was there a breach of said contract on the part of the defendant, as alleged in the complaint? Answer: Yes.

3. If so, what amount are the plaintiffs entitled to recover of the defendant for lumber not paid for, or profits received and not accounted for under said contract, if anything? Answer: $800."

From judgment on the verdict, both plaintiffs and defendant appealed to the Supreme Court.

Geo. R. Ward, R. D. Johnson and Stevens & Beasley for plaintiffs.
Langston, Allen & Taylor for defendant.

PER CURIAM. Under the contract between the parties, as found by the jury, plaintiffs are entitled to recover for the timber sold and conveyed by them to defendant, three dollars per thousand feet; and also, one-half the profit, if any, resulting from the manufacture of said timber, and its sale by defendant. It was agreed that defendant should sell said lumber to the "best of its ability." It is not contended by plaintiff that defendant failed to exercise good judgment in the sale of the lumber, or that it failed to get the best market price for the same.

There was conflict in the evidence tending to show the number of feet of timber cut and manufactured by defendant; it was admitted that defendant has paid to plaintiff on account of said timber the sum of four thousand dollars; under the instructions of the court, the jury has found that plaintiffs are entitled to recover the additional sum of $800 for stumpage.

There was no evidence tending to show that defendant made any profit by cutting and manufacturing the timber, or by the sale of the lumber. The evidence tended to show a loss on the operation because of the price at which the lumber was sold. The burden was on plaintiff to show that the lumber was sold at a profit. There was no error in the instruction that plaintiffs were not entitled to recover any sum as their share under the contract in profits. It is immaterial that other sawmill operators made a profit on lumber manufactured and sold by them during the years 1924 and 1925. In this action, in the absence of evidence tending to show bad faith on the part of defendant, it is liable only for profits made, and not for profits which it might have made.

Defendant cannot complain that after the evidence had been introduced, plaintiffs consented that the jury find that the contract between them and defendant was as alleged in the answer, and not as alleged in the complaint. The evidence tending to sustain plaintiff's contention that under this contract it was entitled to recover in this action, was properly submitted to the jury.

We find no error in either appeal. The judgment is affirmed.

No error.

C. M. KROUSE v. NORFOLK SOUTHERN RAILWAY COMPANY.

(Filed 9 October, 1929.)

Negligence D c—Where evidence shows contributory negligence barring recovery nonsuit is proper.

Where the evidence offered by the plaintiff shows contributory negligence barring his right to recover a nonsuit is proper.

APPEAL by plaintiff from *Daniels, J.*, at March Term, 1929, of PITT. Affirmed.

Action to recover damages for personal injuries resulting from a collision, on a public crossing, between an automobile driven by plaintiff and defendant's train.

From judgment dismissing the action as upon nonsuit, plaintiff appealed to the Supreme Court.

W. C. Gorham and Julius Brown for plaintiff.
F. G. James & Son for defendant.

PER CURIAM. Conceding that the evidence offered by the plaintiff tended to show that defendant was negligent as alleged in the complaint, this evidence also showed that plaintiff contributed to his injuries by his own negligence. There is no error in the judgment dismissing the action as upon nonsuit. *Bailey v. R. R.*, 196 N. C., 515, 146 S. E., 135.

Affirmed.

C. D. HEATH v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 October, 1929.)

1. **Railroads D g—In action to recover for negligent fire the burden is on plaintiff to show railroad caused fire and on it to show due care.**

In order for the plaintiff to recover damages from a railroad company for setting fire to his barn off the right of way by sparks from the defendant's locomotive, the burden is on the plaintiff to show that the fire was caused by sparks from the locomotive, and then on the railroad company to show that its engine was properly equipped and operated, and upon supporting evidence the issue of negligence is for the jury, and the defendant's motion as of nonsuit is properly denied.

2. **Same—The setting afire of a barn by sparks from locomotive is some evidence of negligence of railroad.**

Where there is evidence that plaintiff's barn off the right of way of the defendant railroad company was set afire by sparks from the defendant's

locomotive shifting nearby, it is some evidence that the locomotive emitting the sparks was in a defective condition or that it was improperly operated.

3. Same—Evidence in this case held sufficient on issue of railroad's negligence in setting fire to property.

Evidence that the defendant railroad company's locomotive was shifting cars near the property of the plaintiff, throwing off heavy smoke with live sparks that were carried by the wind to the plaintiff's barn, off the right of way, and that soon thereafter the barn caught fire and was destroyed, and that there was at the time no fire on the plaintiff's premises which could have started the conflagration, is sufficient to be submitted to the jury upon the defendant's actionable negligence.

4. Same—Evidence that same locomotive emitted sparks night before fire is competent as to its defective condition.

Where there is evidence tending to show that defendant's locomotive was throwing off heavy smoke with live sparks which caused the fire in suit, testimony that the same locomotive on the night previous was emitting smoke and live sparks is competent upon the question of the defective condition of the locomotive on the issue of defendant's negligence in this respect.

CIVIL ACTION, before *Daniels, J.*, at May Term, 1929, of CRAVEN.

Plaintiff owned a tract of land upon which was situated his dwelling, a tobacco barn and packhouse within which there were stored hay, fodder, corn and fertilizer. The packhouse is about 104 feet from the railroad track and not upon the right of way. The evidence tended to show that on 6 March, 1928, a freight train owned and operated by the defendant was traveling east and stopped for the purpose of taking water and shifting cars near plaintiff's property. The train arrived about four o'clock in the afternoon and remained from fifteen to thirty minutes. While the train was shifting the engine emitted large quantities of smoke, which was driven by a northeast wind over and across the packhouse of plaintiff.

There was further testimony from a witness for plaintiff who stated that he was driving along the county road while the train was shifting near plaintiff's property, and that the train seemed to be overloaded and that "every now and then the engine spit." Witness further stated: "The engine was throwing out hot cinders because I put my coat over my neck to keep the cinders from burning me, because it did burn my mule."

Plaintiff also offered the testimony of a witness who stated that on the day before, to wit, on 5 March, he saw the same engine of defendant, which was alleged to have set fire to plaintiff's property, emitting live sparks, and that some of these sparks fell on him and burned him on the neck. There was testimony that there had been no fire in plaintiff's home near the packhouse or any fire around the packhouse before the fire

was discovered. The train left shortly after four o'clock. There was testimony that between five and six o'clock fire was discovered on the packhouse next to the railroad track. The packhouse and its contents were destroyed according to the evidence of plaintiff, and he instituted this action for damages.

The defendant denied that its engine had emitted live sparks while shifting near plaintiff's property and offered strong proof to the effect that the engine was properly equipped with a spark arrester of the type approved and in general use, and that the engineer was thoroughly experienced and competent, and that the train was operated in a careful manner.

The jury answered the issue in favor of plaintiff and awarded damages in the sum of $1,200.

From judgment upon the verdict the defendant appealed.

D. L. Ward and D. L. Ward, Jr., for plaintiff.
Moore & Dunn for defendant.

BROGDEN, J. In cases of damage by fire, occasioned by the engine of a railroad company, there are ordinarily two questions to be determined in order to impose liability upon the defendant.

1. Did the engine set out the fire that burned the property?

2. If so, did the fire originate through the negligence of the defendant?

The principle of law governing liability for fire catching off the right of way was thus stated in *Moore v. R. R.*, 173 N. C., 311: "It is settled that if the plaintiff has introduced evidence sufficient in probative force to justify a jury in finding that the fire was caused by a spark from defendant's engine, the issue should have been submitted, the weight of the evidence being a matter for the jury. In such case the defendant is called upon to prove that its engine was properly equipped and operated. If so equipped and operated, there is no negligence or liability upon the part of defendant."

In the case at bar the trial judge, at the request of defendant, charged the jury as follows: "I charge you that under the law of North Carolina, if fire escapes from an engine in proper condition and having a proper spark arrester and operated in a careful way by a careful and competent engineer and the fire catches off the right of way, the defendant is not liable, for there is no negligence, and you should answer the first issue 'No.'"

The pertinent question standing at the threshold is whether there was sufficient evidence to be submitted to the jury upon the origin of the fire; that is to say, whether sparks from the defendant's engine set fire to

plaintiff's property. There was evidence that hot cinders were emitted from defendant's engine at the time it was shifting near plaintiff's property, burning a mule of a witness standing near the railroad, and that the witness was compelled to put his coat over his neck for protection. There was evidence that the wind was blowing toward the plaintiff's property and that large volumes of smoke were coming from the smokestack of the engine. There was further testimony that on the day before, the same engine was throwing sparks which burned the shirt and neck of a witness. There was also evidence that there was no fire about plaintiff's dwelling or packhouse during the afternoon prior to the time the packhouse was burned.

We are of the opinion that there was sufficient evidence to be submitted to the jury on the question of the origin of the fire. Therefore, the motion for nonsuit was properly overruled.

Upon the question of negligence, it has been held that if fire was caused by sparks from the engine, that of itself was some evidence of negligence either in the condition of the spark arrester or in the operation of the engine. *Reid v. R. R.*, 180 N. C., 511, 105 S. E., 169.

The defendant earnestly insists that the evidence of the witness Cruel to the effect that the engine was throwing sparks the night before the plaintiff's property was burned, was incompetent. The position of the defendant upon this point would be sound and effective if the record did not disclose that the same engine was involved. A witness for defendant testified: "The engine they claimed the barn was burned by was coming back toward New Bern; that was the same engine that went to Goldsboro the night before." Another witness for defendant testified: "Engine No. 134 that came down from this direction on the evening of the 5th of March went to Goldsboro, and the same engine came back on the afternoon of the 6th."

The prevailing rule of law with reference to this aspect of the case is thus declared in *Kerner v. R. R.*, 170 N. C., 94, 86 S. E., 998: "It is conceded that where a fatal fire has been set out from a designated or known engine, it is admissible to introduce evidence of other fires previously set out by the same engine for the purpose of showing its defective condition, but the rule has never been extended so as to permit evidence of sparks emitted by some other engine at some other time and place."

No error.

IN RE LAST WILL AND TESTAMENT OF THOMAS FRANCISCO BROCKWELL.

(Filed 16 October, 1929.)

1. **Wills D i—Instruction in this caveat proceeding held not to be expression of opinion by court as to validity of the will.**

   Where the judge in his charge upon a caveat to a will uses the word "will" in referring to the paper-writing being propounded, it will not be held as an expression of the court upon the weight and credibility of the evidence contrary to the requirements of the statute when it appears from the context of the instruction that he was only referring to the writing itself, and must have been so understood by the jury.

2. **Wills D h—Caveators must show fraudulent substitution of sheets when relied on by them.**

   Upon the trial of a caveat to a will where it is contended that one of the several sheets of the writing had been substituted for the original, the caveators must show a fraudulent substitution, and they cannot prevail in this contention when there is no evidence thereof; and where it appears on appeal that the jury has accepted the evidence to the contrary under correct instructions, the judgment of the lower court sustaining the paper-writing as the will will be sustained.

3. **Appeal and Error J e—In this case held: error, if any, in the admission of certain testimony was harmless.**

   Testimony of a witness over appellant's exception in explanation of matter elicited from him on cross-examination, with but little, if any, bearing upon the issue submitted, is not held for reversible error under the facts of this case.

APPEAL by caveators from *Harris, J.*, at second June Term, 1929, of WAKE. No error.

This is a proceeding for the probate in solemn form of a paper-writing propounded as the last will and testament of Thomas Francisco Brockwell, deceased. The paper-writing had been probated in common form by the clerk of the Superior Court of Wake County. Upon the filing of a caveat to said probate, the proceeding was transferred to the civil issue docket of the Superior Court of said county, as provided by statute.

The issue submitted to the jury was answered as follows: "Is the paper-writing offered in evidence and every part thereof the last will and testament of Thomas Francisco Brockwell? Answer: Yes.

From judgment on the verdict, caveators appealed to the Supreme Court.

W. B. Jones for propounders.

W. F. Evans, C. A. Douglass, R. L. McMillan and T. Lacy Williams for caveators.

CONNOR, J. An examination of the record in this appeal fails to disclose any error for which a new trial of the issue involved in this proceeding should be granted. We do not, however, approve the form of the issue submitted to the jury at the trial.

A paper-writing propounded as the last will and testament of a deceased person is not necessarily offered in evidence. In this case, however, the paper-writing was offered in evidence upon the contention that some of the sheets of paper constituting the will as propounded, were not attached to the last sheet, when the testator and the witnesses wrote their names on said sheet. Ordinarily the paper-writing should be described in the issue as "the paper-writing propounded as the last will and testament of the deceased."

There was evidence tending to show the execution by the deceased of the paper-writing propounded for probate as his last will and testament, in accordance with the requirements of the statute. C. S., 4131; this evidence was submitted to the jury under instructions of the court which are free from error. The reference by the court in the charge to the jury to the paper-writing as "the will," could not have been understood by the jury as an expression by the court of its opinion that the paper-writing was the will of deceased. The context shows that the court in the use of the word "will" was referring to the paper-writing.

The jury has found that the paper-writing consisting of sheets of paper attached to each other by clips or fasteners, such as are in ordinary use, and every part thereof, was executed by the deceased as his last will and testament. There was ample evidence to sustain this finding. Indeed, it may be doubted whether there was any evidence to the contrary. There was certainly no evidence to support a suggestion that there had been a fraudulent substitution of sheets of paper, before or after the deceased and the witnesses signed the last sheet. The testimony of the draftsman of the will—a lawyer of experience and of high character—was accepted by the jury as conclusive upon this phase of the case.

Conceding that there was evidence in support of the contentions of the caveators, sufficient to rebut the presumption to the contrary, (1) that the deceased, at the time he signed said paper-writing did not have sufficient mental capacity to make a will, or (2) that he signed said paper-writing because of undue influence, and that for either reason the said paper-writing is not his last will and testament, we find no error in the submission of these contentions to the jury at the trial. Under instructions which we find free from error, the jury has found that the deceased, at the time he signed the paper-writing did have sufficient mental capacity to make a will, and that he did not sign the same because of undue influence.

There was no prejudicial error in the refusal of the court to sustain objections of the caveators to the testimony of one of the propounders, a son of the deceased and a devisee under the will, with respect to the relations between him and the deceased, his father. This testimony had little, if any, probative value as evidence upon the issue submitted to the jury; it was offered solely in explanation of matters elicited from the witness by the caveators on cross-examination. If it was error to overrule the objections of caveators, the error was harmless.

We do not deem it necessary to discuss *seriatim* the assignments of error on this appeal. They present no questions which have not been repeatedly decided by this Court. The principles of law ordinarily applicable in a proceeding of this nature are so well settled by decisions of this Court, that these decisions need not be cited.

The judgment in the proceeding is affirmed. There is

No error.

STATE v. REDMOND WILSON.

(Filed 16 October, 1929.)

Criminal Law B a—Defendant must prove defense of mental incapacity to commit crime to the satisfaction of the jury.

Where the defense in the prosecution for a capital felony is mental disability resulting from hereditary weakness and augmented by a syphilitic infection, the burden is on the defendant to establish his defense to the satisfaction of the jury.

APPEAL by defendant from *Grady, J.*, at May Term, 1929, of PENDER.

Criminal prosecution tried upon an indictment charging the defendant with a capital felony.

Verdict: Guilty of murder in the first degree.

Judgment: Death by electrocution.

Defendant appeals, assigning errors.

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

George R. Ward, R. D. Johnson, Best & Moore and McCullen & McCullen for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that on 27 April, 1929, the prisoner, Redmond Wilson, a colored man, shot and killed Vess Wilson, his first cousin, under circumstances indicative of a mind fatally bent on mischief and a heart devoid of social

duties. The deceased was sitting in a chair, packing strawberries, under a pack shelter, in the edge of a field, when the prisoner, in broad open daylight, came within twenty-five yards, approaching from the rear, deliberately placed his gun to his shoulder, took aim, and without warning shot the deceased in the back inflicting a mortal wound. It is suggested that the prisoner held a grudge against the deceased because the latter had upbraided him about three weeks before for approaches to his granddaughter. It was further in evidence that on the same morning, about three hours prior thereto, the prisoner had shot and wounded John Henry Wilson, a son of the deceased.

The homicide is not denied. The defense interposed on behalf of the prisoner was that of mental debility, resulting from hereditary weakness augmented by a syphilitic infection, which, it is alleged, amounted in the aggregate to irresponsibility or insanity. The evidence tending to support this plea was properly submitted to the jury, but was found to be unsatisfactory. *S. v. Terry,* 173 N. C., 761, 92 S. E., 154.

It is now well settled, by a long line of decisions, that, in this jurisdiction, as well as in many others, in a criminal prosecution, when insanity is interposed as a defense, the burden is on the defendant, who sets it up, to prove such insanity, not beyond a reasonable doubt, but to the satisfaction of the jury. *S. v. Walker,* 193 N. C., 489, 137 S. E., 429; *S. v. Jones,* 191 N. C., 753, 133 S. E., 81, and cases there cited.

After perusing the record with that degree of care which the case merits, we have found no error committed on the trial. The verdict and judgment will be upheld.

No error.

STATE v. MACON O'NEAL.

(Filed 16 October, 1929.)

1. Intoxicating Liquor B a—Constructive possession of intoxicating liquor is sufficient evidence of violation of Prohibition Statute.

Constructive possession of intoxicating liquor is sufficient to take the case to the jury under an indictment for violating our prohibition law by receiving, possessing, transporting, selling intoxicating liquor, and having it on hand for the purpose of sale.

2. Criminal Law I b—When prisoner is absent when verdict is rendered, and has not waived his right to be present, a new trial will be ordered.

The returning into court by the jury of a verdict of guilty of violating our prohibition law, while the defendant is in prison, violates the defendant's constitutional rights (Declaration of Rights, sec. 11), and in the absence of a proper waiver of this right a new trial will be ordered on appeal.

STATE *v.* O'NEAL.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1929, of WAKE. New trial.

Macon O'Neal, Herbert O'Neal, and Vernon O'Neal were charged in one indictment with a violation of the prohibition law by receiving, possessing, transporting, selling, and having on hand intoxicating liquor for the purpose of sale. There was a general verdict of guilty as to all the defendants. From the judgment pronounced Macon O'Neal appealed upon assigned error.

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

Charles U. Harris for defendant.

ADAMS, J. There is at least some evidence that intoxicating liquor was found on premises used by the defendants; and for this reason, by virtue of the statutory direction that the prohibition act "shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented," the trial court committed no error in submitting to the jury the question of the defendant's constructive possession of the prohibited article. *S. v. Meyers,* 190 N. C., 239; *S. v. Pierce,* 192 N. C., 766; *S. v. Weston, ante,* 25.

But on another ground the defendant is entitled to a new trial. When the verdict was returned he was not in the courtroom, but was in prison, confined in close custody. Nor was his attorney present. "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." Declaration of Rights, sec. 11.

In the application of this fundamental principle it has been held that in a capital felony the prisoner cannot waive his right to be present at any stage of the trial. Not only has he a right to be present; he must be present. *S. v. Kelly,* 97 N. C., 404; *S. v. Dry,* 152 N. C., 813. In felonies less than capital the right to be present can be waived only by the defendant himself *(S. v. Jenkins,* 84 N. C., 813), but in misdemeanors the right may be waived by the defendant through his counsel with the consent of the court. *S. v. Dry, supra; S. v. Cherry,* 154 N. C., 624.

Imprisoned, the defendant could not be present when he was convicted by the jury; and there is no suggestion that he waived his right by express consent, or failure to assert it in apt time, or by conduct inconsistent with his right. He is not entitled to his discharge, but merely to a new trial. *S. v. Jenkins, supra.*

New trial.

MRS. C. R. TOWNSEND v. J. C. HOLDERBY ET AL.

(Filed 16 October, 1929.)

1. Husband and Wife F a—Wife may bring action for alienation of affections of husband without his joinder.

An action brought by the wife against her husband's step-father and brother for alienating his affection from her and causing his continuous separation is in tort and does not require the joinder of her husband therein, and is not a defect of parties.

2. Husband and Wife E b—Burden of proof of alienation of affections of husband is on wife in her action therefor.

In an action by a wife against the step-father and brother of her husband for alienating her husband's affections, and causing him to continue to live apart from her, the burden is upon her to prove these matters when alleged by her and denied by the defendants.

3. Same—Evidence that defendants alienated the affections of plaintiff's husband held insufficient in this case.

Where in an action by a wife against the step-father and brother of her husband for the alienation of her husband's affections, the evidence introduced by the wife fails to show any malice or ill-will of the defendants toward her or that the defendants did anything to alienate the affections of the husband or cause him to separate himself from her and continue to live apart from her, but tends to show that his separation was caused by a groundless delusion due to his mental condition, with further evidence that the husband lived with the defendants after the separation, is insufficient to be submitted to the jury, and a nonsuit should be granted, the law not imputing any purpose to injure the plaintiff from the fact that the defendants allowed the husband to live with them after the separation.

APPEAL by defendants from *Lyon, Emergency Judge,* at April-May Special Term, 1929, of PITT. Reversed.

Action to recover damages caused by the wrongful and malicious alienation of the affections of plaintiff's husband, resulting in his abandonment of her.

It is admitted that plaintiff and her husband are now living separate and apart from each other, and that they have so lived since 1924; defendants deny, however, that they or either of them caused such separation, or that they have prevented the return of plaintiff's husband to her.

It is admitted that when plaintiff's husband left his home in July, 1924, he had a delusion, which was wholly without justification in fact, with respect to plaintiff's fidelity to him, and that said delusion was due to the unfortunate mental condition of said husband. The evidence tended to show that said delusion has persisted, notwithstanding the assurances of friends and relatives that it was groundless.

Plaintiff and her husband were married in 1915. They lived together happily until the summer of 1924. During this time three children were born. Plaintiff's husband was successful in business, and all the evidence was to the effect that he maintained a comfortable home for his wife and children, being at all times an affectionate husband and a devoted father. In the summer of 1924 he suffered a breakdown in his health, both physical and mental. Upon the advice of plaintiff and her relatives, he left his home in this State on 2 July, 1924, and went to Richmond, Va., where he entered a sanatorium for treatment. There was no evidence tending to show that defendants or either of them advised with or counselled plaintiff's husband with respect to his health or with respect to his leaving his home. Plaintiff testified that she urged her husband, after consultation with her father, to go to the sanatorium for treatment. She also testified that "the first estrangement that arose between me and my husband was for some reason other than conduct on the part of the Holderbys. I think the cause of the first estrangement between myself and my husband was due to financial reasons, or business transactions, in which neither of the Holderbys had anything whatever to do, that I know of. He never alluded to my being untrue to him until just before he went to the hospital. He accused me of infidelity after the birth of my baby." She further testified, "I think all of the unfortunate occurrences related by me were due to the mental condition of my husband."

While plaintiff's husband was in the sanatorium at Richmond, he communicated with defendants, J. C. Holderby, his step-father, and Murrill Holderby, his brother. At his request, one or both of them went to Richmond to see him. He returned to this State with them, and entered a hospital at Wilson, where the defendants then resided. He remained in this hospital for several weeks; while he was there defendants visited him frequently. When he left the hospital, he went to the home of defendants, Murrill Holderby and his wife, Lillie Holderby. He remained in their home for some time and then went to a hospital at Battle Creek, Michigan. Since leaving that hospital, he has traveled widely throughout the United States, sometimes on business and sometimes visiting relatives. He now lives at Valdosta, Georgia, where he makes his home with defendants, Murrill Holderby and Lillie Holderby. The defendant, J. C. Holderby, now lives at Mullins, S. C. Plaintiff's husband has not lived with her since July, 1924. Plaintiff testified, "I think the beginning of the estrangement between my husband and myself was due to his mental condition. I think the defendants are the cause of his staying away. I do not think they caused his mental condition, but they are the cause of his not keeping well." There was no evidence tending to show any conduct on the part of the defend-

ants, or of either of them, which supports plaintiff's opinion that defendants have prevented the return of her husband to her, unless it be evidence to the effect that they have associated with him and permitted him to live in their home.

After plaintiff's husband left her in the summer of 1924 and after she had been informed that he justified his conduct toward her by charging that she had been unfaithful to him, she caused a warrant to be issued for his arrest on the charge that he had slandered her. He has not been arrested on this warrant. Upon learning of the issuance of the warrant, he left the State and has since remained out of the State for the purpose of avoiding arrest. Plaintiff thereafter instituted a proceeding under the laws of this State, for an allowance to be made out of her husband's estate for her support. In this proceeding an order was made for such allowance and said order has been complied with. Plaintiff has received from her husband's estate money and property for the support of herself and children, in accordance with said order.

The issues submitted to the jury were answered in favor of the plaintiff and against the defendants.

From judgment on the verdict, that plaintiff recover of the defendants both compensatory and punitive damages as assessed by the jury, defendants appealed to the Supreme Court.

Walter G. Sheppard and J. Paul Frizzell for plaintiff.
L. W. Gaylord and Harding & Lee for defendants.

CONNOR, J. Whatever may be the law in other jurisdictions, it is settled in this State by authoritative decisions of this Court, that a married woman, who has been abandoned by her husband, can maintain an action in her own name for a tort. *Brown v. Brown,* 121 N. C., 8, 27 S. E., 998. In that case it was held that a complaint in which the plaintiff alleged that the defendant had alienated the affections of her husband, and induced him to abandon her and to refuse to contribute anything to her support, was not demurrable on the ground that it appeared on the face of the complaint that there was a defect of parties for that plaintiff's husband had not been joined with her as a party plaintiff. Upon an appeal from the judgment on the verdict in that case, 124 N. C., 19, 32 S. E., 320, it was held that "before a parent can be held liable in damages for advising his married child to abandon his wife or her husband, the conduct of the parent should be alleged and proved to be malicious; that the wilful advice and action of the parent in such a case may not be necessarily malicious, for the parent may be determined and persistent and obstinate in his purpose to cause the separation and yet be entirely free from malice—in fact, have in view the highest good of his child." This principle is applicable not only when

the defendant in an action for alienation of affection is the parent of the plaintiff's husband or wife, as the case may be, but also where the defendant is a near relative of plaintiff's husband or wife. *Powell v. Benthall,* 136 N. C., 145, 48 S. E., 598. In that case, it was held that the principle is applicable where defendants are the brother-in-law, and sister of plaintiff's wife. See 30 C. J., p. 1131, and cases cited in support of the text, which is as follows:

"The rule permitting parents to advise their children in good faith applies when the special circumstances require it, in favor of other near relatives of plaintiff's spouse, and in favor of such spouse's guardian, but a defendant cannot claim any such protection where the evidence fails to disclose the necessary special circumstances."

In the instant case, defendants do not admit that they have caused plaintiff's husband to separate himself from her, nor do they admit that they have caused him to live separate and apart from her, and upon such admissions rely upon the contention that their conduct was not wrongful and malicious. They deny the allegations in the complaint that they caused the separation, or that they have caused its continuance. The burden was therefore on the plaintiff to prove the truth of her allegation with respect to these matters. *Gross v. Gross,* 70 W. Va., 317, 73 S. E., 961, 39 L. R. A. (N. S.), 261.

A careful examination of all the evidence set out in the case on appeal fails to disclose any evidence tending to show conduct on the part of defendants, or of either of them, which was designed to, or which in fact did cause plaintiff's husband to separate himself from her, or to continue to live separate and apart from her. The fact that he has lived with defendants, making his home from time to time with them, taken in connection with his admitted relationship to them, is not sufficient to show that defendants have alienated his affection from the plaintiff, or that they have caused him to continue to live separate and apart from her. The conduct of defendants with respect to plaintiff's husband is altogether consistent with a purpose on their part to aid him; the law will not impute a purpose to injure plaintiff, as she alleges. There was no evidence tending to show that either of the defendants have done any wrong to the plaintiff, or that either of them have any ill will or malice toward her. Plaintiff's unfortunate situation was not caused by the defendants. All the evidence tends to show that it is caused by the groundless delusion of her husband, due to his unfortunate mental condition.

There was error in the refusal of the court to allow defendants' motion for judgment as of nonsuit, at the close of the evidence. The action should be dismissed. To that end the judgment is

Reversed.

STATE v. JIM BARBER.

(Filed 16 October, 1929.)

Homicide H c—Instruction in this case held prejudicial error.

Upon the trial for a homicide, where the evidence tends to show that another struck the blow resulting in death, and that the defendant struck a blow which was not mortal, and the inference is not permissible from the evidence that they acted in concert, or that the two blows were struck at the same time, an instruction that is capable of the interpretation that if the other person struck the mortal blow the defendant would be guilty, is error prejudicial to the defendant entitling him to a new trial on appeal.

APPEAL by defendant from *Daniels, J.*, at August Term, 1929, of LENOIR. New trial.

James Barber and Rochelle Turnage were indicted for the murder of Simon Gray, the State not requesting a verdict for murder in the first degree. At the conclusion of the evidence the action was dismissed as to Turnage, but prosecuted as to Barber, against whom there was a verdict for murder in the second degree.

Evidence for the State tended to establish the following circumstances: About 8 o'clock on the night of 3 August, 1929, the defendant in company with James Williams, Rochelle Turnage and Leslie Gray went to a tobacco barn where the deceased was curing tobacco. The deceased was lying on a bunk under the shelter. Turnage, who seemed to be drunk, shook him and the two began to fight each other. Each cursed the other, and the deceased got a bottle and hit Turnage in the forehead. Leslie Gray then ran away. While the deceased was bent over Turnage, who was on his knees, the defendant came up, stood behind the deceased, struck him on the head with a truck round about three feet long and about the size of a man's wrist or arm. The deceased fell trembling. The defendant refused to assist Bruce Croom in taking the deceased home, saying that he "could not handle him" and "could not mess with him." After saying he had "knocked hell' out of him, the defendant remarked: "Let the damn son of a bitch stay there and they won't know who did it."

There was evidence tending to show that Randolph Davis inflicted the mortal blow; that he had a grudge or ill feeling against the deceased, had made threats against him, and on Sunday afternoon preceding the killing at night, had got some shells and threatened his life. It was in evidence that after the homicide Davis admitted that he had struck the deceased; said he ought to have been killed, and asked Leslie Gray not to say who had hit the deceased.

The defendant testified: He served sixty days on the roads, four or five years ago; that he raised tobacco on the place where this barn

stood; that he and Simon were together that morning curing tobacco; that he told Simon he would stay that night; that there was no feeling between them; that he came to the barn about 8 o'clock and told Simon that he would go get supper and come back; that the furnace could not be seen from where the witness Williams was sitting in the car; that the end of the shelter was boarded in; that when the car drove up to the tobacco barn that night Turnage got out and went to the barn; that he, Barber, put a piece of wood in the furnace; that Turnage shook Simon, and that Simon cursed him; that Simon stooped to pick up something; that Turnage pushed him away, and that they ran into each other again; that Randolph Davis came up and struck him with a truck round. The defendant said that Simon had not done anything to him, and that they were on good terms; that Randolph Davis hit Simon twice and that Turnage then jumped up; that he told them to help him take him up, and they would not do it; that Randolph said that he hit him; that Turnage and Simon cursed each other.

There was evidence that the defendant's character was good.

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

Shaw & Jones for defendant.

ADAMS, J. After the homicide had been committed Dr. Lee examined the body of the deceased. He found two wounds on the head: a laceration from three and a half to five inches in length in a line from the right eye back toward the ear, the laceration extending to the bone, and a bruise over the left temple three or four inches long and two inches wide. The witness expressed the opinion that death was caused by a fracture of the skull and contusion of the brain resulting from a lick or blow, and that the laceration or incision could have caused the fracture at the base of the skull; that is, that the laceration could have produced death. There is other evidence which would sustain the conclusion that death resulted from the wound on the left temple.

It is evident that neither of these wounds was inflicted by Turnage. There is evidence that both the defendant and Randolph Davis struck the deceased. James Williams testified that the wound on the left temple was inflicted by the defendant with a truck round; the defendant said that he did not use the round, but that Randolph Davis used it. The evidence would have warranted the jury in finding that the defendant made the wound on the left temple; that Randolph Davis made the other, and that the latter, and not the former, was mortal. That the defendant and Davis acted in concert or that the two wounds were simultaneous is

not a necessary deduction from the evidence. It is in these circumstances that the defendant excepted to the following instructions:

"Now, gentlemen, it is competent for the defendant to testify that somebody else actually did the killing or struck the blow from which the deceased died, in order to exonerate himself, if he can, and if the jury accepts his statement, "because if he never struck at all, somebody else did strike the blow which killed the deceased, then the defendant could not be guilty."

"Now, you are not trying Randolph Davis, you are trying the defendant, but as I say, if the evidence satisfies you that Randolph Davis is the man who struck the blow that killed the deceased, then you would have to find that the defendant was not guilty, if you believe the defendant himself did not strike."

The instructions, as they appear in the record, are susceptible of the construction that if Randolph Davis inflicted a mortal wound on the right side of the head and the defendant inflicted another wound which was not mortal, the defendant would be guilty merely because he struck the deceased, although there was no concert of action between them, and although there may have been an interval between the two blows. For this reason the defendant is entitled to a new trial.

New trial.

THE TOWN OF AYDEN v. E. A. LANCASTER AND DOVIE E. LANCASTER.

(Filed 16 October, 1929.)

1. Trial F a—Issues submitted to jury in this case held sufficient.

Where the issues submitted to the jury on appeal from the clerk in condemnation proceedings are sufficient in form and substance to present all phases of the controversy to the jury, they will not be held for error on appeal to the Supreme Court.

2. Eminent Domain C d—Measure of compensation for taking of lands.

Where lands of the owner are taken by a town for an enlargement of its existing cemetery, compensation therefor should be awarded for the market value of the land appropriated and for the depreciation in value of other contiguous lands of the owner naturally and proximately resulting from the particular use to which the land taken is to be put, less the special benefits accruing therefrom.

3. Eminent Domain C c—Number of cemetery lots land taken would make it competent evidence of injury to adjacent lands.

Where a civil engineer has testified as to the area of the land petitioned by a city to be taken for an addition to its cemetery, it is but a matter of

calculation as to how many cemetery lots of the usual size could be made therefrom, and testimony thereto is competent, taken with other evidence in the case, as to the damage to the value of other contiguous lands of the owner.

4. **Same—Use to which remaining land could have been put except for condemnation is competent evidence of damage thereto.**

The evidence of the depreciation in value of the owner's lands contiguous to that taken in condemnation proceedings by a town as an addition to its cemetery, it is competent for a civil engineer who has made a survey to testify from his own observations that the owner could have divided his land into lots along a certain extended street but for the condemnation.

5. **Eminent Domain C b—Evidence of value of other land similar to that taken is competent.**

Where the opinion of a witness upon the value of land condemned by a town is based upon his knowledge of the value of lands situated nearby, the competency of the testimony depends upon the evidence introduced tending to show the value in the one place was sufficiently similar to that in the other, and the question is for the jury.

6. **Witnesses D d — When witness makes inconsistent statements the credibility of his testimony is for the jury.**

Where a witness has testified in condemnation proceedings by a town for an addition to its cemetery with reference to the damage the owner has sustained by its taking, and on cross-examination makes inconsistent answers as to the correct basis of his opinion, his testimony is for the jury upon the credibility of the witness.

7. **Eminent Domain D d—Judgment in condemnation proceedings should definitely describe property and set forth rights of petitioner therein.**

The judgment in condemnation proceedings by a town against private lands should describe the land appropriated with certainty and set forth the rights of the petitioner to the land and easement, and that upon the payment of the amount assessed the title of the petitioner shall become absolute.

APPEAL by plaintiff from *Daniels, J.*, and a jury, at March Term, 1929, of PITT. Modified and affirmed.

The petition sets forth the following land of defendant, Dovie E. Lancaster, to be condemned: "That your petitioner, the Town of Ayden, desires to enlarge its present cemetery, so as to take in the following described parcel of land, which is a part of the tract of land described in paragraph 3 of the petition, said parcel of land to be condemned, and used for cemetery purposes as follows: (Describing the land by metes and bounds) containing 1 1/5 acres, more or less. That your petitioner, the Town of Ayden, further desires to condemn for street purposes the following tract or parcel of land, being a strip of land 27 feet wide and 66 feet in length running a straight line and connecting with Seminary

Avenue, making a continuation of the said Seminary Avenue from Railroad Street to the cemetery and running a course S. 83 E." (The evidence indicates that the street was 27 feet by 662½ feet, 41/100 of an acre.) This is a proceeding under C. S., 2792, brought before the clerk of the Superior Court of Pitt County to condemn 1 1/5 acres of land as an addition to a cemetery, and 41/100 of an acre for street purposes in the town of Ayden. Commissioners were duly appointed by an order entered by the clerk, who awarded the owner, Dovie E. Lancaster, $900 for the land condemned. Thereafter the respondent, defendants, filed exception to the report of the commissioners on the ground that the land condemned was worth more than $900. The exceptions filed by the respondent were overruled by the clerk and the report confirmed, whereupon the respondent excepted to the ruling of the clerk and appealed to the Superior Court in term for trial by jury. The cause was tried at March, 1929, Civil Term of Pitt Superior Court before his Honor, F. A. Daniels, and a jury.

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

"1. What compensation is the respondent, Dovie E. Lancaster, entitled to recover of the petitioner, the Town of Ayden, on account of the taking of the land described in the petition for cemetery purposes? Answer: $653.

2. What compensation is the respondent, Dovie E. Lancaster, entitled to recover of the petitioner, the Town of Ayden, for the injury and damages, if any, to her other land by reason of the taking of said land and establishing said cemetery thereon? Answer: $500.

3. What compensation is the respondent, Dovie E. Lancaster, entitled to recover of the petitioner, the Town of Ayden, on account of the taking of the land described in the petition for street purposes? Answer: $418.40.

4. What compensation is the respondent entitled to recover of the petitioner, the Town of Ayden, if any, for injury and damages, if any, to her remaining land by reason of the taking of the said land for said street, as set out in the petition? Answer: Nothing.

5. What enhancement of value peculiar to her land and not in common with the other landowners in the vicinity came to Mrs. Dovie E. Lancaster by reason of the taking and laying out of the street mentioned in the petition and exceptions? Answer: Nothing." The total amount, including interest from date, $1,571.40.

The court below rendered judgment on the verdict. Plaintiff, petitioner, made numerous exceptions and assignments of errors and appealed to the Supreme Court.

Harding & Lee and Pittman & Eure for plaintiff, petitioner.
Julius Brown for defendants, respondents.

CLARKSON, J. This Court, in *Town of Ayden v. Lancaster,* 195 N. C., 297, held that in condemnation proceedings instituted by a town before the clerk of the Superior Court, to take lands for public municipal purposes, upon exception duly filed by the owner to the damages assessed by the commissioners and an appeal being taken to the Superior Court and a jury trial demanded on the issues raised by the exception, the landowner had a right to a jury trial in the Superior Court on the question of damages.

The present appeal by plaintiff, petitioner, is for errors which it contends the court below committed when the questions of damages were tried by a jury in the Superior Court. We see no error in the issues submitted; they are "sufficient in form and substance to present all phases of the controversy between the parties." *Virginia-Carolina Joint Stock Land Bank v. The First and Citizens National Bank of Elizabeth City, ante,* 526. The issues were premised on the law of this jurisdiction in condemnation proceedings. *Goode v. Asheville,* 193 N. C., 134.

The civil engineer who made the survey for respondents testified, without objection, that the land taken for cemetery purposes was one and 14/100 acres. "The size of the lots of the old and new cemetery is twenty by twenty, that is twenty feet square," and upon objection testified that the land taken in the present action was between 90 and 100 lots 20 by 20 feet. This was merely a simple question of arithmetic, taking into consideration the number of square feet in an acre that a civil engineer could easily calculate, and some evidence to indicate, no doubt, the damage to respondent's other land in having constantly so many new graves dug contingent to it. *R. R. v. Armfield,* 167 N. C., 464. The evidence did not elicit the selling price of the lots.

In *United States v. Chandler-Dunbar W. P. Co.,* 229 U. S., 51, 57 L. Ed., 1063, it is said: "The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it is taken." *Power Co. v. Hayes,* 193 N. C., at p. 107. We think the evidence competent.

Lurton, J., in *United States v. Grizzard,* 219 U. S., 180, 55 L. Ed., 165, said: "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, the injury due to the use to which the part appropriated is to be

devoted." *R. R. v. Manufacturing Co.*, 166 N. C., at p. 173; *Power Co. v. Hayes, supra,* p. 104. In condemnation proceedings the rule in regard to damages is fully set forth in *Goode v. Asheville, supra,* at p. 136, as follows: "The measure of damages in such cases 'is the difference in value before and after taking, less the special benefits, and that increased value to the land enjoyed in common with others affected by the improvement is not a special benefit.' *Lanier v. Greenville,* 174 N. C., 311; *Campbell v. Commissioners,* 173 N. C., 500; *Elks v. Commissioners,* 179 N. C., 241; *Bost v. Cabarrus,* 152 N. C., 531; *R. R. v. Platt Land,* 133 N. C., 266. The Legislature has power to provide by statute that the damages accruing to the landowner can be reduced not only by special benefits received by the landowner, but by all benefits accruing to him 'either special or in common with others." *Miller v. Asheville,* 112 N. C., 768; *Lanier v. Greenville,* 174 N. C., 311. In *Stamey v. Burnsville,* 189 N. C., 39, the rule was thus declared: 'It seems to be the general rule in this jurisdiction that the compensation which ought to be made, just compensation, under our general statute is such compensation after special benefits peculiar to the land are set off against damages.'" See C. S., 1721 and 1722.

The civil engineer, witness for defendant, respondent, who had experience in value-standards, testified that from his survey and personal observations, the lands immediately west of the new cemetery and south of it, are suitable lands for subdivision into building or residential property. This was not objected to. The witness was then asked "if the new part of the cemetery had not been taken from Mrs. Lancaster and the street marked Cemetery Road had been extended southwardly in the same direction, could there have been two tiers of lots laid off between that and Blount Street according to your survey and observation, as shown on the Forrest property? Petitioner objected; overruled and petitioner excepted. Certainly the road could be extended on through in a southern direction and lots could be laid off or not on the westerly side of Cemetery Road if it was extended, and on the eastern side also, and also on the eastern side of Blount Street."

From the location of this particular land, the whole piece being 34 acres, the evidence indicates that it is in and adjacent to the town "her land continues eastward beyond the corporate limits." "All land taken is in corporate limits."

The witness indicated the method of subdivision, but did not put any value on the land. He only described the way the subdivision could be made and stated the facts. We can see no objection to this testimony.

In 1 Elliott on Roads and Streets, 4th ed., sec. 295, it is said: "If the situation, quality and character of the property are such as to make it peculiarly adapted to a certain purpose and to give it an especial value

for that purpose, then damages should be assessed with reference to its adaptability to that purpose. . . . (Sec. 296) So, too, in a proper case, may its special value or adaptability to be made into city lots. Its availability for the purpose for which it is taken is to be considered likewise. But the evidence and consideration should not be confined to its value for such purpose, nor to the purpose to which the owner has actually applied it. The use or damage must not, however, be too remote, uncertain and speculative. . . . (Sec. 297) Incidental injuries stop short of remote, conjectural or speculative injuries, for the law does not attempt to furnish an absolutely complete indemnity to the landowner; it only undertakes to secure to him compensation for such injuries as are the natural and proximate result of the appropriation of the property to the particular public use." *Rouse v. Kinston,* 188 N. C., at p. 12; *Milling Co. v. Highway Commission,* 190 N. C., 692.

The price for which the 12 2/5 acres of land was sold to the Baptist Seminary, in proximity and similarity, and the price which defendant, respondent, paid for the 34 acres of land a few years prior, were at least permissible in corroboration.

On both of these aspects, the court below instructed the jury: "This evidence has been admitted for your consideration in corroboration of the witness' testimony as to the value he fixed upon these lands in September, 1923, not as independent evidence of its value, but merely in corroboration of the witness' statement, if it does corroborate him."

In *DeLaney v. Henderson-Gilmer Co.,* 192 N. C., at p. 652, it is said: "Ordinarily the value of the property damaged is to be determined as of the time and place of its damage or injury. Proof of its value within a reasonable time under the circumstances of the particular case, before and after the injury is competent. *Newsom v. Cothrane,* 185 N. C., p. 161; 8 R. C. L., 487-8-9."

The exception and assignment of error as to the testimony of the old man who had lived in the vicinity all his life and knew the land taken for cemetery and street purposes and its market value at the time it was taken and gave his reasons and the damage, this cannot be sustained because on cross-examination he answered both ways to the effect that he did and did not base the damage upon the price they were selling the cemetery lots for. This affected the credibility of the witness and the probative force given to such testimony was for the jury. *Shell v. Roseman,* 155 N. C., 94; *Shaw v. Handle Co.,* 188 N. C., 236.

There are other assignments of error we do not think material to be considered, in reference to them we quote from Wigmore on Evidence, Vol. 1, 2 ed., p. 1136, part sec. 718: "Hence, the question arises how far an acquaintance with value standards in one place will suffice when the value in question is of a thing in another place. The witness' com-

petency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down."

We do not think the assignment of error to portions of the charge of the court below can be sustained, yet no proper assignment of error was made. *Rawls v. Lupton,* 193 N. C., 428. From a careful reading of the charge we think the learned and painstaking judge in the court below gave succinctly the contentions, evidence and law applicable. The value testimony as to the property was conflicting, the probative force was for the jury.

The judgment should describe the land taken with certainty and should set forth the rights of the plaintiff, petitioner, to the land and easement, and, upon payment of the damages assessed by the jury, title to become absolute. See C. S., 607-608; *Beal v. R. R.,* 136 N. C., 298.

There is no error in the trial. The judgment is

Modified and affirmed.

NEW YORK INDEMNITY COMPANY v. CORPORATION COMMISSION OF NORTH CAROLINA, LIQUIDATING AGENT OF BANK OF BELHAVEN.

(Filed 23 October, 1929.)

1. Principal and Surety B c—Surety's subrogated right against insolvent bank not subject to off-set by personal debt of sheriff.

Where a bank has received from the sheriff of the county funds of the county for deposit, and thereafter the bank becomes insolvent, and a judgment has been obtained against the surety on the sheriff's bond for the sum deposited, which has been paid, the effect of the judgment is to subrogate the surety to the rights of the county to a pro rated share in the distribution of the assets of the bank, and the sheriff being insolvent, a personal debt of the sheriff to the bank cannot be used as an off-set to the right of the surety thereto. *Coburn v. Carstarphen,* 194 N. C., 368, cited and distinguished.

2. Sheriffs D a—Sheriff is insurer of public funds collected by him.

The liability of a sheriff for moneys he has collected for the county is that of insurer, the moneys so collected being regarded as held by the sheriff in trust for the county, and his liability for such funds can be discharged only by payment to the county under the provisions of the statute.

APPEAL by defendant from *Nunn, J.,* at Chambers, Raleigh, N. C., 13 September, 1929, of WAKE. Affirmed.

Submission of controversy without action. C. S., 626.

The facts: T. C. Swindell was sheriff of Hyde County. He deposited in the Bank of Belhaven $1,522.12 in the name of T. C. Swindell, sheriff. The funds so deposited came into his hands as sheriff and as county funds which he must account for and which he was obliged to pay over to the county of Hyde. He also carried a personal account in the name of T. C. Swindell. He borrowed money personally from the Bank of Belhaven and also personally endorsed some notes. The Bank of Belhaven closed its doors on 16 March, 1927, and the Corporation Commission undertook its liquidation. At the time of its closing, there was on deposit in said bank the aforesaid $1,522.12 of county funds of the county of Hyde and deposited in the name of T. C. Swindell, sheriff. There was also a deposit of $9.99 in the name of T. C. Swindell. At that time T. C. Swindell was personally indebted to said bank in the amount of $800 represented by note signed by him and was personally indebted to said bank as an endorser on two other notes in the amount of $500 and $370.75, respectively. The plaintiff in this action was surety on the official bond of T. C. Swindell, sheriff. In a suit by the proper officials of the county against the plaintiff and T. C. Swindell, sheriff, judgment was entered discharging, for a consideration paid by plaintiff, the obligation of said sheriff and of the plaintiff, his surety, to the said county and specifically subrogating the plaintiff to the rights of the said county in and to the deposit in the Bank of Belhaven carried in the name of T. C. Swindell, sheriff. Upon demand by the plaintiff that depositors' dividends be paid to it as the holder of the rights of the county of Hyde in said deposit, the Corporation Commission, liquidating agent, refused to make any such payment, but claimed a set-off because of the personal indebtedness to the bank of T. C. Swindell. T. C. Swindell is insolvent. Upon suit being brought, judgment was entered in favor of the plaintiff, declaring the plaintiff entitled to regular depositors' dividends on the deposit of $1,522.12 in the name of T. C. Swindell, sheriff, and from the judgment the defendant appealed.

Smith & Joyner for plaintiff.
I. M. Bailey for defendant.

CLARKSON, J. T. C. Swindell, sheriff of Hyde County, had on deposit in the Bank of Belhaven $1,522.12 in the name of T. C. Swindell, sheriff. The funds so deposited came into his hands as sheriff and as county funds which he must account for and which he was obligated to pay over to the county of Hyde. C. S., 4270, in part is as follows: "If any clerk of the Superior Court or *any sheriff,* treasurer, register of deeds or other public officer of any county or town of the State shall embezzle or wrongfully convert to his own use, or corruptly use, or shall

misapply for any purpose other than that for which the same are held, or shall fail to pay over and deliver to the proper persons entitled to receive the same when lawfully required so to do, any moneys, funds, securities or other property which such officer shall have received by virtue or color of his office in trust for any person or corporation, such officer shall be guilty of a felony."

The Bank of Belhaven became insolvent and its affairs are being liquidated by defendant, Corporation Commission. At the time of closing its doors, T. C. Swindell, sheriff, as before mentioned, had on deposit $1,522.12. T. C. Swindell in his own name had on deposit $9.99. At the time T. C. Swindell was indebted to the bank in the sum of $800 on a note signed by him and as an endorser on two other notes, one for $500, and the other for $370.75, making a total of $1,670.75.

In an action brought by proper officials, judgment was entered against the plaintiff as surety on T. C. Swindell's bond as sheriff on payment of a certain sum and by the judgment plaintiff was subrogated to all the rights of the county in and to the deposit in the Bank of Belhaven of $1,522.12, in the name of T. C. Swindell, sheriff, and which the sheriff was obliged to pay to the county.

It is contended by defendant, Corporation Commission of North Carolina, liquidating agent of the Bank of Belhaven, that it has the right to set-off the $1,522.12 in the name of T. C. Swindell, sheriff, and which the sheriff was obligated to pay to the county, against the personal indebtedness of the sheriff of $1,670.75 due by him to the bank by note and as endorser. We cannot so hold.

The sheriff, if he embezzled it or wrongfully converted it to his own use or corruptly used it or misapplied it for any purpose or failed to pay over and deliver it to the proper party, was guilty of a felony. In the present action the sheriff was obligated to pay it over to the county. This was a trust fund of the most inviolate kind—the fund of a public official.

In *Marshall v. Kemp,* 190 N. C., at p. 493, it is said: "The liability of a public officer differs from that of a trustee or a bailee. The general rule is that an officer who enters into an obligation to account for money received by virtue of his office insures the safety of all funds received by him in his official capacity—insures, as *Justice Rodman* said, against loss by any means whatever, including such losses as arise from the act of God or the public enemy. *Commissioners v. Clarke,* 73 N. C., 255. In *Havens v. Lathene,* 75 N. C., 505, *Chief Justice Pearson* expressed the same opinion by saying that such officer is accountable as a debtor who can relieve himself only by payment. His liability is founded on public policy and the evil consequences which would follow from a less rigid rule as well as on the language of his official bond."

In *Commissioners v. Clarke, supra,* at p. 257, it is said: "It must not be inferred from this, however, that the money belongs to the sheriff, to be dealt with as his own, as a bank deals with its deposits, or otherwise than he is permitted by law."

This rigid rule that public officers are insurers does not ordinarily apply to trustees and bailees, unless made so by special contract. *Sams v. Cochran,* 188 N. C., 731; *Marshall v. Kemp, supra.*

The principle as to set-offs is thus stated in 7 C. J., part sec. 357, pp. 658-9: "In order to warrant a set-off it is of course necessary that the money deposited shall belong to the depositor, and hence the rule does not apply where the bank has knowledge that the moneys are held by the depositor in trust, in his capacity as a public official, or as agent, factor or broker." See *Wilbur v. Mortgage Loan Co.,* 149 S. E., 262 (S. C.).

"A bank having notice that a deposit is held by one for the use of another, or as security for another, has only such right of set-off as is not inconsistent with the rights of the latter. *United States v. Butterworth-Judson Corp.,* 267 U. S., 387, 45 Sup. Ct. Rep., 338"; 50 A. L. R., 633. See *Davis v. Industrial Mfg. Co.,* 114 N. C., 321; *Moore v. Bank,* 173 N. C., 180; *Trust Co. v. Spencer,* 193 N. C., 745.

We think that *Coburn v. Carstarphen,* 194 N. C., 368, 55 A. L. R., 819, is distinguishable from the present action. In the *Coburn case* it affirmatively appears that the treasurer, Carstarphen, was solvent; that as treasurer he was the insurer of the deposit. It was held in *Commissioners v. Clarke,* 73 N. C., 255, that the sheriff was liable although the money had been placed in an iron safe and stolen therefrom. The county was not protesting against the set-off, nor did it claim the deposit. Carstarphen, with the consent of the county, had a right to make the set-off. There was no misapplication unless done with a fraudulent intent. The county looked to the solvent treasurer for payment. The true situation, therefore, was that the loss was surely to fall upon the solvent treasurer and the solvent treasurer, by reason of his proposed payment of the deposit to the county, was the substantial and equitable owner of the deposit and of the right thereunder against the bank.

In the present action the sheriff is insolvent. The county looked to this deposit, which was in the name of T. C. Swindell, sheriff, in his official capacity. It did not belong to him personally, but the county was the *cestui que trust* and the beneficial owner. The sheriff being insolvent, action was brought by the county against him and plaintiff corporation. The action was on the sheriff's bond for a settlement. The county in the adjustment with the plaintiff bondsman of what the insolvent sheriff owed the county, this deposit in the sheriff's name belonging to the county, was taken in consideration. The rights of the county as beneficial owner, in the settlement with plaintiff, was by the judgment

practically assigned to plaintiff or plaintiff was subrogated to the rights of the county, the beneficial owner. The bank has no claim against the county, and never did have; its claim was against T. C. Swindell personally. The plaintiff is the equitable owner acquiring its rights from the county in this official's deposit, hence there can be no set-off by the defendant, liquidating agent. Equitable principles depend on the facts of the particular case.

The judgment of the court below is

Affirmed.

L. L. KING v. COMMERCIAL CASUALTY INSURANCE COMPANY.

(Filed 23 October, 1929.)

Insurance R b—In this case held: directed verdict on issue of accidental injury was proper in action on accident policy.

Where the evidence of the plaintiff in his action to recover on a policy of accident insurance discloses that several years prior to the issuance of the policy he had been shot in the foot, the shot remaining in his foot without causing special pain or trouble, and that after the issuance of the policy he had accidentally sprained his ankle, which resulted in inflammation and necessitated an operation for the removal of the shot, and finally made it necessary to amputate the foot, and there is no evidence that the operation necessitated the amputation: *Held*, a directed verdict on the issue of whether the injury was caused by accidental means was proper, though the burden was on the plaintiff to show that his injury was within the provisions of the policy.

APPEAL by defendant from *Harris, J.*, at February Term, 1929, of NEW HANOVER. No error.

On 1 September, 1925, the defendant issued to the plaintiff an accident insurance policy containing this clause: "This policy insures against the effects resulting directly and exclusively of all other causes, from bodily injury sustained during the life of this policy solely through external, violent and accidental means, suicide, sane or insane, not included."

The plaintiff brought suit on the policy and at the trial the following verdict was returned:

1. Did the defendant issue to plaintiff policy No. CD-47164, as alleged in the complaint? Answer: Yes.

2. Did the injury complained of result directly and exclusively of all other causes solely through external, violent and accidental means as provided in said policy? Answer: Yes.

3. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: $1,200 and interest from 1 March, 1928.

Judgment was rendered for the plaintiff from which the defendant appealed, assigning error.

John A. Stevens and Bryan & Campbell for plaintiff.
Rountree & Carr and M. G. James for defendant.

ADAMS, J. The parties agreed that the first issue should be answered in the affirmative and that the third, if the plaintiff was entitled to recover, should be answered $1,200 with interest from 1 March, 1928. Whether the plaintiff was entitled to recover depended upon the answer to the second issue.

As the defendant introduced no evidence the controversy turned almost entirely upon the testimony of the plaintiff. The facts are undisputed. In August, 1927, the plaintiff sprained his left ankle. It swelled and developed into "a kind of reddish purple." In a few days it was examined by a physician and was photographed by the aid of X-rays. The picture revealed a small shot imbedded in the foot just above the toe joint, caused, it was said, by the accidental discharge of a gun in 1909. The shot was removed, but the pain continued. The physician then reopened the incision by which the shot had been removed and made another on the other side of the foot; and on the next day he made four or five incisions. On two subsequent occasions he removed portions of bone and afterwards amputated the foot.

The specific question is whether the plaintiff's injury resulted directly and exclusively of all other causes solely through external, violent, and accidental means. The defendant contends, not that amputation resulting from the sprain alone would not have brought the injury within the terms of the policy, but that the injury resulted from a surgical operation for the removal of a shot on the side of the foot opposite the sprain and that it was not an effect resulting exclusively of all other causes from bodily injury sustained through external, violent, and accidental means; or if this position cannot be maintained that the second issue should have been submitted to the jury. The plaintiff contends, on the other hand, that it is immaterial whether blood poison was caused by the sprain or by the surgeon's act in removing the shot. The trial judge adopted the plaintiff's view of the law and instructed the jury, if they believed the evidence, to answer the second issue in the affirmative.

We have discovered nothing in the plaintiff's evidence from which the jury could reasonably infer that the condition of his foot was due to the imbedded shot or to the incision made for its removal. The shot had been there for several years and had never caused special pain or trouble.

This in effect, according to the evidence, was admitted by the defendant's agent before the policy was issued. The entire defense seems to rest on the theory that infection resulted from the operation to remove the shot, but there is nothing in the testimony to support the theory—no sufficient evidence to this effect. The burden, of course, was on the plaintiff to show that his injury is covered by the terms of the policy; but there is abundant evidence to support this conclusion and none which is so inconsistent with it as to require a new trial for error in the instruction on the second issue. If, however, infection followed the operation for the removal of the shot, it was not the natural or probable result of the plaintiff's act. It was not a result which would ordinarily follow the act, but one attended with an unexpected and unusual result. Vance on Insurance, 566, sec. 232; 6 Cooley's Briefs on Insurance, 5234; *Clay v. Insurance Co.*, 174 N. C., 642.

Our view of the undisputed evidence precludes the necessity of considering the interesting questions of law which under other conditions would have been controlling. We find

No error.

S. W. MORGAN AND W. B. BLADES v. BEAUFORT & WESTERN RAILROAD COMPANY ET AL.

(Filed 23 October, 1929.)

1. **Actions E b—Party invoking process of court may not thereafter seek to nullify proceedings he has invoked.**

Semble, where the plaintiff in a special proceeding to have the title to his lands registered under the provisions of the Torrens Act has signed the petition, he may not, after the court has proceeded with the cause, enter a special appearance for the purpose of nullifying the very process that he has invoked.

2. **Deeds and Conveyances E a—In this case petitioner could not attack Torrens Proceedings on ground that clerk did not sign jurat.**

Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of C. S., 2384, upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside.

3. **Appeal and Error J c—Where findings of fact do not appear of record it is presumed that court found facts supporting judgment.**

Where an agreement was signed by one purporting to be an attorney for petitioner in proceedings under the Torrens Act, and the Superior

Court has denied the motion of the petitioner to dismiss the action upon the ground of an invalid jurat apparently issued by the clerk, it will be presumed on appeal that the judge below made sufficient findings of fact to sustain his action in denying the petitioner's motion to dismiss the proceedings, and the petitioner may not sustain his averment that the attorney was not authorized by him to so act, there being no finding to support his contention.

CIVIL ACTION, before *Daniels, J.*, at July Term, 1929, of CARTERET.

This is a special proceeding instituted by the plaintiffs in the Superior Court of Carteret County for the purpose of having title to the lands described in the petition certified and registered under the statute commonly known as the Torrens Act. The petition was signed by both plaintiffs as petitioners on 16 July, 1925, and by Julius F. Duncan, attorney, Beautfort, N. C. The verification of the petition is as follows: "North Carolina, Carteret County: W. B. Blades and Sam W. Morgan, each being duly sworn, deposes and says, each for himself that he has read the foregoing petition; that the same is true to his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true. Sam W. Morgan, W. B. Blades.

"Sworn to and subscribed before me, this 17 July, A. D. 1925. ....., Clerk Superior Court."

It appears that the clerk did not sign the verification or jurat. Thereafter, on 21 September, notice of publication was duly issued by the clerk as required by statute. All parties filed answers. On 25 November the proceeding was referred to the examiner of titles. On 14 May, 1928, an order of survey was made in the cause. On 9 May, 1928, the examiner made a preliminary report, together with an abstract of title to lands set out in the petition. The preliminary report refers to sundry hearings before the examiner and refers to an agreement entered into by the attorneys of record for the parties to the effect that "all titles be merged." The agreement of 15 July, 1927, was signed by the attorney of record for petitioners, Morgan and Blades. This agreement, upon its face, purports to adjust the differences between the parties by dividing the various tracts of land in accordance with the plan set out in the agreement. Thereafter on 2 February, 1929, the petitioner, Morgan, having employed other counsel, entered a special appearance for the purpose of "an arrest of judgment and for dismissal of the action as to the said S. W. Morgan . . . for that the proceedings . . . are void and of no effect . . . in that the original petition was not sworn to by each of the petitioners or either of them and did not contain a full description of the land," etc.

The said S. W. Morgan moves for dismissal of said action on the further ground that he has never employed an attorney in said proceed-

ing and never authorized any one to act for him in said proceedings in filing said petition or making any agreement pertaining thereto, etc.

The clerk of the Superior Court denied the motion and the petitioner, Morgan, appealed to the judge. Judge Daniels heard the appeal and denied the motion. No facts were found by the trial judge. From such judgment the petitioner, Morgan, appealed.

Albert L. Cox and E. H. Gorham for movant, S. W. Morgan.

G. W. Duncan for Perry heirs.

W. B. Rodman, Moore & Dunn and MacLean & Rodman for Railroad Company, appellee.

Julius F. Duncan for Blades, and record attorney in the proceeding for Blades and Morgan.

BROGDEN, J. In a Torrens proceeding, after publication and public hearings before the examiner, and after an agreement has been entered into by counsel of record for petitioner, can one of the petitioners enter a special appearance to dismiss the proceeding upon the ground that the jurat of the clerk did not appear upon the original petition?

At the outset it must be observed that no decision has been called to our attention which permits a petitioner or person invoking the process of a court in his own behalf, and after the court has proceeded with the cause, to enter a special appearance for the purpose of nullifying the very process which the petitioner has invoked. Such a legal position, upon its face, would appear to be illogical and contrary to the practice. The petitioner, however, asserts that the proceeding is void by reason of failure of the clerk to attach a jurat to the original petition. Hence if the petition is void, the court acquired no jurisdiction, and neither the parties nor the land are in court for any purpose. C. S., 2384, requires that "the petition shall be signed and sworn to by each petitioner." In the case at bar the petition was signed by both petitioners and by the attorney of record. In addition thereto, the oath was signed by both petitioners. The oath recites that "W. B. Blades and S. W. Morgan, each being duly sworn, deposes and says, each for himself," etc. It is obvious that when the petitioner, S. W. Morgan, signed this oath it was a solemn declaration on his part that he was sworn even though the clerk failed to sign the jurat. If the record did not clearly disclose that the petitioner, Morgan, by actually signing the oath, asserted that he was duly sworn, a different question might be presented. Furthermore, it appears that an agreement was made and duly signed by counsel representing the parties of record, adjusting the differences involved in the proceeding. This agreement was filed by attorneys on 15 July, 1927, practically two years after the petition had been filed. While the moving petitioner

alleges that his original counsel of record had no authority to represent him in the proceeding, yet no evidence is offered to that effect, and there is no finding by the clerk or the trial judge in support of the allegation. If such findings were necessary, nothing else appearing, it is to be assumed that the trial judge found facts warranting the judgment denying the motion for dismissal.

We find no error of law upon the face of the record and the judgment is Affirmed.

STATE v. CHESTER WADE.

(Filed 23 October, 1929.)

Seduction B a—Statement of prosecutrix to physician held not privileged communication under the facts of this case.

Upon the trial under an indictment for the seduction of an innocent and virtuous woman, C. S., 4339, a statement by the prosecutrix to a physician, whom she had consulted, tending to show that she was not innocent or virtuous at the time of the alleged seduction, does not fall within the principle of a privileged communication between physician and patient when made by her after this relationship has ceased, C. S., 1798, and its rejection as evidence by the court is reversible error to the defendant's prejudice, entitling him to a new trial.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1929, of HOKE. New trial.

Indictment for the seduction of an innocent and virtuous woman, C. S., 4339. There was a verdict of guilty. From judgment on the verdict, defendant appealed to the Supreme Court.

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

W. H. Cox and J. W. Currie for defendant.

CONNOR, J. Evidence offered by the State on the trial of this action tended to show that at the time she was seduced by the defendant, as contended by the State, the prosecutrix was an innocent and virtuous woman.

There was evidence for the defendant in sharp conflict with the State's evidence with respect to this essential element of the crime charged in the indictment. C. S., 4339. *S. v. Crook,* 189 N. C., 545, 127 S. E., 579. This evidence was the testimony of several young men who each testified to acts on the part of the prosecutrix, which she had denied on her cross-examination by counsel for the defendant. They testified that

these acts had occurred prior to the time when the State contended that the prosecutrix was seduced by the defendant. The credibility of these witnesses was sharply attacked by the State on their cross-examination by the solicitor.

In support of his denial of the contention of the State that the prosecutrix was an innocent and virtuous woman at the time she testified that she was seduced by him, defendant offered the testimony of Dr. A. C. Bethune, a physician, with respect to a statement made to him by the prosecutrix as to the paternity of her unborn child. This testimony upon objection by the State, was excluded on the ground, apparently, that the communication of the prosecutrix to the witness was privileged under the statute. C. S., 1798.

The witness testified, however, that the statement was made to him after the relationship of physician and patient between them had terminated. The statement was not made to enable the witness to prescribe for the prosecutrix; it was made after he had advised her that he could render her no professional service with respect to her condition. The statement was not privileged under the statute. The testimony was competent as evidence for the defendant; its exclusion was, we think, prejudicial error, for which the defendant is entitled to a new trial.

There are other assignments of error on this appeal, which counsel for defendant earnestly contend should be sustained. It is needless for us to pass on these assignments, as there must be a

New trial.

E. V. HOWELL, AGENT, v. W. S. ROBERSON, L. D. PENDERGRAFT AND W. A. LLOYD.

(Filed 23 October, 1929.)

1. Homestead D a—Agreement in note of waiver of homestead is not enforceable.

A promise on the face of a note to waive the homestead exemption and to pay attorneys' fees in its collection is not enforceable in this State.

2. Bills and notes D b—Those who sign note as makers may not show different liability as against holder.

An endorser of a note is one who writes his name on the back thereof, C. S., 3044, and one who writes his name, with others, on the face thereof after the written obligation to pay, is prima facie regarded as a maker, and he may not show a different liability as against the holder or payee acquiring without notice, but may show primary and secondary liability as against the other signers of the instrument by sufficient competent evidence. C. S., 2977, 3041.

HOWELL *v.* ROBERSON.

APPEAL by L. D. Pendergraft from *Cranmer, J.*, at August Term, 1929, of ORANGE. Affirmed.

Gattis & Gattis for W. A. Lloyd.
R. O. Everett for L. D. Pendergraft.

CLARKSON, J. The plaintiff, E. V. Howell, agent, instituted this action against the defendants to recover upon a note executed by the defendants in his favor, as follows:

$1,500.00. Chapel Hill, N. C., 12/13/1926.

Six months after date ..... promise to pay to E. V. Howell, agent, or order, without offset, fifteen hundred dollars, negotiable at the Bank of Chapel Hill, N. C.

"For value received, and we, the makers and endorsers hereby waive our benefit to the homestead exemption as to this debt, and agree to continue and remain bound for the payment of this note and all interest thereon, notwithstanding any extension of time granted to the principal, and also waive presentment, demand, protest and notice of same, and agree to pay ten per centum attorneys' fees if collected by law.

No. 1500. W. S. ROBERSON,
Due 6/13/27 W. A. LLOYD,
P. O. L. D. PENDERGRAFT."

It may be noted that the waiver of homestead in the manner set forth in the above note is contrary to the law in this jurisdiction and also the allowance of attorneys' fees.

The contention of Pendergraft was to the effect that he was liable to W. S. Roberson, but secondarily to W. A. Lloyd. The contention of Lloyd was to the effect that Pendergraft and himself "signed the instrument sued on as makers thereof for the accommodation of the defendant, W. S. Roberson, and it is alleged that the defendant, Pendergraft, and this defendant are sureties upon the said note and are jointly and severally liable thereon."

It will be seen from the language of the note "any extension of time granted to the principal" would imply that the other makers were sureties.

Pendergraft contends that he is an accommodation endorser and secondarily liable to his codefendant, Lloyd, in the order in which their names appear on the face of the note, there being no evidence to vary the priority. We cannot so hold.

Under the law in this jurisdiction, all three who signed the note were joint makers and may be so held by the payee or holder of the note. C. S., 2977, 3041. As among themselves, they may ordinarily show by

parol their respective liability to each other on the note. Co-principals and co-sureties are presumed to assume equal liability, but this presumption may be rebutted by parol evidence. *Smith v. Carr,* 128 N. C., 150; *Carr v. Smith,* 129 N. C., 232; *Lancaster v. Stanfield,* 191 N. C., at p. 343; *Trust Co. v. Boykin,* 192 N. C., 262; *State Prison v. Bonding Co.,* 192 N. C., 391. See *Busbee v. Creech,* 192 N. C., 499. In the present action the defendant, Pendergraft, attempted to show that he was secondarily liable to Lloyd. We do not think the evidence sufficient to establish this fact. There was no evidence sufficient to show either an implied or express agreement with Lloyd that Pendergraft should be liable secondarily to him.

The assignment of error made by Pendergraft: "For that his Honor sustained defendant Lloyd's motion to grant judgment as of nonsuit as to defendant Pendergraft, at the close of defendant Pendergraft's evidence." This cannot be sustained. Lloyd and Pendergraft were both prima facie makers. Pendergraft was not an endorser of the note; he did not put his name on the back of the note. C. S., 3044, 3049. In this jurisdiction it is well settled that a person placing his name on the back of a note is, nothing else appearing, an endorser and liable on the note only as endorser. *Dillard v. Mercantile Co.,* 190 N. C., 225. A person placing his name on the face of a note is, nothing else appearing, a maker and liable on the note as such. The judgment below is

Affirmed.

J. H. PITMAN ET AL. v. FRED HUNT ET UX.

(Filed 23 October, 1929.)

1. **Evidence D b—Testimony in this case held not to be incompetent as communication with decedent.**

Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of the statute, C. S., 1795, disqualifying a party interested in the event from testifying as a witness in his own behalf as to transactions or communications with a decedent, and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial.

2. **Adverse Possession A f—Tenant may not dispute landlord's title during tenancy or until surrender of possession.**

Where the relation of landlord and tenant exists, the tenant will not be permitted to dispute the landlord's title, either by setting up an adverse claim to the property or by undertaking to show title in a third person, during the continuance of the tenancy, or without first surrendering the possession to the landlord.

3. Same—Possession of tenant is deemed possession of landlord.

Where a tenant on land takes possession under the title of the landlord, the possession of the tenant is deemed in law the possession of the landlord, and in order for the tenant to acquire title by adverse possession he must show possession for twenty years after the termination of the tenancy under a written lease, or, where there is no written lease, from the payment of the last rent, and if the title is claimed under color, seven years sufficient possession must be shown.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1929, of ROBESON.

Civil action in ejectment.

From a judgment of nonsuit entered on motion of defendants at the close of plaintiff's evidence, the plaintiffs appeal, assigning error.

McKinnon & Fuller for plaintiffs.
Varser, Lawrence, Proctor & McIntyre for defendants.

STACY, C. J. There is evidence on behalf of plaintiffs tending to show that their ancestor and predecessor in title, H. F. Pitman, took a deed for the *locus in quo* on 22 June, 1878, and that the same was duly registered 10 November, 1879. (The description may need to be aided by parol, but this the plaintiffs offered to do. *Bissette v. Strickland,* 191 N. C., 260, 131 S. E., 655.) Thereafter, the said H. F. Pitman placed one Berry Oxendine in possession of the land as his tenant, and plaintiffs offered to show that the said Berry Oxendine remained in possession of said property, as tenant of plaintiffs and their ancestor, for approximately forty years, when, by deed bearing date 19 March, 1927, he undertook to convey the same to the defendants.

All evidence offered by plaintiffs tending to show that Berry Oxendine was first the tenant of their ancestor and later their own tenant was excluded, presumably upon the ground that it violated the meaning and spirit of C. S., 1795, which disqualifies a party or person interested in the event, or a person from, through or under whom such a party or interested person derives his title or interest, from testifying as a witness in his own behalf, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of the deceased person, concerning a personal transaction or communication between the witness and the deceased, except where the executor, administrator or survivor, or person so deriving title, is examined in his own behalf, or the testimony of the deceased person is given in evidence concerning the same transaction or communication. *In re Mann,* 192 N. C., 248, 134 S. E., 649. But without passing upon this question, which was discussed in *Poole v. Russell, ante,* 246, it appears that some of the witnesses were not interested in the event, and as to their testimony the statute

would have no application. We think there was error in excluding all the evidence tending to show the tenancy of Berry Oxendine, which entitles the plaintiffs to a new trial.

It has been the uniform holding with us that where the relation of landlord and tenant exists, and the latter takes possession of premises under a lease from the former, the tenant will not be permitted to dispute the title of the landlord, either by setting up an adverse claim to the property or by undertaking to show that it rightfully belongs to a third person, during the continuance of such tenancy, or without first surrendering the premises to the landlord. *Hobby v. Freeman,* 183 N. C., 240, 111 S. E., 1; *Lawrence v. Eller,* 169 N. C., 211, 85 S. E., 291. And it is provided by C. S., 433 that 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. *Power Co. v. Taylor,* 191 N. C., 329, 131 S. E., 646.

It may be well to add, also, that in actions between individual litigants, as here, when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. *Dill Corp. v. Downs,* 195 N. C., 189, 141 S. E., 570; *Power Co. v. Taylor, supra.*

Reversed.

STATE v. ED. McKINNON AND TOM JOHNSON.

(Filed 23 October, 1929.)

1. Homicide G a—Evidence of guilt of first degree murder held sufficient to be submitted to jury in this case.

Circumstantial evidence that the deceased was killed with a stick identified as that carried by one of the defendants; that at the time of the killing the deceased had large amounts of money on his person; that neither of the defendants had money immediately before, but had money thereafter on the night of the killing, with circumstances tending to show a division of the particular money of which the deceased was robbed, and the identity of the pocket-book of the deceased as that seen soon after the killing in the possession of one of the defendants, foot tracks of two persons, one identified as having been made by the boots of one of the defendants; that one of the defendants was seen talking to the deceased just before the killing, is *held,* with other circumstantial evidence in this case, sufficient to be submitted to the jury and to sustain a verdict of guilty as to both defendants of murder in the first degree, the one as the actual perpetrator of the crime and the other as aiding and abetting therein.

2. Criminal Law I j—Upon motion of nonsuit all evidence should be considered in light most favorable to the State.

Upon defendant's motion as of nonsuit (C. S., 4643), made after the close of the State's evidence and renewed after the close of all the evidence, all the evidence which tends to prove the defendant's guilt will be considered in the light most favorable to the State, and in this case *held:* the evidence, although circumstantial, raised more than a conjecture, scintilla or suspicion, and was sufficient to be submitted to the jury, the probative force being for them.

3. Criminal Law G d—Error, if any, in the admission of certain testimony in this case cured by testimony of other witnesses to same effect.

Where the identity of the defendant and the loss by the deceased of his pocket-book on the day of the crime have been established by the testimony of competent witnesses, incompetent testimony of another witness to these facts thus established is immaterial under the facts of this case, and the admission of the incompetent testimony is not held for reversible error.

4. Criminal Law I g—Refusal of requests for instruction substantially given in charge is not erroneous.

Where the requests for instruction by the defendant are substantially contained in the charge, the refusal of the trial court to give the particular instructions requested will not be held for error.

5. Same—Inadvertence in charge as to contentions of party should be called to the attention of the court in apt time.

Where the judge in his charge to the jury inadvertently misstates a contention of the defendant in one particular, the inadvertence should be called to his attention before the jury retires, and under the circumstances of this case where the judge warned the jury not to be governed by his recollection, but by their own, the appellant's assignment of error in this respect cannot be sustained.

6. Criminal Law C a—One aiding and abetting commission of murder is guilty as principal.

One who is present when another commits a capital felony with the knowledge of the other, and does some act to render aid in the perpetration of the crime, is guilty of the offense as an aider therein, though he takes no direct share in its actual commission, and when present advising, instigating or encouraging the other to commit the crime, is guilty as an abetter therein.

APPEAL from *Daniels, J.*, and a jury, at July Term, 1929, of DUPLIN. No error.

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

D. M. Jolly for Ed. McKinnon.

D. L. Carlton and Murray Allen for Tom Johnson.

CLARKSON, J. The defendants were convicted of the murder, in the first degree, of J. H. Boney, and sentenced by the court below to be electrocuted. The State's evidence tended to prove that J. H. Boney was a strawberry grower, 66 years old, living near Tin City, in Duplin County. He had a great many negro strawberry pickers who came from nearby places to pick strawberries, among them the defendant, Ed. McKinnon. He furnished the pickers houses to live in. On Thursday, 25 April, 1929, J. H. Boney was discovered dead about 11 o'clock at night, at the rear end of his pack-house or barn, about 25 yards back of his house, face down in a mud hole. No pocket-book was found on him. He had $6.60 in change in his pocket—two or three bills and some silver. "When found he had been dead about two or two and a half hours." He was struck six times, first across the head and cut in the head about three and a half inches and struck on the back and cut another about three and a half inches on the back of the head; both jaws were struck on each side and he was struck on the neck and across the arm. There was not a whole bone in his head. The physician who examined him said "the wounds were made with a blunt instrument—a blunt smooth instrument, in my opinion. It could have been made with a stick like this," the stick introduced in evidence found near the body with hair and blood stains on it.

The evidence to connect two being present when the crime was committed: About 30 feet from the body a stick was found where it was thrown in some dog fennel which was holding it up, with Boney's hair on it and stains of blood. "Tracks led from the body in the direction of the stick, one with shoes and one with rubber boots, two men's tracks. After passing the tracks led across the edge of the strawberry patch" towards the shanty where McKinnon stayed. Did not go with the path, "but went across the field four feet apart running side by side." The boots admitted by McKinnon to be his, "put one boot in the track, and it fit as fine as you ever saw."

The evidence to connect Ed. McKinnon with the crime: Boney had a brown folding pocket-book, like one shown on the trial bought at the same store. On Wednesday before he was killed on Thursday night, he lost this pocket-book in the strawberry patch where Ed. McKinnon and the other negroes were picking berries at the time. It was in evidence that McKinnon asked how much money was lost and was told $800. The pocket-book was found by his son about 3 o'clock in the afternoon—an hour after it was lost. It contained about $800, mostly $20 and $10 bills, and a peculiar gold coin. His son would haul the berries and give his father the money. Boney was seen by his son at 6 o'clock, about dark, 50 or 75 yards from his house, on the evening he was killed, and had the pocket-book in his pocket with a stack of strawberry checks, when his

son went with others to the river, about three miles away, to fish. Some of the women pickers stayed in the barn, or pack-house, in the edge of the yard; they lived upstairs and the stables were underneath. About 200 to 300 yards, almost directly behind the pack-house in the woods, Ed. McKinnon stayed in a shanty—two rooms. The women in one, men in the other. About 6 o'clock the evening Boney was killed, McKinnon was at Hall filling station with a stick in his right hand exactly like the one which was found near the body, which when found had hair and blood stains on it. "I saw him as much as 2 or 3 times with that very stick." He wore at the time overalls, rubber boots and wide-brim hat. Before that day he wore a wide-brim hat and a handkerchief around his neck, and the negroes called him "cow boy." He was without money that evening; had lost his money and was going to borrow some from Boney, and was seen going in the direction of Boney's house about 6 o'clock in his boots and overalls. Early next morning after the killing, witnesses testified: "Tracks led from the body in the direction of the stick, one with shoes and one with rubber boots—two men's tracks. After passing the tracks led across the edge of the strawberry patch" towards the shanty where McKinnon stayed. Did not go with the path, "but went across the field four feet apart running side by side." The boots admitted by McKinnon to be his "put one boot in the track and it fit as fine as you ever saw." The tracks were followed to within 75 or 100 yards of the shanty. Boney was knocked down in a mud hole. Rubber boots were found about twenty steps from where the path led out to the front of the shanty. The woods were back of the shanty and the boot tracks twenty steps from the woods. McKinnon was at the shanty when they were found and said he pulled them off and left them there as he dressed to go to the picture show the evening before. "I turned a boot over with my foot and there was some red clay on it. It looked like blood, but it was not blood, but pure red clay from off that hill." McKinnon, on his return from the movie with the negro girls, about 11:30 o'clock that night, was at Boney's and heard the tale of the crime, but did not go near the body, but went immediately to the shanty. Witnesses who slept in the shanty said that McKinnon came in the night of the killing; "heard him burst the latch from the door as he came in," and said that Mr. Boney was dead; some one killed him; he did not know who did. "I believe I will leave," and he was advised not to do so. When he came in something was in his hand; "looked like a paper rolled up; it was brown." Another witness said "It looked like a pocket-book and was the color of that one." He had a black pocket-book in his hand; "it was a long one and opened on one side; had no money in it." McKinnon "had a splinter in his hand and fired it when he came in the house." Search was made and no money or pocket-book was found in the house or on McKinnon, who was arrested early next morning.

A rural policeman testified that defendant, Tom Johnson, made a voluntary statement to him. "He said he was over in the field adjoining some woods on the Boney farm; seems like it was a fish pond, and said that Ed. McKinnon came on. It was the night of the murder. He followed Ed. McKinnon thinking he had some whiskey, and when he walked up to Ed. McKinnon in the woods he had five or six piles of money; looked like $100 to the pile. He asked him where he got it, and McKinnon said he got it off his boss man, and said McKinnon promised to give him some if he would not tell it, and about that time there was a rustle in the bushes and McKinnon thought somebody was coming, and grabbed it and got all but one pile and he, Tom Johnson, grabbed the other pile, and put three $10 bills in his socks and carried the other and put it in his trunk, and then he heard the officers were going to search the house and he was advised by George McCray to move it out, and he moved it out and put it in a pile of stove wood near the house, and when he went back for it it was gone. He said that George McCray was the only one who knew where it was. I (the rural policeman) asked him for the gold money, and he said that after he found out they were looking for it, he decided that he had better throw it away, and threw it in a branch near the house. Tom (Johnson) said he was lying on the ground with the other money when McKinnon ran, and that he picked up $90 in all."

Evidence to connect Tom Johnson with the crime: He did not work for Boney, but picked strawberries a week and a half on another nearby farm. He had no money, and left the next day after the killing, after paying his employer one dollar he had borrowed from him. "Tracks led from the body in the direction of the stick, one with shoes and one with rubber boots—two men's tracks. After passing the tracks led across the edge of the strawberry patch" towards the shanty where McKinnon stayed. Did not go with the path, "but went across the field four feet apart and running side by side." The boots admitted by McKinnon to be his "put one boot in the track and it fit as fine as you ever saw." Johnson testified that he saw McKinnon "over in the edge of the field adjoining some woods on the Boney farm." Got some $90 in all. He threw the piece of gold coin away. Boney's daughter testified this was a peculiar coin given her father, and one like it given her, while on a trip through Maryland, with a Bible verse on it like the one shown in evidence. Witnesses testified to the peculiar make when seen in Johnson's possession and like the one Boney's daughter had and shown in evidence. A witness testified: "I live at Lumber Bridge and know Tom Johnson. I picked berries for Mr. Boney; left on Monday night before he was killed on Thursday night. I saw Mr. Boney with a gold coin like that; kept it in his pocket-book; brown folding book, like that one you have.

On Friday night Tom Johnson came to my house at Lumber Bridge. My husband and I had retired. Tom Johnson came there about 3 o'clock Friday night and said 'It's on at Tin City.' He said that Mr. Boney got killed, and he sat on the edge of the bed and pulled out three $10 bills; one of them was green on one side and yellow on the other, and he ran down in his pocket and pulled out two 50-cent pieces and a gold piece. It looked like that one. My husband asked him where he got that money, and he said he throwed his boss man for it, and he said that George McCray stole $90 from him. Tom said he was going to Fayetteville and buy a pistol and come back and kill George, and he went on to tell how long the stick was, and said that Mr. Boney had been hit six times. He said the stick was that long, and big at one end and little at the other. He said he knew who killed him, and if he had to tell it he would tell it."

Prior to and at 8:10 o'clock the night of the killing, Tom Johnson was there talking to Boney at the rabbit pen, between his house and the pack-house. That night at the show at Wallace "I saw Tom Johnson with two pockets full of money, but I don't know how much he had." There were others who saw him that night at the show and hobby-horses with money in bills. Johnson said he started to the show from Tin City about 8:30 to 9 o'clock. It was in evidence that the sun set on 25 April, 1929, at 6:40 p.m.

Both the defendants denied that they killed Boney. McKinnon introduced evidence tending to show that he was at the moving picture show in Wallace at the time Boney was killed. It took about a half hour to walk from the pack-house to the movie at Wallace—from Boney's house to Wallace was about one and one-fourth miles. McKinnon's party of negro girls had gone on before. McKinnon had gone to the shanty to change his clothes and overtook them; he then had on tennis shoes and light grey hat. The show opened at 8:15 to 8:30, and McKinnon and his crowd were a few minutes late. One of the negro girls who stayed in the pack-house, testified, speaking of McKinnon: "I asked him if he was going to the show, and he said he had lost his money, and if he could borrow some money he was going to the show. He said he was going to borrow some money from Mr. Boney. He went back and dressed, and stayed too long, and we went and left him, and he got mad about it. He went back home, saying he was going to borrow some money and dress, and stayed too long, and we went on and he caught us at the last house at Tin City and went on to the show; he was running when he caught up with us. He was drinking when he caught up. I asked him what was the matter, and he said he was tired; that he had been drinking a little bit." McKinnon testified that he only had $1 that night and in telling people in the shanty about Boney being killed he

was not excited. He also explained the circumstances relied on by the State, and denied what Johnson testified to in regard to the money.

It was the contention of the State that Boney was killed between 8:30 and 9:00 o'clock; that McKinnon killed him, and Johnson was present aiding and abetting him; that McKinnon robbed him, threw the stick in the dog fennel patch, and they both ran towards the shanty and divided the money hurriedly in the woods; McKinnon left his rubber boots near the shanty, quickly changed his clothes and put on tennis shoes and caught up with the negro girls running, and they entered the movie late. The distance from the shanty was only a little over one and one-fourth miles to the movie. Johnson went to the movie that evening and was seen with two pockets full of money, which he testified he got from McKinnon, which was before he (Johnson) went to the movie. That night on his return with the negro girls, about 11 o'clock, McKinnon did not go to where Boney's body was lying, but went to the shanty immediately, burst the door of the shanty open, showed a pocket-book like Boney's and wanted to leave after telling about Boney being killed, but was persuaded not to do so.

The defendants, at the close of the State's evidence, and at the close of all the evidence, moved to dismiss the action or for judgment of nonsuit. C. S., 4643. These motions cannot be sustained.

"On motion to dismiss or judgment of nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. 'An exception to a motion to dismiss in a criminal action taken after the close of the State's evidence, and renewed by defendant after the introduction of his own evidence does not confine the appeal to the State's evidence alone, and a conviction will be sustained under the second exception if there is any evidence on the whole record of the defendant's guilt.' *S. v. Earp*, 196 N. C., at p. 166. See *S. v. Carlson*, 171 N. C., 818; *S. v. Sigmon*, 190 N. C., 684. The evidence favorable alone to the State is considered—defendant's evidence is discarded. *S. v. Utley*, 126 N. C., 997. The competency, admissibility and sufficiency of evidence is for the court to determine, the weight, effect and credibility is for the jury. *S. v. Utley, supra; S. v. Blackwelder*, 182 N. C., 899. The evidence in the case was circumstantial." *S. v. Lawrence*, 196 N. C., at p. 564.

The evidence, though circumstantial, is sufficient to be submitted to a jury. It is more than a conjecture, a suspicion or a scintilla—the probative force is for the jury.

In regard to the evidence against McKinnon, as to every link in the chain of circumstances the court below recited the evidence pro and con and charged the jury: "If you are so satisfied beyond a reasonable doubt,

then you would consider that circumstance, otherwise you would disregard it," and charged "These are the circumstances relied upon by the State as to McKinnon, and our law lays down certain rules governing juries in the consideration of circumstantial evidence. Our Court has said that circumstantial evidence is a necessary and useful means for the ascertainment of truth. But it says further that the juries shall consider against the defendant, no circumstance unless it is established to their satisfaction, from the evidence beyond a reasonable doubt. They shall take all the circumstances that they find to be so established, and take them together, and if they lead their minds to a moral certainty or beyond a reasonable doubt of his guilt, then they will convict. But this other rule is laid down, that if the jury can explain the circumstances upon any other reasonable theory, than that of the guilt of the defendent, it is their duty to do so, in the interest of human life."

In regard to the circumstantial evidence against Johnson, the evidence was recited by the court below and the charge was as follows: "These are circumstances, upon which the State relies for the conviction of Tom Johnson, and I give you the same charge as I gave you in regard to the circumstantial evidence in reference to McKinnon. Treat these circumstances the same way. Consider only those that you find to be established beyond a reasonable doubt. Consider them together, and if they lead you to a moral certainty or beyond a reasonable doubt as to his guilt, you will convict. If not, you will acquit. If you can explain the circumstance alleged against Johnson by any other reasonable theory, other than that of guilt, it is your duty to so explain them." We think the charge is fully sustained by authorities in this jurisdiction.

The contention of defendant McKinnon is mainly as to the sufficiency of evidence. The exceptions and assignments of error as to the witness testifying as to the loss of the pocket-book, we think, immaterial. She testified, "The pocket-book was lost in the field, but I don't know what day it was. Q. Did you know it was lost? They said it was lost." The testimony that followed showed beyond question that it was lost and found the day of the killing and McKinnon knew it. Nor to the testimony of the witness in describing the man in Tin City the afternoon before Boney was slain. In answer to the question he said, "He was about the same size and he had on boots and a pair of overalls. He was dressed like they said he was; I just noticed that." The witnesses that had testified prior identified both McKinnon and the stick positively.

The contention of defendant Johnson, is the refusal to give the following instructions: "1. If the jury should find from the evidence that the defendant, Tom Johnson, saw a man out in the road in front of him, and knew who he was, and he whistled at him and he ran out into the edge of the woods and found him counting some money, and the man

took fright and ran, leaving a part of the money, and the defendant Tom Johnson picked up the money and appropriated it to his own use, the said defendant would not be guilty of any crime, unless it was for larceny and receiving. 2. If the jury believe from the evidence that Tom Johnson followed the defendant, Ed. McKinnon, out into the edge of the woods and found him counting money, and Ed. McKinnon took fright at some noise he had heard and left part of the money he could not be guilty of higher offense than the crime of receiving stolen property."

We think this request was given substantially in the charge as follows: "The defendant, Tom Johnson, could not be convicted upon this bill of indictment, if you are satisfied of the truth of his evidence that he went into the woods and found somebody there with money, who said that it had been found and that the man ran away and he picked it up and carried it off. If that is true, that would not even constitute a circumstance against him. You might find that he might be guilty of receiving stolen money, but he is not indicted for larceny." The court below, in regard to Johnson, stated: "The State contends that he was seen in the yard of Mr. Boney at 8:10 the night of the homicide. Mr. Thompson, son-in-law of Mr. Boney, testified to that, and Johnson himself admits that." Johnson, defendant, contends that not only did he not admit that he was with Mr. Boney at 8:10 the night of the homicide, but expressly denied this fact in the following language: "I was not sitting on the rabbit-box talking to Mr. Boney at ten minutes past 8 o'clock the night he was killed. It was not me he was talking to. If Mr. Thompson said he saw me there he is mistaken. I was there in the afternoon part, or first part of the evening. George McCray and all of us boys left there together. Mr. Thompson did not see me. I used to go nights to see my girl. I heard Mr. Boney had lost his pocket-book the night he was killed."

The court had prior recited the evidence as follows: "Now, as to the other defendant (Johnson) the State has offered evidence that he was seen talking to Mr. Boney by his son-in-law, Mr. Thompson, at 8:10 that night in his yard; that Mr. Boney was sitting on a rabbit-box and the defendant, Johnson, standing by his side; that he, Thompson, went into the house and that he never saw Mr. Boney any more until he was killed out at the pack-house and found him lying there in the path dead."

The court had prior charged the jury: "As I recall it, that is substantially the testimony in the case. You are not to be governed by my recollection of it, however, but by your own. The counsel have kindly relieved me from the necessity of reading all my notes to you, but suggested that I undertake to summarize it, as I have tried to do. But, if I have left out anything, you will recollect it and consider it with all the evidence, as you recall it."

Defendant Johnson did not request the court below to correct the inadvertence at the time it was made.

The defendant Johnson admitted he was there the "afternoon part or first part of the evening." In a long trial, where there were so many witnesses as in the present case, it is natural that what a witness says may be inaccurately stated from memory. The time Johnson admitted he was there was stated by the court, inadvertently, as the time fixed by Thompson, although Johnson had been there the early part of the evening. This inadvertence should have been called to the attention of the court. To illustrate the wisdom of this, in this case the attorney for defendant McKinnon called attention to an inaccuracy stated by the court in regard to certain testimony in reference to McKinnon. The notes of the evidence were immediately referred to and correction made. The court below warned the jury "not to be governed by my recollection of it however, but by your own." The inadvertence was to a contention. The assignment of error cannot be sustained. *S. v. Geurukus,* 195 N. C., 642.

In the first part of the charge the court below charged the jury: "There arises a presumption of innocence in the defendant's favor, and he ought not to be convicted until all the evidence, fairly considered, satisfied the jury beyond a reasonable doubt of his guilt." And the latter part of the charge: "The law presumes that every defendant when placed on trial on a criminal charge is innocent, and this presumption goes with the defendant through the trial and remains with him until the State has produced evidence which satisfies the jury beyond a reasonable doubt, that he is guilty. If you have a reasonable doubt as to the guilt of either of the defendants, you will acquit that defendant. If you have reasonable doubt as to the guilt of both of them, you will acquit them both. The credibility of the evidence is a matter for the jury to determine under the evidence in the case, what credit or what weight, if any, you will give the evidence of the witnesses. In determining this question, it is your duty to take into consideration the demeanor of the witness on the stand. It is proper for you to take into consideration in passing upon the credibility of any witness, the offenses which he admits he had been guilty of, and you have a right to take into consideration all he says, in order to enable you to determine what weight you give the testimony."

The court below charged the jury: "If the evidence satisfies you beyond a reasonable doubt that both defendants were present at the time the fatal blows were struck and that they were struck for the purpose entertained by both defendants of robbing the deceased, and in attempting to perpetrate such robbery, one of the defendants struck the blows that caused the death of the deceased and that at that time the other de-

fendant was present, to the knowledge of the defendant who struck the blows, for the purpose of encouraging or aiding and abetting in the commission of the robbery, then both defendants would be guilty of murder in the first degree. A person aids when, being present at the time and place, he does some act to render aid to the actual perpetration of the crime, though he takes no direct share in its commission. An abetter is one who gives aid and counsel, or who either commands, advises, instigates or encourages another to commit a crime—a person, who by being present, by words or conduct, incites another to commit the criminal act, or one who so far participates in the commission of the offense as to be present to the knowledge of the person actually committing the crime for the purpose of assisting, if necessary." We think there was sufficient evidence as to aiding and abetting, and the charge fully borne out by authorities. *S. v. Baldwin,* 193 N. C., 566; *S. v. Lambert,* 196 N. C., 524.

The court below charged fully the law of murder in the first and second degrees and manslaughter, and every phase of the law bearing on the evidence.

From a careful review of the evidence, we think it was sufficient to be submitted to the jury as to both defendants—the probative force was for them. We can find no error in law.

No error.

LEE WATSON, BY HIS NEXT FRIEND, JOSIE WATSON, v. WARSAW CONSTRUCTION COMPANY.

(Filed 23 October, 1929.)

1. Master and Servant C d—Failure to warn servant is not ground for liability for injury occurring after termination of employment.

Where the *alter ego* of a principal orders an employee whose regular duty is to haul dirt for the construction of a highway, to take a box of dynamite caps to a tool-house, and fails to warn the servant of the danger in connection therewith, and the employee takes the box of caps to the tool-house in his pocket and deposits the box there, about a half hour being required therefor, and on the next day the employee is injured by an explosion supposed to have been caused from dynamite caps remaining in his pocket: *Held,* the master is not liable in damages for the failure to warn the servant, the injury having occurred after the particular employment had terminated.

2. Negligence A d—In this case held: injury could not have been reasonably foreseen and defendant is not liable therefor.

Where the *alter ego* of a principal gives an employee a box of dynamite caps to take to a tool-house, and the lid of the box is sprung, allowing,

from conjecture, some of the caps to escape from the box into the pocket of the employee, where they exploded the next day: *Held*, the defendant cannot be held to have reasonably anticipated that any harm would result from the fact that the lid of the box was sprung, and he is not liable in damages for the injury resulting therefrom.

3. Negligence A a—A person is under duty to use care commensurate with danger.

The degree of care which a person is required to exercise in a particular situation to absolve himself from the imputation of negligence may vary with the obviousness of the risk; but with respect to his liability, the ultimate question is whether he exercised due or commensurate care under the circumstances. The former doctrine of degrees of negligence disapproved.

APPEAL by defendant from *McElroy, J.*, at March Term, 1929, of SWAIN. Reversed.

The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the explosion of dynamite caps negligently put into his possession by the defendant.

The defendant is a corporation, and at the time of the injury was engaged in blasting and grading a roadbed for a highway to be built from Hazel Creek in Swain County to the Tennessee line. The plaintiff had been in the employ of the defendant for two or three years, and prior to that time in the service of the defendant's predecessor. When injured he was the defendant's teamster. He was 18 years of age and weighed 90 or 95 pounds. His foreman was A. W. Whaley. His account of the injury follows: "I had been hauling for Warsaw Construction Company about two or three months. Mr. Whaley gave me and the other members of the crew orders and directions what to do. I kept my team near the river in a barn where I had been ordered by the company and Mr. Whaley to keep the team. The barn was pretty close to the highway. I was hauling dirt for the Warsaw Construction Company on the afternoon of 2 February, 1928. I went to the barn to put up my team. I was there doctoring my mule—doctoring his shoulder—and Mr. Whaley came and called me. I went by the name of Jack; he called my name and said, 'Here is a box of caps and a roll of fuse. I want you to carry it to the little shack and put the caps and fuse up over the door.' I told him all right, and he said that would be all right. I told him that just as quick as I got through doctoring my mule I would go. He said that will be all right. I laid the fuse down on the ground and put the caps in my pocket. I was wearing overalls. I put them in the right pocket. Mr. Whaley was standing there present when I put the box of dynamite caps in my pocket. He didn't say anything. He didn't give me any instructions or any warning as to the danger of the caps or explosives. He made no statements about it at all. It took me

something like 10 or 15 minutes to finish up my work there. After I did that I went on and done what he told me—put up the caps and fuse. The little house he ordered me to put them in was kind above the highway, right on the side of the highway, something like 75 or 100 feet from the barn. I put them up over the door like he said. There was dynamite, tools, leather and so forth and so on in that house. The house was not locked where the dynamite was kept. The door was open. After I put the caps, the box of caps, and the fuse, where I was ordered to put them, I went on to the house, to my boarding place. I was wearing loose overall pants. The shack was 100 feet from the barn. When Mr. Whaley gave me the dynamite caps he didn't tell me how many were in the box. After he gave me the roll of fuse and caps he went on to the house, I suppose. He went that way. The next day I was hauling pipe for him, for the Warsaw Construction Company, under the instructions of Mr. Whaley. I hauled two loads of pipe and got in about 1:30 and ran to the house and ate dinner and hurried back and started to haul another load, and Mr. Whaley called me and wanted me to move a pump down to the river to the little ferry. I took one mule and moved the pump to the boat and brought the mule back and hooked it into the wagon, and when I hooked it up I got on one side of the wagon and looked down and saw my whip on the ground, and I jumped down to get it, and when I hit the ground it fired. I don't know what it was that fired. The explosion occurred just as I hit the ground. It knocked me kind of backwards. I ran backwards to keep from falling, and I thought I could come straight. Mr. Luck was standing over from me; I thought I could walk to him, but I couldn't. I went around and around and fell backwards in the road and then raised up and saw that my leg was torn up. The leather lines were shot in two. My pants were shot all to pieces."

This is his description of the box containing the caps: "The box Mr. Whaley gave me was kind of a square box, about an inch and a half broad and about an inch and a half all the way. This is broader on this box than what he gave me. The lid on the other box was narrower than this. This shuts down tighter than the other one. It is broader. I put the box he gave me in my right overall pocket. I didn't know any caps had come out in my pocket. The lid would come off easy on that box. I didn't know they would come out in my pocket. I observed that the corners of the cap box he gave me were loose. They were loose in the corners like that. They were not fastened together." . . . "To the best of my knowledge the lid was sprung on the box that he gave me. After he gave me the box and I went up to the house, I didn't put my hand in my pocket. When I took the box out of my pocket the corner of the lid was raised up. When I took it out it pushed back on."

Speaking of the caps he said: "I put them down in my pocket, then took them to the shack. I put my hand in my pocket and took them out and put them up. I put up all that he gave me. . . . I didn't know I had any dynamite caps in my pocket. From 5 o'clock that evening after I took the dynamite caps and put them up I never had my hand in my right-hand pocket till the next day when I got hurt. I could have put my hand in my pocket and found out what I had, but I didn't, that I remember. The best I remember I didn't put my hand in there, for if I had I would have found something. When Mr. Whaley handed me the box of dynamite caps I didn't notice it; I just put it in my pocket. I glanced over the box and put it in my pocket. I didn't notice anything about it when I glanced over it. That was after I took it out of my pocket that I noticed one corner of the lid was raised. That was in broad daylight. When I took that box out of my pocket and noticed that the lid was pulled up, the foreman was not present and he didn't know anything about it. If the lid was pulled up and some of the caps had slipped out of the box, I never thought anything about it. I just put them up. I just pushed it back down a little. I never thought there was any caps in my pocket. I reached my hand in my pocket and then noticed that the lid was slipped up or had come off, but it went back on and I set it up. Seeing and knowing that, I didn't put my hand in my pocket to see if any of the caps had come out. I never thought about it."

Other witnesses were examined, but the plaintiff's testimony is for him the most favorable. At the close of the plaintiff's evidence and at the conclusion of all the evidence, the defendant moved for judgment as of nonsuit. Each motion was denied and the defendant excepted.

The issues of negligence, contributory negligence, and damages were answered in favor of the plaintiff, and he was awarded judgment, from which the defendant appealed upon error assigned.

Sutton & Stillwell for plaintiff.
Edwards & Leatherwood for defendant.

ADAMS, J. At 5:30 in the afternoon of 2 February, 1928, the plaintiff received the dynamite caps from the defendant's foreman and was injured by an explosion in his pocket on the day following at 1:30. The material allegations of negligence, as set forth in the complaint, are the defendant's failure to warn the plaintiff of danger in handling the caps and its failure to provide a safe box or container for their transportation. Let us consider each of these allegations in its relation to the plaintiff's evidence.

As to the first, it is conceded to be the duty of an employer to warn his employees concerning dangers which are known to him, or which

in the exercise of reasonable care should be known to him, and are unknown to his employees or are undiscoverable by them in the exercise of due care, and concerning dangers which, by reason of youth, inexperience or incompetency the employees do not appreciate. Under these conditions unless the servant is warned or instructed he does not assume the risk of such dangers, and if without fault or negligence on his part he receives an injury in consequence of not having been warned or instructed the master will be liable to him in damages. *West v. Tanning Co.*, 154 N. C., 44; *Norris v. Mills, ibid.*, 474; *Steeley v. Lumber Co.*, 165 N. C., 27, 34.

For the present purpose, we may admit the proposition that where explosives are given to a messenger for transportation in a package apparently harmless, and he has no information or notice of their general character, and carries them with the care adapted to their apparent nature, the person delivering the explosives will ordinarily be held liable for injuries resulting from an explosion during the period of transportation. But without saying that the jury may not reasonably have inferred from the evidence that the defendant had been negligent in failing to warn the plaintiff of probable harm, we are confronted with the fact that no injury resulted to the plaintiff during the course of his employment—*i. e.*, during the time he was engaged in obedience to the foreman's orders in carrying the caps from the barn to the shack. His regular service was that of a teamster. The reason of requiring warning in appropriate cases is to impress upon the employee the necessity of keeping the danger in mind while performing the specific duties required of him and to give him information by which to determine whether he will continue in the service. 39 C. J., 489. As a rule an employer will not be liable for failure to instruct an inexperienced or ignorant employee unless the injury sustained during the employment resulted from the employee's unskillfulness or want of knowledge.

With respect to the caps and the fuse the plaintiff's employment ceased, as we have indicated, when he put them in the house. He had nothing more to do with them. His service was of short duration: not more than thirty minutes intervened between the time he received the caps and the time he put them on the shelf. No accident or injury occurred on this short journey or while the particular employment continued. If the object of warning is to save the employee from injury while engaged in the service for which he is employed, the employer's failure to warn him will not, as a general principle, be held for actionable negligence where no injury is sustained during the continuance of the service, and will not be regarded as having contributed to an injury which did not occur during the period to which the instruction was intended to apply. *Mitchell v. R. R.*, 176 N. C., 645; *Wilson v. Clark*,

110 N. C., 364; *Mather v. Rillston,* 156 U. S., 391, 39 Law Ed., 464. For these reasons the plaintiff's first position cannot be maintained.

The second proposition advanced by the plaintiff raises the question whether the defendant failed in another respect to exercise due care for his safety.

The defendant had a right to assume that the plaintiff would obey the foreman's instructions and leave in the house all the caps the foreman had given him. To meet this situation the plaintiff avers that the defendant negligently failed to provide a suitable container, and that on account of a defective lid five or six caps came out of the box while it was in the pocket of his overalls, and without his knowledge remained there until the explosion occurred in the afternoon of the day following. He contends that his right to recover damages is not dependent upon the existence at the time of the injury of any contractual relation between him and the defendant. His allegation is this: "The plaintiff noticed when he took the box from his pocket at the shack that one corner of the tin or copper lid was slipped up slightly, but did not know that any of the said caps had come out of the box into his pocket." Elsewhere in the complaint he refers to the box as "containing one hundred caps and being made of tin with a loose and springy lid thereon." Upon his allegations he rests the contention that the defendant by its foreman, while the temporary relation of master and servant existed, negligently put in operation a dangerous agency which, continuing after the relation had ceased, caused an explosion which resulted in his injury. These allegations in their relation to the evidence must be considered in the light of familiar principles underlying the law of negligence.

The relation between the conception of negligence and liability in the field of trespass involves three propositions: (1) "For intentional injury done by the direct application of force a man is absolutely liable. (2) For injury done by the direct application of force under such circumstances that the law can ascribe to the actor an intention to do the harm, he is also absolutely liable. (3) But where the actual intention is absent and the circumstances are such that the law will not raise a presumption of intention against the actor, there liability cannot exist unless negligence, in the sense of some degree of blameworthy remissness or lack of care on the part of the actor is shown. In other words, negligence is essential to liability for unintentional injury, and it is a good defense in an action of trespass for unintended harm for the defendant to show that he was in no way negligent or to blame in doing the act which proximately caused the damage." 1 Street's Foundations of Legal Liability, 74.

The essential elements of actionable negligence may be stated as (a) a failure to exercise commensurate care, (b) involving a breach of duty,

(c) resulting proximately in damage to the plaintiff. Hale on Torts, 449; Jaggard on Torts, ch. 12, sec. 246. The degree of care required of persons having the possession and control of dangerous explosives has been variously defined as "the utmost," "the highest," "reasonable," and "commensurate." *Brittingham v. Stadiem,* 151 N. C., 299; 25 C. J., 185. But in modern legal thought the notion that there are degrees of negligence is not approved. In *Wilson v. Brett,* 11 M. & W., 113, *Rolfe, B.,* assailing the propriety of distinguishing such degrees, insisted that negligence in any degree is merely negligence—a statement of the law to which our own decisions conform, except perhaps in reference to the law of bailment. *Hanes v. Shapiro,* 168 N. C., 24. It is said in *Ridge v. R. R.,* 167 N. C., 510, 526, to be "generally conceded that there is no classification of negligence with respect to the degree of care required in any given case, as being slight, ordinary, and gross, as such a distinction can serve no practical purpose and is often very misleading. *Steamboat New World v. King,* 16 How. (U. S.), 469, 475; *Milwaukee, etc., R. Co. v. Arms,* 91 U. S., 489; 8 Enc. of U. S. S. C. Reports, pp. 878, 879, and notes." Also that "the requisite degree of care to be employed is that which is suited to the particular transaction being investigated, and reasonably commensurate with its circumstances and surroundings, that being supposed to be the care which any man of ordinary prudence will use, as dictated to him by a natural sense of his own protection and safety, if his personal rights were involved." And in *Commissioners v. Jennings,* 181 N. C., 393, 400: "Counsel discussed before us at some length the difference between ordinary care, the highest degree of care and gross negligence, but we deem it unnecessary to draw any distinction between them. It is all but ordinary care, which means that degree of care which a man of ordinary prudence would use in the same or similar circumstances." The degree of care which a person is required to exercise in a particular situation to absolve himself from the imputation of negligence may vary with the obviousness of the risk; but with respect to his liability the ultimate question is whether he exercised due or commensurate care.

There is no substantial basis for the plaintiff's contention that the defendant did not exercise the required care in providing a suitable container for the caps. It is generally held that "reasonable foresight of harm supplies the criterion for determining the preliminary question whether negligence exists in a particular case." The defendant contends that under the circumstances related by the plaintiff it could not reasonably have anticipated or foreseen the infliction of any injury. According to this theory foresight of harm is a condition of liability, the test of the defendant's negligence being whether in the exercise of due care

it could have foreseen, not necessarily the specific injury sustained, but consequences of a generally injurious nature. While a person may be charged with knowledge of that which as a reasonably prudent person he should have foreseen, he is not under any duty to foresee what a reasonably prudent person would not have foreseen, or under any obligation to provide against a danger he would not reasonably have anticipated. In *Carter v. Lumber Co.,* 129 N. C., 203, 209, it is said: "No act or omission, though resulting in damage, can be deemed actionable negligence unless the one responsible could, by the exercise of ordinary care under all the circumstances, have foreseen that it might result in damage to some one. 16 Am. & Eng. Enc., 439; Pollock on Torts, 36, 37; Shear. and Redf. on Neg., 10. There must be, before a recovery can be had in actions for negligence, a breach of duty on the part of the defendant, and the act or omission, producing the breach of duty, culpable in itself, must be such as a reasonably careful man would foresee might be productive of injury; and one is not liable for an injury which he could not foresee. Smith on Neg., 24; *Blythe v. Water Co.,* 11 Exc., 781." And in *Drum v. Miller,* 135 N. C., 204, 208: "There is a distinction, we think, between the case of an injury inflicted in the performance of a lawful act and one in which the act causing the injury is in itself unlawful or is at least a wilful wrong. In the latter case the defendant is liable for any consequence that may flow from his act as the proximate cause thereof, whether he could foresee or anticipate it or not; but when the act is lawful, the liability depends, not upon the particular consequence or result that may flow from it, but upon the ability of a prudent man, in the exercise of ordinary care, to foresee that injury or damage will naturally or probably be the result of his act. In the one case he is presumed to intend the consequence of his unlawful act, but in the other, while the act is lawful, it must be performed in a careful manner; otherwise it becomes unlawful, if a prudent man in the exercise of proper care can foresee that it will naturally or probably cause injury to another, though it is not necessary that the evil result should be, in form, foreseen." Also in *Bradley v. Coal Co.,* 169 N. C., 255: "Before there could be a recovery on the part of the plaintiff it was necessary for him to show a breach of duty on the part of the defendant . . . some act or omission producing the breach culpable in itself and such as a reasonably careful man would foresee might be productive of injury; for one is not liable for an injury which he could not foresee." Of like tenor are *Winborne v. Cooperage Co.,* 178 N. C., 88; *Jefferson v. Raleigh,* 194 N. C., 479; and *Street v. Coal Co.,* 196 N. C., 178.

But the foresight of harm as an element of actionable negligence must not be confused with foresight as an element or test of proximate cause.

The idea that a wrongdoer is liable in damages for all the consequences which flow from his wrongful act is sometimes expressed by saying that the consequences for which he is liable are those which he ought reasonably to have foreseen; but anticipation of harm as an element of negligence is distinct from the anticipation of consequences as an element of proximate cause. The latter phase is set forth in *Brewster v. Elizabeth City,* 137 N. C., 392; *Wright v. Thompson,* 171 N. C., 88; *Whitt v. Rand,* 187 N. C., 805, 808, and other cases. See 45 C. J., 656, 657, 913, 917.

The container was a small tin or copper box, the lid of which, according to plaintiff's testimony, would come off easily, because the corners were loose and not fastened together. He said that to the best of his knowledge the lid was sprung and that he pushed it back when he took the box from his pocket: "I reached my hand in my pocket and then noticed that the lid was slipped up or had come off, but it went back on and I set it up; seeing and knowing that, I didn't put my hand in my pocket to see if any of the caps had come out. I never thought about it." When he retired at night he laid his pants by the side of the bed, and the next day he wore them.

It is important to note the plaintiff did not say that any of the caps came out of the box and remained in his pocket; this is a matter of conjecture. He did not say that any of the caps exploded in his pocket. His words were, "I jumped down to get it (his whip), and when I hit the ground it fired. I don't know what it was that fired."

The plaintiff's evidence considered as a whole does not disclose conditions from which we can conclude as a matter of law that the defendant should reasonably have foreseen that dynamite caps would escape from the box and be carried in the plaintiff's pocket for nearly twenty-four hours and then, when subjected to a jar, explode and inflict the alleged injury, or, indeed, that any other injury would result. In the box there was manifestly no defect that was not as apparent to the plaintiff as to the defendant—in any event nothing more than an ill-fitting lid; and if the plaintiff, after seeing the lid was loose, did not suspect that caps might have been left in his pocket, it is not reasonable to say that the defendant should be held to liability for failing in the exercise of due care to foresee such an unusual and unaccustomed contingency.

The motion for nonsuit should have been granted. Judgment Reversed.

NORTH CAROLINA INDUSTRIAL COMMISSION ET AL. V. NATHAN O'BERRY, STATE TREASURER.

(Filed 23 October, 1929.)

1. Master and Servant B a—North Carolina Industrial Commission must operate under budgetary policy of the State.

The North Carolina Industrial Commission created by the statute is an agency of the State and subject to the fixed policy of the State requiring each department of the State government to operate within the appropriations allowed to it by the Budget Bureau under the statute creating it.

2. Same—Funds collected from self-insurers are available to Industrial Commission under allocation of Budget Bureau.

The moneys received under section 73 (j) of the Workmen's Compensation Act is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed *in pari materia*, and *Held*, the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said section 73 (j) as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose.

THIS was a controversy without action, heard by *Nunn, J.*, at July Term, 1929, of WAKE.

The agreed statement of facts, upon which the judgment was rendered, tended to show in substance that the plaintiff was duly created under authority of chapter 120, Public Laws of 1929, and that the defendant is the Treasurer of the State. Chapter 280 of Public Laws of 1929, Division 4, Section 1, Item 17, appropriated for the use of the plaintiff the sum of $42,000 for each year of the biennium. Section 67 of chapter 120, Public Laws of 1929, permits certain employers to become self-insurers. Section 73 (j) provides that "the Commission shall assess against such payroll a maintenance fund tax computed by taking 2½ per cent of the basic premiums chargeable against the same or most similar industry or business taken from the manual insurance rate for compensation then in force in this State." On 26 June, 1929, the Commission received from the city of Greensboro a check in the amount of $214.15, representing the amount assessed against said city of Greensboro as a self-insurer by the Industrial Commission under the provisions of said subsection (j) of said section 73. Upon receipt of said check the Commission deposited the check in a Raleigh Bank as a special deposit for the use of the Commission. The defendant, State Treasurer, declined to accept the deposit "as a special deposit for the use of the Commission, but on the contrary, under the advice of the Attorney-

General, said Treasurer insists and demands that the said fund be deposited to the credit of the State Treasurer for the use of the State."

The facts further tended to show that the appropriation of $42,000 for the use of the Commission was wholly inadequate to enable the Commission to properly and efficiently discharge the duties imposed by law, and that in order to discharge such duties the sum of $159,298.54 would be required for the first year of the biennium and a somewhat smaller sum for the second year.

The plaintiff thereupon brought this action, asking that a writ of mandamus should issue, ordering the State Treasurer to place said fund and such other funds of like character in a special account "to be used for the maintenance of the North Carolina Industrial Commission."

The judgment of the court was as follows:

"This controversy without action coming on to be heard before Hon. R. A. Nunn, judge presiding at the July Term, 1929, of the Superior Court of Wake County, and being heard at said time by consent of all parties hereto, upon the facts agreed; and the court, after due consideration, finding the facts to be as set forth in the agreed statement of facts, and being of the opinion that all funds that shall be assessed and collected by the North Carolina Industrial Commission under the provisions of section 73, subsection (j) of the Workmen's Compensation Act (chapter 120, N. C. Public Laws of 1929), including the check of the city of Greensboro already collected by the Commission under the provisions of said section, as set forth in the agreed statement of facts, are by the provisions of said act, intended to be available as a special fund for the uses of said Industrial Commission to meet its maintenance and expense requirements, and as such, should be deposited as collected by the Commission, to the credit of the Treasurer as a special fund for such purpose, and so accepted by the said Treasurer and carried on his books accordingly, to be paid out upon proper warrants issued by the Auditor of the State upon requisition of the said Industrial Commission for the payment of the proper expenses of said Commission; it is, upon motion of J. M. Broughton, attorney for the plaintiffs:

Now, therefore, ordered, considered and adjudged by the court that the defendant, Treasurer of the State of North Carolina, be, and he is hereby authorized and directed to accept as a special fund for the uses of the said Industrial Commission, to meet its maintenance and expense requirements, the specific deposit of $214.15, referred to in the agreed statement of facts, together with all other funds which shall be collected by the Industrial Commission under the provisions of said section 73, subsection (j) of the said Workmen's Compensation Act, as the same shall be collected and deposited from time to time by the said Industrial

Commission, and that said funds when so deposited shall be set up on the books of the Treasurer of the State as a special account, available for the payment of proper expenses of said Commission upon warrants issued for such purpose by the State Auditor, upon proper requisition of the Industrial Commission, in the manner provided by law."

J. M. Broughton for plaintiff.

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

BROGDEN, J. Do the words "the Commission shall assess against such payroll a maintenance fund tax computed," etc., contained in section 73, subsection (j) of the Workmen's Compensation Act constitute the proceeds of such assessment a special fund for the exclusive use of the Industrial Commission?

The Industrial Commission is an agency of the State, established by chapter 120, Public Laws of 1929.

The General Assembly having created this important arm of service, undertook to provide for the maintenance and support thereof. It now appears that the general appropriation is wholly inadequate to enable the Commission to discharge with efficiency the extensive duties required by the law, thus resulting in a serious impairment of the quality of service to be rendered the people of the State. Chapter 280, Public Laws of 1929, Division 4, Item 17, appropriated for the maintenance of the Commission the sum of $42,000 for each year of the biennium.

The plaintiff contends that if it is permitted to use the proceeds of the assessments against self-insurers that such assessments will create for its use a sum not only sufficient, but perhaps in excess of its reasonable needs. The Commission further contends that the General Assembly, realizing that the general appropriation might be inadequate, used the words "maintenance fund tax" in section 73, subsection (j) in the sense of an additional appropriation for its use.

It is manifest, therefore, that the case turns upon the construction of the words "a maintenance fund tax" employed in said section 73 (j). It must be noted that this section does not empower the Commission to collect the money, but merely to levy the assessment. It must be further noted that if the funds derived from the assessment should exceed the amount reasonably necessary for the use of the Commission that no provision is made for the disposition of any balance.

It must be conceded that the language is indefinite and capable of more than one construction. In order, therefore, to arrive at the true construction, it is manifest that the words employed by the General

Assembly must be read and interpreted in the light of the general policy of the State with reference to the maintenance of State agencies. An examination of legislative acts pertinent thereto clearly disclose the outstanding fact that the budget system is a fixed policy of the State. This idea is fully supported by the provisions of the Consolidated Budget Act, which is chapter 100, Public Laws of 1929. Section 5 of said act provides that "all moneys heretofore and hereafter appropriated shall be deemed and held to be within the terms of this act and subject to its provisions unless it shall be otherwise provided in the act apppropriating the same; and no money shall be disbursed from the State Treasury except as herein provided." Again in section 17 thereof it is declared: "The provisions of this act shall continue to be the legislative policy with reference to the making of appropriations and shall be treated as rules of both branches of the General Assembly until and unless the same may be changed by the General Assembly either by express enactment or by rule adopted by either branch of the General Assembly." The same idea is further expressed in section 18 of said act, providing that "every State department, . . . Commission . . . shall operate under an appropriation made in accordance with the provisions of this act; and no State department, . . . Commission or other State agency, . . . shall expend any money, except in pursuance of such appropriation, and the rules, requirements and regulations made pursuant to this act."

These provisions of law demonstrate beyond a doubt that the Industrial Commission must operate within the provisions and limitations of the budgetary policy of the State as declared by the General Assembly.

However, sections 28 and 29 of the Budget Act refer to departments or agencies "as receive moneys available for expenditures by them." Section 29 provides: "It is the intent and purpose of this act that every department . . . Commission . . . that expends money appropriated by the General Assembly or money collected by or for such department, . . . Commission, or agencies . . . under any general law of this State, shall be subject to and under the control of every provision of this act," etc.

Conceding, by broad interpretation, that the words "maintenance fund tax" occurring in section 73 (j) of the Workmen's Compensation Act created a fund available for the use of the Commission, the provisions of sections 28 and 29 of chapter 100 of Public Laws of 1929 limit or restrict the availability of such funds by providing that the expenditure thereof "shall be subject to and under the control of every provision of this act." In other words, if a State agency collects or receives funds available for its use, who must determine the amount to be used by any

such agency in the absence of express or necessarily implied legislative designation? If the agency receiving the funds can use them according to its own discretion or according to its own idea of its needs or necessities, then clearly, large sums of the State's money would be unbudgeted, and the whole scheme of law which is built upon a sound fiscal policy, would become a medley of financial confusion and a patchwork of financial control.

Viewing the law in its entirety, we are of the opinion, and so adjudge, that the proceeds derived from self-insurers under the Compensation Act are available for the use of the Industrial Commission, and that under the law the Budget Bureau has the power and authority to allocate to the Commission the whole of such proceeds or such amounts thereof as in the judgment of the Budget Bureau may be reasonably necessary for the proper and efficient maintenance of the Commission.

The record in the case at bar discloses that the Commission will be greatly handicapped unless additional funds can be allocated. The Budget Bureau has the power, under the law, to meet this emergency by permitting the Commission to use the fund in controversy and other funds of similar nature to the extent and to the amount necessary to enable it to serve in an efficient manner the people of this State.

Reversed.

LUCIAN GUSTAVEUS BRIDGEMAN v. THE PILOT LIFE INSURANCE COMPANY.

(Filed 23 October, 1929.)

1. Insurance I b—Defense of false representations affecting validity of policy cannot be maintained under facts of this case.

Where in an application for a policy of accident insurance the plaintiff answered no to the question as to impairment of sight, and the jury has found that he had answered truthfully under the evidence tending to show that he had at one time an injury to his eye, but that it was cured at the time of the application: *Held*, the defense that the answer was incorrect and was a false representation affecting the validity of the policy, cannot be maintained.

2. Pleadings A c—Trial court has power to allow amendment to pleadings which do not substantially change cause of action.

The judge of the Superior Court has plenary power to permit amendments to the pleadings when the amendment does not substantially change the cause of action originally alleged or set up a new cause of action. C. S., 547, 549.

3. Appeal and Error J e—Error, if any, in admission of certain testimony was cured by admissions to same effect.

Where questions eliciting evidence objected to are covered by admissions of the objecting party, the admission of such evidence, if erroneous, is harmless and not prejudicial.

APPEAL by defendant from *Cranmer, J.*, and a jury, at May Term, 1929, of ROBESON. No error.

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

"1. Did the plaintiff represent, in his application for the accident policy now sued on, that he had no impairment of sight? Answer: Yes.

2. Was said representation true? Answer: Yes.

3. What sum, if any, is plaintiff entitled to recover? Answer: $833.

The first issue was answered by consent, and the third issue was answered by consent following the verdict of the jury on the second issue."

Britt & Britt for plaintiff.

Varser, Lawrence, Proctor & McIntyre for defendant.

PER CURIAM. The plaintiff brought this action against the defendant on an accident policy, taken out in defendant's company on 17 August, 1928, and in force at the time of the accident. The conditions of the policy were complied with and proof of the accident furnished the defendant. Among the various injuries which the policy provides for is payment for the accidental loss of an eye. The only question around which the controversy waged was the second issue: "Was said representation true?" The jury answered this issue in favor of the plaintiff. The defendant set up fraud to vitiate the policy. In the application that plaintiff made for the policy, was the following: "*Have you any* deformities, amputations, *impairment of sight* or hearing *or have you ever had* fits, epilepsy, attacks of unconsciousness, or any nervous trouble?" To this question the plaintiff answered "No." The contention of the defendant was that this was false—the "question was incorrectly, falsely and fraudulently answered" and that "said condition materially affected the insurability of plaintiff." That the plaintiff had theretofore suffered a serious injury to his right eye and it was practically destroyed, and the accident was to the same eye for which this action was brought. Plaintiff contended that in an automobile accident on 14 October, 1928, this right eye was so seriously injured that he had to have it removed from the socket and has lost the sight of this eye. In reply to the allegation of fraud, the plaintiff, after setting up other defenses not material on this record to be considered, denied "that the questions as answered were false and fraudulent, and especially denied that he made

any incorrect statements or answers to the questions." It may be noted that the language of the policy was, "Have you any . . . impairment of sight," not "have you ever had."

Without objection plaintiff testified "The complete ball of the eye was removed from the socket. This eye was *absolutely all right* prior to the time that I had the accident the 14th of September (October). I could see out of the eye and read anything I wanted to. I do not wear glasses." Plaintiff testified that this eye was previously injured, on 19 July, 1927, by an ale bottle "Nehi" bursting and the top striking him in the eye "cutting a little skin on the lid just below the eye lash and striking the ball of the eye." The plaintiff further testified, without objection, that he employed a physician to treat it. "I finally got *absolutely well* from the treatment. That was in 1927. I never have worn a pair of glasses. . . . At that time I was tested as to whether I could see out of that eye by Mr. Badger (referring to Badger McLeod, agent, who wrote the insurance for defendant company). He closed this eye (indicating good eye) and pointed out calendars and pencils and other things he had in the office to examine my eye with, and I was able to read out of that eye absolutely; there was no impairment that I know of."

We do not think that under our liberal practice that there was such a departure in the pleadings and evidence that there was any error in this respect in the trial in the court below. The court below had plenary power to amend the pleadings in so far as it did not change the cause of action and allege substantially a new cause of action without consent. C. S., 547, 549. *Lefler v. Lane,* 170 N. C., 181; *Goins v. Sargent,* 196 N. C., at p. 481. Taking into consideration the evidence unobjected to and that which was objected to bearing on the same subject, if any error was committed, it was not prejudicial. The evidence taken as a whole, we think, complied with C. S., 564.

From a careful perusal of the case, it appears to us that it was mainly a question of fact. That fact was decided by the jury in favor of plaintiff. On the whole record, we find no prejudicial or reversible error.

No error.

STATE v. J. W. POE.

(Filed 23 October, 1929.)

False Pretense A b—False representations must be relied on to constitute crime of false pretense.

In order to constitute the crime of false pretense it is required that the representations alleged to be false were relied upon, and under the evidence in this case it is held the action should have been dismissed.

STATE *v.* POE.

APPEAL by defendant from *Devin, J.*, at June Term, 1929, of ORANGE. Reversed.

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

A. C. Ray for defendant.

PER CURIAM. The defendant was indicted for false pretense, the charge being that he had falsely pretended to Ernest Mann that T. N. Mann had said for Ernest Mann, his son, to accept the defendant's check in payment of a large quantity of lumber. T. N. Mann testified he had not made this statement. There was evidence for the State that when the defendant came to the place of business to get flooring, Ernest Mann went to see his father, who told him that the defendant would have to pay the cash or its equivalent for the lumber, and that upon his return he gave this information to the defendant, who then said that he had arranged with T. N. Mann to give him a note payable in thirty or sixty days. Ernest Mann testified: "I let him have the lumber upon his representations that the check would be paid when due, and but for these representations and the statement made to me that he had arranged with my father to take a note or check I would not have let him have it. I helped to load the lumber after I returned from seeing my father about it, and after Mr. Poe stated he had arranged with my father to take a check or note, payable in thirty or sixty days. I am sure that I saw my father last, and that Mr. Poe did not see him after I did."

One of the elements of a criminal prosecution for false pretense is reasonable reliance on the representation by the party to whom it is made. Ernest Mann was told by his father immediately before the alleged representation was made that credit should not be extended to the defendant, and if he saw fit to disregard this positive instruction it cannot be held for law that he reasonably relied upon the defendant's statement. He must have known that if his father had previously made this agreement with the defendant it was not effective in the face of the instruction to accept from the defendant nothing but the cash or its equivalent.

The action should have been dismissed. *S. v. Mayer,* 196 N. C., 454.

Reversed.

L. N. SASSER v. TOLAR-HART HOLT MILLS, INC.

(Filed 23 October, 1929.)

Master and Servant C a—Employee must establish negligence of employer as proximate cause of injury.

Where an employee at a cotton mill chooses of his own volition to run his hand into a revolving screen to clean it of a piece of cotton, knowing that it would be injured, except for his quickness in withdrawing it, and that the machinery should have been first stopped: *Held*, there is no presumption of negligence on the part of the defendant from the fact of injury, and the plaintiff must establish negligence of the defendant as the proximate cause of his injury, and in this case the action was properly dismissed.

APPEAL by plaintiff from *Crammer, J.*, at February Term, 1929, of CUMBERLAND. Affirmed.

Nimocks & Nimocks and Robinson, Downing & Downing for plaintiff.
Oates & Herring for defendant.

PER CURIAM. This is an action for the recovery of damages for personal injury. The plaintiff undertook to clean a lapping machine while the machinery was in motion, in consequence of which his left hand was caught in a revolving screen and severely injured. His action was dismissed as in case of nonsuit and he appealed.

It was incumbent upon the plaintiff to establish the defendant's negligence as the proximate cause of his injury. The mere fact of his injury does not raise a presumption of negligence, and there is no evidence that the defendant required the plaintiff to remove the trash or waste cotton while the machinery was moving. The plaintiff seems to have acted upon his own initiative. He testified: "I saw this piece of cotton in the screen. I seen the bulk of it. I knew that there were revolving spokes in there at that place. I knew that unless I stopped the machine that the screen with its spokes was turning. I knew that if I put my hand in between the spokes and left it there long enough that one of those spokes was bound to cut my hand, but I didn't intend to let it stay. It cut me anyway."

An examination of the record discloses no reversible error either in the rejection of evidence or in the judgment dismissing the action.

Affirmed.

W. C. CLARK v. A. J. MAXWELL, COMMISSIONER OF REVENUE OF NORTH CAROLINA.

(Filed 30 October, 1929.)

Taxation A d—Classification of trucks, etc., for taxation in accordance with distance between termini is constitutional and valid.

The statute classifying trucks, etc., hauling freight for hire for license taxes in accordance with the distance of route along the State's highway is held to be upon a reasonable and substantial basis, and there being no constitutional inhibition against such classification, it is held not to be discriminatory contrary to the provisions of our State Constitution, Art. V, sec. 3, or section 1, Fourteenth Amendment to the Constitution of the United States.

APPEAL by defendant from *Harris, J.*, at April Term, 1929, of WAKE. Reversed.

Action to recover a sum of money paid by plaintiff, under protest, to defendant, as a license tax, for the privilege of engaging in the business of operating a motor-propelled truck for the transportation of property over the public highways of this State, for compensation.

Payment of said license tax was demanded by defendant, as Commissioner of Revenue of this State, under the provisions of subsection 3, section 165, chapter 345, Public Laws of North Carolina, 1929. This chapter is entitled "An act to raise revenue." Section 165 of said act is included under Schedule B, which is entitled "License Taxes." Subsection 3 of said section is in words as follows:

"Every person, firm or corporation, their lessees, trustees or receivers, engaged in the business of operating automobiles, or other motor vehicles, trucks, tractors, trailers or semi-trailers, for the transportation of property over the public highways of this State for compensation between termini for a distance of greater than fifty (50) miles, either upon call, prearrangement, contract, lease or other arrangement, shall apply for and procure from the Commissioner of Revenue a State license for the privilege of engaging in such business, and shall pay for such license an annual tax as follows:

For each such motor-propelled vehicle, truck, trailer or semi-trailer of a rated carrying capacity of less than three tons, at the rate of forty-five dollars ($45) per ton.

For such motor-propelled vehicle, truck, tractor, trailer or semi-trailer of a rated carrying capacity of three tons or over at the rate of seventy-five dollars ($75) per ton."

Plaintiff is a citizen of this State, and the owner of a one-ton, motor-propelled truck. He is engaged in the business of operating said truck for the transportation of property over the public highways of this

State, for compensation. He operates said truck sometimes between termini which are less, and sometimes between termini which are more than fifty (50) miles distant from each other, dependent upon the special contract or arrangement made by him with each customer.

He was engaged in such business on 1 June, 1929, and since said date he has continued, and now proposes to continue in such business. Upon defendant's demand, plaintiff has paid to defendant the sum of forty-five dollars ($45), for which sum a State license has been issued to him, in accordance with the provisions of subsection 3, section 165, chapter 345, Public Laws of North Carolina, 1929.

Plaintiff conceded that he was liable, under subsection 2, section 165, chapter 345, Public Laws of North Carolina, 1929, for a license tax of fifteen dollars. He contended that he is not liable for a license tax, under subsection 3, section 165, chapter 345, Public Laws of North Carolina, 1929, for the reason that said statute is unconstitutional and void. Plaintiff paid to defendant the sum of thirty dollars, under protest.

This action to recover the sum of thirty dollars was begun in the court of a justice of the peace of Wake County, and was heard in the Superior Court of said county, upon plaintiff's appeal from the judgment of said court.

From the judgment in accordance with the opinion of the court that the statute, under which the license tax was demanded by defendant and paid by the plaintiff, is unconstitutional and void, defendant appealed to the Supreme Court.

Albion Dunn for plaintiff.

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

CONNOR, J. The only question presented for decision by this appeal is whether the statute under which plaintiff has been required to pay a license tax for the privilege of engaging in the business of operating a motor-propelled truck for the transportation of property over the public highways of this State, for compensation, is in violation of section 3 of Article V of the Constitution of North Carolina, or of section 1 of the Fourteenth Amendment of the Constitution of the United States.

Plaintiff contends that the license tax which he has been required to pay under the provisions of the statute is not uniform, in that the said license tax exceeds the amount of the tax imposed by other statutes upon persons engaged in the same business, and that, therefore, the statute is in violation of section 3 of Article V of the Constitution of North Carolina.

Plaintiff further contends that the enforcement of the said statute deprives him of his property without due process of law, and of the equal protection of the law, in that he is required by its provisions to pay a larger sum of money as a license tax than is required of others engaged in the same business, and similarly situated, and that, therefore, the statute is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States.

In reply to the contrary contentions of defendant, plaintiff alleges that the classification made by the statute for the purpose of taxation, is unreasonable and arbitrary in that there is no just or reasonable ground for the classification. If these contentions of the plaintiff are well founded, the judgment should be affirmed; otherwise it must be reversed.

Upon full consideration of these contentions, and of the principles of law, established by authoritative decisions of this Court and of the Supreme Court of the United States, we are of opinion that they are not well founded, and that the judgment must be reversed.

There is no express provision in the Constitution of North Carolina that taxes levied by the General Assembly of this State, on trades, professions, franchises or incomes, as authorized by section 3 of Article V of said Constitution, shall be uniform. The rule of uniformity, as therein prescribed, is applicable only to taxes on property, real or personal, including moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise. It is well settled, however, that a tax imposed or authorized by the General Assembly on trades, professions, franchises or incomes, not uniform, as properly understood, cannot be sustained for the reason that such tax is inconsistent with natural justice. *S. v. Williams,* 158 N. C., 610, 73 S. E., 1000. The rule of uniformity, as applied to such taxes, does not deprive the General Assembly of the power to classify the subjects of taxation, for the purpose of prescribing a different rule of taxation for each class, and of imposing upon such subjects falling within the several classes a different rate of taxation. The only limitation upon this power is that the classification must be founded upon reasonable, and not arbitrary, distinctions. The rule is authoritatively stated by *Hoke, J.,* in *Land Company v. Smith,* 151 N. C., 70, 65 S. E., 641, as follows:

"The power of the Legislature in this matter of classification is very broad and comprehensive, subject only to the limitation that it must appear to have been made upon some 'reasonable ground—something that bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.' "

Upon this principle, the classification made by the General Assembly of this State for purposes of taxation of persons, firms or corporations engaged in the business of operating motor-propelled vehicles, for the

transportation of property on the public highways of the State, for compensation, must be sustained. All persons, firms or corporations engaged in such business are required to pay a license tax. None are exempt. The amount of the tax is determined by the class in which each person, firm or corporation is included. The distinction between those who transport property over the public highways of the State, for compensation, between termini which are less than fifty (50) miles distant from each other (subsection 2, section 165, chapter 343, Public Laws 1929), and those who transport property over said highways also for compensation sometimes between termini which are less, and sometimes between termini which are more than fifty (50) miles distant from each other, dependent upon the contract with each customer (subsection 3, section 165, chapter 345, Public Laws 1929) is, we think, reasonable and not arbitrary. The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business, only. The service furnished by the State to the former is less expensive than the service furnished to the latter. It cannot be said that it is unjust for the State to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the State. We cannot hold as a matter of law that the classification made in this instance by the General Assembly is void, for that the line separating the two classes is arbitrary. As said by *Justice Holmes,* in his opinion in *Louisville Gas & E. Co. v. Coleman,* 277 U. S., 32, 72 L. Ed., p. 775: "When a legal distinction is determined, as no one doubts it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself, without regard to the necessity behind it, the line or point seems arbitrary. It might as well, or nearly as well, be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the Legislature must be accepted, unless we can say that it is very wide of a reasonable mark."

It has been held in numerous cases by the Supreme Court of the United States, whose decisions are authoritative with us upon the question as to whether the statute involved in the instant case is in violation of section 1 of the Fourteenth Amendment of the Constitution of the United States, that the provisions of said section do not forbid classification by the State of subjects of taxation, and that the power of the State to classify for purposes of taxation is of wide range and flexibility, subject only to the limitation that the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all

persons similarly circumstanced shall be treated alike. *Louisville Gas & E. Co. v. Coleman,* 277 U. S., 32, 72 L. Ed., 770, and cases cited. In *Brown-Forman Co. v. Kentucky,* 217 U. S., 563, 54 L. Ed., 883, it is said: "A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses, or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law."

Upon these principles, it must be held that the statute involved in this action is not in violation of the provisions of section 1 of the Fourteenth Amendment of the Constitution of the United States.

The General Assembly of this State, for purposes of taxation, has classified all persons, firms or corporations engaged in the business for which a State license is required by statute. The distinction made between the several classes, in accordance with said classification, rests upon reasonable grounds, having a substantial relation to the objects of the legislation. Having made a valid classification, the General Assembly had the power, which it has exercised in its legislative discretion, to prescribe different methods of determining the amount of the license tax imposed upon the subjects of the taxation, falling within the several classes, and to impose a license tax of varying amount upon such subjects of taxation. There is no provision of the Constitution either of this State or of the United States, which forbids the General Assembly to exercise this power. The statute is valid; upon the agreed statement of facts, plaintiff was liable for the license tax paid by him upon the demand of the defendant. He is therefore not entitled to recover in this action.

The distinction between the statute involved in this case, and the statute which we held void in *Tea Co. v. Doughton,* 196 N. C., 145, 144 S. E., 701, is, we think, obvious. The classification made, as contended by the defendant in that case, was not founded upon any reasonable or substantial ground. That statute also unjustly discriminated between the plaintiffs, who owned and operated six or more stores, all of which were taxed, and other merchants, who owned and operated five or less stores, all of which were exempt from the tax imposed by the statute upon plaintiffs. In this case the classification, for purposes of taxation, is reasonable, and there is no exemption. There is, therefore no unjust discrimination. The judgment in this case is

Reversed.

CLEMENT RICHARDSON v. CULLEN SATTERWHITE.

(Filed 30 October, 1929.)

Estoppel B a—Where issues are raised by the pleadings a judgment without a trial will not estop subsequent action.

A judgment rendered as a matter of law upon pleadings which raise issues of fact determinable only by a jury, is not an estoppel between the parties and those claiming under them in a subsequent action involving the same subject-matter.

CIVIL ACTION, before *Grady, J.*, at February Term, 1929, of FRANKLIN.

The evidence tended to show that Cullen Satterwhite owned a tract of land in Franklin County, and that he had traded through a period of sixteen years with N. B. Finch, trading as N. B. Finch & Co., purchasing fertilizer and supplies, and that on 5 March, 1924, Finch represented to Satterwhite that he was indebted to him on said account in the sum of $4,811.73, and procured the execution of a mortgage upon Satterwhite's land to secure the indebtedness. Thereafter, on 2 November, 1926, Finch, mortgagee, advertised the land for sale in accordance with the terms of said mortgage. Thereupon, on 3 December, 1926, Satterwhite instituted an action in the Superior Court of Franklin County, entitled, "Cullen Satterwhite *v.* N. B. Finch, trading as N. B. Finch & Co.," alleging that there was a mistake in the account for that, although Satterwhite had executed said mortgage to secure the sum of $4,811.73, as a matter of fact the said Satterwhite, upon a proper accounting, owed Finch nothing, and that by reason of said mistake Finch was indebted to said Satterwhite in the sum of $2,000. Satterwhite in the complaint asked for an injunction to restrain a sale of his land "until there shall have been an accounting between the plaintiff and the defendant." The cause came on for hearing at the August Term, 1927, Franklin Superior Court, when Judge Lyon rendered the following judgment:

"And it appearing to the court and being found by the court from the pleadings, that there has been account stated between the parties on 5 March, 1924, at which time there was due the defendant by plaintiff the sum of $4,011.73, with interest on said sum from 1 January, 1924, at the rate of 6% per annum;

And it further appearing to the court, and being found by the court from the pleadings, that the plaintiff alleges no fraud or specific errors in said account, and that all material facts and allegations of the complaint being fully denied by the defendant in his answer, and the court being of the opinion, and so finding from the pleadings, that the plaintiff is not entitled to the relief demanded in his petition and complaint:

It is, therefore, by the court ordered, considered and adjudged, that the petition and complaint of the defendant be and the same is hereby denied, and the temporary restraining order hereinbefore entered is dissolved, and it is further ordered, adjudged and decreed that unless the plaintiff shall, within ninety days from the expiration of this term of Franklin Superior Court, pay off and discharge the mortgage and lien bond described in the pleadings, together with interest thereon, that the defendant is authorized, empowered and directed to proceed with the foreclosure of the said lien bond and mortgage in accordance with the terms thereof and by law provided.

It is further ordered, adjudged and decreed that the plaintiff pay the costs of this action to be taxed by the clerk."

Satterwhite neither excepted to nor appealed from said judgment.

Thereafter, on 20 February, 1928, N. B. Finch, mortgagee, sold said land, and the same was purchased by F. D. Finch. On 27 April, 1928, Finch and wife conveyed the land to Clement Richardson.

On 24 November, 1928, Clement Richardson brought the present suit against Cullen Satterwhite, alleging that Satterwhite was in the unlawful possession of said land. The defendant, Satterwhite, filed an answer alleging that at the time of the sale by Finch, mortgagee, on 20 February, 1928, "there was nothing whatever due to the said N. B. Finch from the mortgage which he pretended to foreclose, and the said sale was unlawful, null and void for said reason," etc. In the meantime, on or about 27 April, 1928, the plaintiff, Clement Richardson, had borrowed from the Citizens Bank of Spring Hope, N. C., the sum of $3,500, and in order to secure the same had executed and delivered to O. B. Moss, trustee, a deed of trust upon said tract of land. Satterwhite, however, alleged that the bank had full notice and knowledge of all the facts set forth in the answer of Cullen Satterwhite and held the land "subject to all the rights and equities of this defendant." The case came to trial at the February Term, 1929, Franklin Superior Court. At the conclusion of the evidence the following judgment was entered:

"This cause coming on to be heard before his Honor, Henry A. Grady, judge presiding, and a jury, after the evidence had been offered by the plaintiff and defendant, the court was of the opinion and held as a matter of law that the defendant was estopped by the judgment rendered at August Term, 1927, entitled Cullen Satterwhite *v.* N. B. Finch, trading as N. B. Finch & Co., wherein it was found as a fact, by Hon. C. C. Lyon, presiding judge, that there had been an accounting between the parties to said action on 5 March, 1924, the present plaintiff being the successors in title to the lands referred to in said former judgment by mesne conveyances from N. B. Finch, mortgagee of Cullen Satterwhite; and the court holds as a matter of law that the defendant is estopped by

said judgment from setting up the equities referred to in his answer in respect to the alleged invalidity of said mortgage deed; and the following issues having been submitted to the jury and answered by them, to wit (see issues and verdict above):

Now, upon the verdict and the evidence offered, and the ruling of the court in respect to the estoppel pleaded by the plaintiff, it is considered, ordered and adjudged that the plaintiff, Clement Richardson, is the owner in fee simple, subject to the mortgage deed to his co-plaintiff referred to in the pleadings of the Citizens Bank of Spring Hope, N. C., of all the lands and premises referred to and described in the complaint, being that certain tract or parcel of land situate in Franklin County, Dunn Township, and described by metes and bounds in that certain mortgage deed, dated 5 March, 1924, and recorded in Book 257, at page 237, of the register's office of Franklin County, which book and page shall operate as a part of this judgment, and the description therein contained shall be deemed to be a part hereof to all intents and purposes.

It is further ordered and adjudged that a writ of assistance be issued by the clerk of the Superior Court, directing the sheriff of Franklin County to put the defendant out of the possession of said lands, and to put the plaintiff Richardson into possession thereof.

It is further ordered that the question of rents and profits issuing out of said lands, and demanded in the complaint, be continued to be passed upon by a jury at some subsequent term of this court."

From the foregoing judgment the defendant appealed.

White & Malone for plaintiff.
Yarborough & Yarborough for defendant.

BROGDEN, J. Did the judgment of Lyon, J., rendered at the August Term, 1927, of Franklin Superior Court, constitute an estoppel upon the defendant in this action?

An examination of the Lyon judgment, set out in the record, discloses that the judge found from the pleadings that the plaintiff in the action was indebted to N. B. Finch in the sum of $4,011,73. The judge further found from the pleadings that "all material facts and allegations of the complaint, being fully denied by the defendant in his answer, and the court being of the opinion, and so finding from the pleadings that the plaintiff is not entitled to the relief demanded in his petition and complaint, it is, therefore, by the court ordered, considered and adjudged that the petition and complaint of the plaintiff be, and the same is hereby denied."

It will be observed that the complaint alleged that the plaintiff was a colored man with practically no education, and entirely unable to keep books or accounts, and that he relied upon the correctness of the account as kept by the defendant. Plaintiff further alleged that a mistake had been made in the account, and that although he had given a note to the defendant and secured the same by a mortgage upon his land, that by reason of the mistake he was not indebted to the defendant at all.

Clearly, the complaint alleged a cause of action. The allegations of the complaint were denied in the answer. The pleadings, therefore, raised an issue of fact for the jury. The trial judge ordered "that the petition and complaint of the plaintiff be, and the same is hereby denied." While this language is of doubtful import, apparently the judgment, denying the complaint, would be equivalent to a dismissal of the action. As the pleadings raised issues of fact and the jury trial was not waived, the judge was without power to declare, upon the pleadings alone, "that there has been an account stated between the parties." The principle of law applicable is stated in *Grimes v. Andrews,* 170 N. C., 515, 87 S. E., 341: "And when it appears from the record that the court never determined the merits of the controversy nor rendered any judgment affecting the same, but simply dismissed the plaintiff's action, without trial and without evidence, such judgment does not support a plea of former adjudication. . . . We do not say that where it appears that the merits have been considered and passed upon, the judgment of dismissal may not be successfully pleaded as a former adjudication," etc.

The Lyon judgment decreed that if the plaintiff should not pay the indebtedness within ninety days that the defendant was authorized and directed to proceed with foreclosure of said lien bond and mortgage in accordance with the terms thereof, but having dismissed plaintiff's action, and there being no allegation in the action or prayer for foreclosure, this portion of the judgment was not supported by the pleadings. This principle of law was expressly declared in *Hoell v. White,* 169 N. C., 640, 86 S. E., 569.

In view of the facts disclosed by the record, we are of the opinion that the judgment rendered by Lyon, J., at the August Term, 1927, was not an estoppel upon Cullen Satterwhite, and, therefore, the judgment of Grady, J., at the February Term, 1929, is

Reversed.

IN THE MATTER OF CAROLINA BANK AND TRUST COMPANY, AN INSOLVENT BANKING CORPORATION.

(Filed 30 October, 1929.)

1. **Banks and Banking H a—Request that cashier sell stock does not relieve holder of statutory liability when stock has not been sold.**

Where the name of a person remains on the books of a bank as a stockholder on the date of the bank's insolvency, and so appears when the insolvent bank is in the hands of a liquidating agent appointed by the Corporation Commission, C. S., 219(a), Vol. 3, his statutory liability to the amount of the par value of his shares subscribed is not affected by the fact that he had prior requested the cashier of the bank to sell his shares when the cashier had not been able to do so, and the sale had not been made and the shares had not been transferred on the books of the bank to another. *Darden v. Coward*, *ante*, 35, cited and distinguished.

2. **Same—Defense that bank stock was bought prior to enactment of Ch. 113, Public Laws 1927, is untenable in action for statutory liability thereon.**

The statutory liability of the holder of bank stock for the amount equal to the par value of his shares is contractual and exists from the time of the purchase of the stock, and chapter 113, Public Laws of 1927, does not alter nor enlarge this liability, but has reference only to the pocedure to enforce it, and the defense that the stock was bought prior to the enactment of the statute of 1927, and that the statute could have no retroactive effect, is untenable.

3. **Same—Only depositor's dividends may be credited to his statutory liability on stock in insolvent bank.**

Where the holder of stock of an insolvent bank is also a depositor therein, only such dividends as he receives on his deposit may be credited by the liquidating agent of the bank upon his indebtedness to the bank on his statutory liability as a stockholder, and he is not entitled to have the total amount of his deposit applied as a payment on the assessment made against him by reason of his statutory liability.

APPEAL by John F. McLean, petitioner, from *Cranmer, J.*, at May Term, 1929, of ROBESON. Affirmed.

This is a proceeding for the liquidation of the Carolina Bank and Trust Company, an insolvent banking corporation organized under the laws of this State. The proceeding was begun by the Corporation Commission of North Carolina, under the provisions of chapter 113, Public Laws of North Carolina, 1927, N. C. Code, 1927, sec. 218(c). An assessment was made by said Corporation Commission, as authorized by section 13 of said statute, upon the stockholders of said insolvent corporation, by reason of their statutory liability. C. S., Vol. III, sec. 219(a).

The petitioner, John F. McLean, alleges that the assessment made against him as a stockholder of said corporation is void, for that he was

not a stockholder at the date of the insolvency of said corporation. He alleges that he had sold, or requested the cashier of said corporation to sell for him, the five shares of stock of said corporation, which he had purchased in 1917, prior to said date, and that, therefore, he is not liable to assessment as a stockholder.

The said petitioner alleges further, that if it shall be found by the court that he was a stockholder of said corporation, at the date of its insolvency, said assessment is void, as to him, for that section 13 of chapter 113, Public Laws of North Carolina, 1927, was enacted subsequent to the purchase by him of shares of stock in said corporation, and that said section 13, under which the assessment was made against him, is not applicable to him as a stockholder of said insolvent corporation. He alleges that a valid assessment can be made against him only under the statute in force at the date on which he purchased stock in said corporation.

The said petitioner, upon these allegations, prays that the assessment made by the Corporation Commission against him as a stockholder in this proceeding, be declared null and void, and that he be relieved of said assessment.

The said petitioner alleges further that at the date of the insolvency of said corporation, he was one of its depositors, having to his credit on its book amounts subject to his check; that the liquidating agent of said corporation, appointed by the Corporation Commission, as provided by statute, has refused to pay to him the dividends apportioned from the assets in his hands upon the amounts due him as a depositor, but has applied said dividends as payments on the assessment made againt him as a stockholder. He alleges that said liquidating agent is without authority to apply the said dividends as payments on said assessment, and that said dividends are due and payable to him, as a depositor and creditor of said insolvent corporation.

The said petitioner, upon these allegations, prays that he be declared the owner of and entitled to said dividends, and that said liquidating agent be ordered and directed to pay the same to him.

The material allegations of the petition, chiefly of law, are denied by the answer of the liquidating agent. He prays that the assessment made by the Corporation Commission against the petitioner, as a stockholder of the insolvent corporation, be declared valid, and that the application of the dividends apportioned to the petitioner as a despositor of said corporation made by him, be approved.

Upon the facts found by the court, in accordance with the agreement of the petitioner and the respondent, it was ordered and adjudged that the prayers of the petitioner be and the same were denied. From said judgment the petitioner appealed to the Supreme Court.

McKinnon & Fuller for petitioner.
I. M. Bailey and McLean & Stacy for respondent.

CONNOR, J. In 1917 the petitioner, John F. McLean, purchased five shares of the capital stock of the Carolina Bank and Trust Company, a corporation organized and engaged in the banking business, at Red Springs, N. C., under the laws of this State. The certificate issued to the petitioner for these shares of stock was endorsed by him and assigned to said company as collateral security for his note given for the purchase price of said shares of stock. This note was endorsed by J. D. McLean.

Annual dividends declared by said company on said shares of stock were paid from time to time to the petitioner, until 1921. During that year the petitioner notified the cashier of said company that he was insolvent and unable to pay his note, then held by said company; he requested the said cashier to sell the said shares of stock, and to apply the proceeds of said sale to the payment of said note. The said cashier attempted to sell the shares of stock, but was unable to do so. Dividends declared on the stock which stood in the name of the petitioner on the books of the corporation were not paid to him, after 1921, but were applied as payments on his note. At the date of the insolvency of the corporation, when the Corporation Commission of North Carolina took possession of its assets, under the provisions of chapter 113, Public Laws of North Carolina, 1927, five shares of its capital stock stood on its books in the name of the petitioner. The said shares of stock had not been sold by the petitioner or by the cashier of the corporation at his request.

Upon the foregoing facts there was no error in the finding by the court that the petitioner, John F. McLean, was a stockholder of the Carolina Bank and Trust Company at the date of its insolvency, and that as such he was liable to an assessment for an amount equal to the par value of said shares of stock. *Trust Co. v. Jenkins,* 193 N. C., 761, 138 S. E., 139. The facts in this case are easily distinguishable from the facts in *Darden v. Coward, ante,* 35, 147 S. E., 671. In that case the plaintiff, whose name appeared on the books of the insolvent bank as the owner of ten shares of its capital stock, had sold said shares of stock to the cashier of the bank prior to its insolvency, and at the date of such sale had transferred the certificate for same to said cashier, with directions that such cashier as transfer agent of the bank, cancel the certificate in the name of the plaintiff, and issue a new certificate to the purchaser. The failure of the cashier to make such transfer was due to his neglect and not to the fault of the plaintiff. In the instant case, no sale had been made; petitioner's certificate was in the possession of the bank as col-

lateral security. The certificate had not been delivered by the petitioner to the cashier as the transfer agent of the corporation, with direction to transfer the same to a purchaser. The petitioner had done nothing to divest himself of his rights, or to relieve himself of his liabilities as a stockholder of the Carolina Bank and Trust Company prior to its insolvency.

The statutory liability of the petitioner as a stockholder of the Carolina Bank and Trust Company was not affected by the provisions of chapter 113, Public Laws of North Carolina, 1927. Such liability was not altered in its nature or enlarged in its extent. Only the procedure for its enforcement was affected by section 13 of said statute. In *Corporation Commission v. Murphey, ante,* 42, 147 S. E., 667, we held that the statute is valid, and that its only effect is to remedy defects which under the procedure formerly prescribed by statutes as construed by our decisions, had prevented an effective enforcement of the statutory liability of stockholders in banking corporations, organized under the laws of this State. Petitioner's contention that the statute is not applicable to him because it was enacted after he purchased his stock cannot be sustained.

The statutory liability of stockholders of banks organized under the laws of this State has been held to be contractual in its nature. For this reason it is held in *Smathers v. Bank,* 135 N. C., 410, 47 S. E., 893, that the statute enacted in 1897 should be construed to operate prospectively only. This principle does not apply to section 13 of chapter 113, Public Laws of North Carolina, 1927, for the reason that this statute does not impose any new liability, or enlarge the liability theretofore imposed by statute. It affects only the procedure by which the liability incurred by petitioner when he bought his stock may be determined and the sum for which he is liable may be assessed. The identical question here presented was decided in *Lamar v. Taylor,* 141 Ga., 227, 80 S. E., 1085, contrary to the contention of the petitioner.

The liability of the petitioner as a stockholder of the Carolina Bank and Trust Company, by reason of the statute, was for all "contracts, debts and engagements of the corporation," to the extent of the par value of his stock. He was liable equally and ratably with the other stockholders. This liability did not arise when the corporation became insolvent or when its assets were taken over by the Corporation Commission; nor did it arise when the assessment was made by the said Commission. It arose when the petitioner became a stockholder by the purchase of five shares of the capital stock of the corporation in 1917. The amount for which he is liable was determined by the assessment. He is now a debtor in said amount to the liquidating agent of the insolvent corporation, as the representative of its depositors and other creditors, and of its stockholders. When his assessment has been collected, its amount will

be part of the general assets of the corporation and will be immediately available for distribution as provided by the statute. When the expenses of the liquidation have been paid, and all of the liabilities to creditors have been discharged, the assets then in the hands of the liquidating agent, if any, will be distributed *pro rata* to the stockholders. Section 13, chapter 113, Public Laws 1927.

Dividends upon the claims of petitioner as a depositor of the insolvent banking corporation, in the hands of the liquidating agent, are due by such agent and are payable by him to the petitioner. The petitioner is a creditor of the liquidating agent to the extent of the dividends apportioned to him out of the general assets of the corporation. These dividends were properly applied by the liquidating agent as payments on the amount due him by the petitioner, on account of the assessment. Equity and justice require that the liquidating agent, when he comes to settle with the petitioner, shall deduct the amounts of dividends due to him as a depositor, from the amount due by him to the liquidating agent on account of his assessment by reason of his statutory liability. *Davis v. Mfg. Co.*, 114 N. C., 321, 19 S. E., 371. It does not follow that a depositor who is also a stockholder of an insolvent banking corporation is entitled to have the total amount of his deposit applied as a payment on his assessment. Only the dividends apportioned to him as a depositor may be so applied. To hold otherwise, would be unjust and inequitable both to creditors and to other stockholders. We find no error in the judgment. It is

Affirmed.

S. M. DAVIS AND WIFE, FLORA M. DAVIS, v. UNION CENTRAL LIFE INSURANCE COMPANY ET AL.

(Filed 30 October, 1929.)

1. **Mortgages E a—The assignee of the mortgagee may enforce the mortgage security.**

   The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, C. S., 2591, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note.

2. **Mortgages H q—Refusal to continue action for junior lien holders to be made parties not erroneous where their interests protected by the decree.**

   Where the decree of foreclosure of a mortgage has been made by the court with the provision that all junior lien holders be notified of the

time and place of the sale and to show cause at the next succeeding term why they should not be bound by the decree and sale, their rights are protected by the decree and the refusal of the court to continue the action for foreclosure so that they might be made parties is not held for error under the facts of this case.

CIVIL ACTION, before *Cranmer, J.*, at April Term, 1929, of BLADEN.

The record discloses that prior to 26 March, 1921, the plaintiffs, S. M. Davis and wife, owned a tract of land in Bladen County, containing about 501½ acres, and that on said date plaintiffs borrowed from the defendant, Union Central Life Insurance Company, the sum of $10,000, evidencing said indebtedness by notes secured by a deed of trust upon said land, to the defendant, Louis Breiling, trustee, which deed of trust was duly recorded in the office of the register of deeds of Bladen County. Having failed to make the payments due in 1926 and 1927, the plaintiffs borrowed from the National Bank of Fayetteville a certain sum of money and issued as evidence thereof a promissory note and secured the same by a second mortgage or deed of trust upon said property to A. B. McMillan, trustee for the National Bank of Fayetteville. Thereupon the National Bank of Fayetteville delivered to the defendant, Union Central Life Insurance Co., its certificate of deposit, payable 1 November, 1927, in the sum of $1,848. Thereafter, on 8 August, 1927, the National Bank of Fayetteville closed its doors by reason of insolvency and the Union Central Life Insurance Company could not collect the deposit of $1,848.58. Thereupon the Union Central Life Insurance Company directed Louis Breiling, trustee in the first deed of trust, to advertise and sell plaintiff's property. The land was accordingly advertised for sale on Wednesday, 14 December, 1927. Plaintiffs instituted an action on 12 December, 1927, against the Union Central Life Insurance Company and Louis Breiling, trustee, to restrain the sale of said property, alleging that the defendant, Union Central Life Insurance Company, had accepted the deposit of the National Bank of Fayetteville as a payment of the amount due by the plaintiffs according to the tenor of the notes. The Union Central Life Insurance Company contended that it had accepted deposit from the National Bank of Fayetteville as collateral security and not as payment. The controversy was heard by Sinclair, J., on 31 December, 1927, and a consent judgment was entered to the effect "that the defendant, Union Central Life Insurance Company, and its trustee, Louis Breiling, be and they are hereby restrained from exercising power of sale in the deed of trust referred to in the pleadings until 1 March, 1928." The judgment further provided that if the indebtedness was not paid on or before 1 March, 1928, that the power of sale should be exercised.

No further steps were taken in the matter until Louis Breiling, trustee, readvertised the property for sale on 29 October, 1928. The property was sold on said date and "was bid in by the Union Central Life Insurance Company for $10,000." On 8 November, 1928, and prior to the expiration of the ten days allowed by law, the LaFayette Bank and Trust Company, of Fayetteville, sent to Johnson-Johnson & Floyd, attorneys for Union Central Life Insurance Company, a check for $12,983.65, which was the amount of the indebtedness due the Union Central Life Insurance Company. Thereafter Johnson-Johnson & Floyd, attorneys, sent to the LaFayette Bank and Trust Company the notes and deed of trust held by the Union Central Life Insurance Company, said deed of trust bearing the following endorsement: "For value received and without recourse on us this deed of trust and the notes secured by the same are hereby transferred and assigned to D. U. Sandlin, trustee for the LaFayette Bank and Trust Company, together with all our right, title and interest in the same. This 17 November, 1928. Union Central Life Insurance Company, by Johnson-Johnson & Floyd, attorneys." The money sent by LaFayette Bank and Trust Company to Johnson-Johnson & Floyd was by them forwarded to the Union Central Life Insurance Company and retained by said company. Subsequently, on 29 December, 1928, the LaFayette Bank and Trust Company and D. E. Sandlin, trustee, upon notice and order of the court, were permitted to interplead in the action then pending between Davis and wife and the Union Central Life Insurance Company and Louis Breiling, trustee. The receivers of the National Bank of Fayetteville also filed answers, alleging in substance that the LaFayette Bank and Trust Company had paid off the mortgage of Union Central Life Insurance Company at the instance of plaintiff Davis, and that as a result thereof the second mortgage or deed of trust held by the National Bank of Fayetteville constituted the first lien upon the land of the plaintiff.

The cause came on for hearing, and the following issues were submitted to the jury:

"1. Were the notes and deed of trust securing the same transferred and assigned to the LaFayette Bank and Trust Company and D. E. Sandlin, trustee, as alleged?

"2. Has the mortgage indebtedness been paid?"

The trial judge instructed the jury to answer the first issue "yes," and the second issue "no." Judgment was signed, decreeing that the plaintiffs were indebted to the LaFayette Bank and Trust Company in the sum of $12,983.65, with interest from and after 8 November, 1928.

It was further ordered that in the event said amount was not paid by 10 June, 1929, the land should be sold, and commissioners were appointed to make the sale.

It was further ordered that all junior lien holders or judgment creditors of plaintiffs should be notified of the time and place of the sale, and further to show cause at the next term of court held after the sale why each of said junior lien holders or judgment creditors should not be bound by the terms of the decree and the sale had thereunder.

From the foregoing judgment the receivers of the National Bank of Fayetteville appealed.

Rose & Lyon for LaFayette Bank and Trust Company and D. E. Sandlin, Trustee, interpleaders.

R. W. Herring for A. D. Burrowes, receiver of the National Bank of Fayetteville.

BROGDEN, J. Two questions of law are presented for determination:

1. Can a third party purchase notes secured by deed of trust, after a sale of the property, under power contained in the deed of trust and within the period of ten days for increasing the bid, and thereafter enforce the security?

2. Was the receiver of the National Bank of Fayetteville entitled to a continuance of the cause for the purpose of permitting subsequent lien holders to be made parties to the suit?

The first question must be answered in the affirmative. The record discloses that the land was sold under the first deed of trust held by the Union Central Life Insurance Company on 29 October, 1928. Thereafter, on 8 November, 1928, the LaFayette Bank and Trust Company paid to the attorneys of the Union Central Life Insurance Company all sums due by virtue of the execution and delivery of the notes and deed of trust. Thereupon the attorneys for the lien holder assigned and delivered to the LaFayette Bank and Trust Company the notes and deed of trust evidencing the indebtedness and forwarded the money to the lien holder, and the money was retained without question.

Until the expiration of the ten days the Union Central Life Insurance Company, by virtue of having purchased the land at the sale, became "a mere preferred proposer until confirmation." *In re Sermon's Land*, 182 N. C., 122, 108 S. E., 497.

It has been expressly held by this Court in *Cherry v. Gilliam*, 195 N. C., 233, 141 S. E., 594, that a mortgagor can sell his interest in the mortgaged premises during the ten-day period described by C. S., 2591. If a purchaser of the land could acquire the title of the mortgagor during the ten-day period, by the same token a purchaser could acquire title to the notes and deed of trust held by the lien holder. Therefore, it necessarily follows that such purchaser of notes can enforce the security according to the tenor thereof.

Ordinarily, a continuance rests in the sound discretion of the trial judge. *Massey v. R. R.*, 169 N. C., 245, 84 S. E., 1047. Furthermore, subsequent lien holders or encumbrancers are proper parties to a suit of foreclosure—certainly if they seek to become parties, but they are not necessary parties in all cases. *Gammon v. Johnson*, 126 N. C., 64, 35 S. E., 185; *Barrett v. Barnes*, 186 N. C., 154, 119 S. E., 194; *Bank v. Watson*, 187 N. C., 107, 121 S. E., 181. However, in the present case it is provided in the judgment that the commissioner appointed to sell the property should notify all junior lien holders "to show cause before this court at the next term of court to be held after the sale, why each of said junior lien holders or judgment creditors should not be bound by the terms of this decree and sale, if any, to be held hereunder, as well as the price which may hereafter be offered for said property at public auction."

This decree, therefore, protected the rights of all parties concerned. The judgment is

Affirmed.

GEORGE W. SMITH v. ÆTNA INSURANCE COMPANY.

(Filed 30 October, 1929.)

1. Insurance J b—In absence of valid waiver the provision in policy for forfeiture for nonpayment of premiums is valid.

A policy of fire insurance for a term of years containing a provision excluding the insurer from liability for a loss that may occur while any installment note given for the premium remains past due and unpaid, by its valid terms does not render the insurer liable when the insured has not paid the premiums, but has given notes therefor, and a fire occurs after the maturity of the unpaid notes, in the absence of a valid waiver by the insurer of the provisions of the policy in this respect.

2. Same—In this case held: evidence of waiver of provision for forfeiture for nonpayment of premium insufficient.

Where a policy of fire insurance provides that the insurer would not be liable for loss covered by the policy during the time notes given for premiums were past due and unpaid, evidence that other policies issued the plaintiff, containing the same provisions had been reinstated upon the payment of the premiums, without evidence of demand by the insurer for the payment of the premium on the policy sued on after the maturity of the notes, is insufficient evidence of a valid waiver by the insurer of this provision, and the burden being upon the plaintiff to show a valid waiver, a motion as of nonsuit should be granted.

3. Same—Where insured does not read policy his failure to do so is not evidence of waiver of provisions by insurer.

Where an insured can read and understand his policy of fire insurance, and has full opportunity to do so, and the insurer does nothing to prevent

him from reading the policy, the neglect of the insured to have acquainted himself with the conditions on which the policy was issued and written cannot be taken as evidence of the waiver by the insurer of the conditions imposed.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1929, of CUMBERLAND. Reversed.

Action to recover upon a policy of fire insurance. The validity of the policy at the date of its issuance, and the destruction by fire of the property insured thereby, are admitted. The question involved is whether the policy was in force at the date of the loss.

It is admitted that by reason of the default of plaintiff in the payment of his note for a portion of the premium for said policy, at its maturity, and of the continued default in such payment, the policy was not in force according to its terms at the date of the loss, and that defendant, by virtue of a provision in said policy, is not liable to plaintiff for the loss resulting from the destruction of his property by fire.

The premium note was due on 1 September, 1928. The loss occurred on 26 September, 1928. At the date of the loss, the note was past due and unpaid. No demand for the payment of said note was made by the defendant, after its maturity and prior to the date of the loss.

Plaintiff alleges that by its conduct prior to the maturity of said note defendant waived the provision in the policy and also in the note, that defendant should not be liable to plaintiff, under the policy, for any loss or damage to the property, insured thereby, if such loss or damage should occur while any note given for the premium or for any portion of the premium was past due and unpaid. This allegation is denied by the defendant.

The issues submitted to the jury were answered as follows:

"1. Did the defendant Ætna Insurance Company, waive the provision as to the payment of the note, as alleged in the reply? Answer: Yes.

2. What sum, if any, is plaintiff entitled to recover of defendant? Answer: $2,000, and interest from the date of the fire, less note, $33.16, and interest."

From judgment on the verdict defendant appealed to the Supreme Court.

Cook & Cook for plaintiff.
Vann & Millikin for defendant.

CONNOR, J. The policy of insurance issued by defendant to plaintiff, insuring the property described therein against loss or damage by fire for a term of five years from and after 2 November, 1927, contains a provision as follows:

"It is understood and expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned, while any installment note given for premium upon this policy remains past due and unpaid; or while any single payment, promissory note (acknowledged as cash or otherwise) given for the whole or any portion of the premium, remains due and unpaid."

Plaintiff did not pay the premium for said policy, or any portion thereof, in cash. He gave two notes for said premium, one for $33.16, due on 1 September, 1928, and the other for $132.64, due in four equal installments of $33.16 on 1 December, 1928, 1929, 1930 and 1931, respectively. In both said notes there was a provision identical with that in the policy to the effect that upon default in the payment of said note, according to its terms, the defendant should not be liable to plaintiff under the policy, during the continuance of such default. But for the default of plaintiff in the payment of the note which was due on 1 September, 1928, the policy would have been in force at the date of the loss, to wit, 26 September, 1928. By reason of such default, however, the policy was not in force on said date, unless defendant had, as contended by plaintiff, by its conduct prior to the date of such default, waived the provision in the note and also in the policy.

In *Hayworth v. Insurance Co.*, 190 N. C., 757, 130 S. E., 612, it is said: "When a note is given for the payment of the premium on a life insurance policy and the note and the policy contain a stipulation that, upon the failure to pay the note at maturity, the policy shall cease and determine, then a failure to pay such premium note renders the policy void." This principle, well settled in this and other jurisdictions, is applicable not only to life insurance policies, but also to other policies, including fire insurance policies. *Moore v. General Accident, Fire and Life Assur. Corp.*, 173 N. C., 532, 92 S. E., 362. In the instant case, it is provided in effect that the continued default in the payment of the note for the premium, or for a portion thereof, after its maturity, suspends the liability of the company under the policy during the period of such default. If the company after such default accepts or demands payment of the note, the policy is thereby reinstated from the date of such acceptance or demand. If a loss occurs after the policy has thus been reinstated, the company is liable for such loss, according to the terms of its policy, notwithstanding the suspension of its liability during the period of default.

It is conceded by defendant that in accordance with authoritative decisions of this Court, notwithstanding the provision in the policy with respect to the effect of plaintiff's default in the payment of his premium note, upon the liability of the defendant, the defendant is liable under

the policy if it has waived said provision, as alleged by plaintiff. The burden, however, is on the plaintiff to show such waiver.

On an examination of the record in this appeal, we fail to find any evidence showing or tending to show a waiver, by defendant, as contended by plaintiff. There was no evidence tending to show that defendant or its agents caused the plaintiff to fail to pay his note at its maturity, or to rely upon an extension of said note by defendant. The fact that defendant after the maturity of a note given by plaintiff for the premium on another policy, issued by defendant to plaintiff prior to the issuance of the policy in this case, accepted payment of said note and thereby reinstated the said policy, was not sufficient as evidence that defendant, at the date of the issuance of this policy, and the execution of this note, waived the provision in the policy and the note, with respect to the effect of a default in the payment of this note upon defendant's liability under this policy. Acceptance of payment of a premium note had the effect only of reinstating the policy from the date of such payment. There was no evidence in this case that plaintiff, either before or after its maturity, requested defendant to extend the date of the maturity of his note. Plaintiff testified that he can read and write. The fact that he did not know when his note became due, because he failed to read either the note which he signed, or the policy which was delivered to him, is not evidence tending to show a waiver by defendant. There is no evidence tending to show that plaintiff failed to read the note or the policy because of any conduct on the part of defendant or its agents.

There was error in the refusal of the court to allow defendant's motion for judgment as of nonsuit, at the close of all the evidence. The judgment must, therefore, be

Reversed.

STATE v. W. E. GREEN.

(Filed 30 October, 1929.)

Criminal Law I c—In this case held: abuse of defendant in solicitor's argument entitled defendant to new trial.

In a criminal action the defendant is entitled to the protection of the court against the unwarranted abuse of his character by the solicitor in his argument when not supported by the evidence or by reasonable inference therefrom, and a new trial will be awarded on appeal where the trial judge refuses the appeal to him by the defendant's counsel and affords no relief from the unwarranted imputations.

CRIMINAL ACTION, before *Cranmer, J.*, at May Term, 1929, of CUMBERLAND.

The defendant was convicted of the crime of assault upon his wife, and also of the crime of nonsupport, and sentenced to serve a term of thirty-six months. From judgment pronounced the defendant appealed.

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

Malcolm McQueen and Dye & Clark for defendant.

BROGDEN, J. The record shows the following:

During the argument of counsel the solicitor, in the closing address, spoke to the jury as follows: "Gentlemen of the jury, the defendant has made himself so obnoxious to the court that even his own counsel have deserted him." The defendant's counsel excepted to this statement by the solicitor. (One of the counsel for the defendant left the court-room at the noon recess, and after all the evidence was in, and did not return before verdict, it being agreed there was to be but one argument to the jury by the defendant's counsel, and that by Mr. McQueen.)

The court failed to make any statement, and the Solicitor continued as follows:

"I have the supremest contempt, if that be a proper word, Mr. McQueen, for any man who will sink so low in society, as this defendant has done, and swear, falsely, that his wife has committed adultery and obtain a divorce on those false grounds. The first thing you know, gentlemen of the jury, this defendant will have some girl around here and fool her into marrying him, claiming he has a divorce, and he will be indicted for bigamy."

The defendant's counsel objected to these statements on the grounds that there was no evidence of a divorce on the ground of adultery, and that his counsel had not deserted him, and therefore, the solicitor should not draw conclusions which were not supported by the facts and the evidence.

The court again failed to interpose, and the solicitor was allowed to continue this line of argument and statements without interruption.

The defendant excepted.

In *Lamborn v. Hollingsworth*, 195 N. C., 350, 142 S. E., 19, this Court said: "Under our law it is the undoubted right of counsel to argue every phase of the case supported by the evidence without fear or favor, and to deduce from the evidence offered all reasonable inferences which may flow therefrom. The testimony and conduct of witnesses and parties must at all times be subject to such criticism and attack as the circumstances reasonably justify. However, the baiting and badgering of witnesses and parties ought not to be permitted by the court. Parties come into court, as they have a right to do, to have controversies deter-

mined according to the orderly processes of the law, and witnesses are compelled to come to court whether they desire to do so or not. At all events, as long as they demean themselves in a courteous manner they are entitled to the same courtesy in the courthouse as would be accorded to a citizen in any other business transaction."

The argument made in behalf of the State exceeded the limit of fair comment, and was not justified by the evidence introduced in the cause. The defendant testified "that he had maintained his residence in Florida all of his life and, after the warrant was issued, got a divorce there." Hence there was nothing in the evidence to indicate that the divorce was secured upon the ground of adultery or that the defendant was attempting to fool any girl into marrying him or that there was any probability of an indictment for bigamy.

The defendant, according to the orderly processes of law, appealed to the court for protection, and did not receive it. He is, therefore, entitled to a

New trial.

STATE v. LEE ELDRIDGE.

(Filed 30 October, 1929.)

Homicide C b—Where negligence of deceased was sole proximate cause of death defendant is not guilty of manslaughter.

Where in a prosecution for manslaughter for the negligent killing of the deceased through the reckless driving of an automobile, the defense is interposed that the deceased met her death through her own negligence in unexpectedly running in front of defendant's car under circumstances making it impossible for him to avoid striking her: *Held*, the defendant is entitled to show as a complete defense that the death was caused by the act of the deceased and not by his negligence, and an instruction that denies him this right is reversible error to his prejudice entitling him to a new trial. The doctrine of contributory negligence does not apply.

APPEAL by defendant from *Moore, J.*, at April Term, 1929, of SURRY.

Criminal prosecution tried upon an indictment charging the defendant with the unlawful killing of Mrs. Will Quesinberry by striking her with an automobile while operating same on a public highway in a dangerous and reckless manner.

The defense interposed was unavoidable accident, and the defendant offers evidence tending to show that the deceased, in an effort to cross the road, negligently and unexpectedly ran in front of his car, under such circumstances as to render it impossible for him to avoid striking her.

Verdict: Guilty of manslaughter, with recommendations of mercy.

Judgment: Imprisonment in the State's prison for not less than five nor more than ten years.

Defendant appeals, assigning errors.

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

Folger & Folger for defendant.

STACY, C. J. The validity of the trial is called in question by a number of exceptions and assignments of error, but detailed consideration of them is omitted, as the Attorney-General confesses error, and we find it necessary to award a new trial for error in the following instruction:

"If you find beyond a reasonable doubt that the boy was driving the car at such a rate, at the time he hit the deceased that his car was not under control, so as to stop and save the life of this woman, however negligent she may have been, it would be your duty to find him guilty of manslaughter."

This instruction took from the defendant his plea of misadventure or unavoidable accident, and deprived him of the contention that the negligence (not contributory negligence) of the deceased was the sole proximate cause of her death. *S. v. Palmer, ante,* 135. Contributory negligence on the part of the deceased, which *ex vi termini* implies that the negligence of the defendant was one of the causes of the injury, as distinguished from a self-inflicted wound, which perforce carries a different meaning, has no place in the law of the case. *S. v. McIver,* 175 N. C., 761, 94 S. E., 682. But the defendant is entitled to show, if he can, that the deceased met her death, wholly as a result of her own misfortune, and not because of any culpable negligence on his part. *S. v. Whaley,* 191 N. C., 387, 132 S. E., 6.

New trial.

STATE v. T. S. CORNETT AND TWAY CORNETT.

(Filed 30 October, 1929.)

Criminal Law L e—Appeal in this case was not from final judgment and was dismissed in the Supreme Court.

Where the judgment in a criminal action for a misdemeanor has been suspended until the trial of a civil action against the defendant, the cost is no part of the punishment, the effect of the imposition of cost being to vest the cost in those entitled thereto, and an appeal therefrom, not being from a final judgment or one which is final in its nature, will be dismissed.

MOSELEY *v.* R. R.

APPEAL by defendants from *Moore, J.*, at April Term, 1929, of ASHE. Appeal dismissed.

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

W. R. Bauguess for defendants.

ADAMS, J. The defendants were indicted and convicted of wilfully injuring and removing a fence surrounding a cultivated field in breach of C. S., 4317. Judgment was suspended, upon payment of the cost, until the termination of a pending civil action. The order for the payment of the cost is not a part of the punishment which may be imposed for the commission of a misdemeanor, the legal effect of the order being only to vest the right to the cost in those entitled to it. *S. v. Crook,* 115 N. C., 760; *S. v. Smith,* 196 N. C., 438. As no final judgment has been pronounced, the appeal must be dismissed. In a criminal action an appeal may be taken only from a final judgment on conviction or from one which in its nature is final. *S. v. Bailey,* 65 N. C., 426; *S. v. Jefferson,* 66 N. C., 309; *S. v. Wiseman,* 68 N. C., 203; *S. v. Webb,* 155 N. C., 426; *S. v. Tripp,* 168 N. C., 150.

Appeal dismissed.

ZEB. V. MOSELEY, ADMINISTRATOR OF THE ESTATE OF LESLIE DAVIS, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 October, 1929.)

1. Railroads D b—In this case held: evidence of defendant's negligence causing injury at crossing sufficient to be submitted to the jury.

In an action to recover damages for the negligent killing of the plaintiff's intestate, evidence tending to show that the defendant's rapidly moving train collided with an automobile the plaintiff was driving at a much used public crossing, coming upon him without signal or warning at a place where the defendant's tool and supply houses obstructed the intestate's view so that he could not apprehend the danger in time to avoid it, is sufficient to take the case to the jury upon the question of whether the defendant's negligence was the proximate cause of the injury in suit.

2. Same—Testimony of witnesses that they did not hear approaching train give warning is sufficient to be submitted to the jury.

Where the plaintiff's intestate has been killed in a collision of his automobile with the train of the defendant at a public crossing, and the question is involved as to whether the defendant negligently omitted to give warning of its approaching train, testimony of witnesses who were present that they did not hear the bell ring or the whistle blow is sufficient to take the case to the jury on this question.

3. Same—In this case held: question of plaintiff's negligence in failing to stop before crossing was for the jury.

Where there is evidence that the defendant's train colliding with an auto truck of the plaintiff's intestate as he was attempting to cross the defendant's tracks at a public crossing, with the train speedily coming upon him without warning, the question is for the jury as to the negligence of the intestate in failing to stop before attempting to cross under the rule of the prudent man under the facts of this case.

4. Same—Question of whether crossing was extraordinarily dangerous requiring watchman or gongs was for the jury in this case.

While it is negligence *per se* for a railroad company not to observe a statutory requirement of maintaining gates or safety devices, or watchmen at a grade crossing, it is also incumbent upon it, in the absence of statute, to do so when the crossing is much used by the public and is more than ordinarily dangerous, and the failure to do so would be a great menace to the public, and the question of whether or not such precautions were required is for the jury under correct instructions under the evidence in this case.

APPEAL by defendant from *Nunn, J.*, and a jury, at February Term, 1929, of LENOIR. No error.

This is an action for actionable negligence brought by plaintiff, administrator of Leslie Davis, against the defendant for killing his intestate at a street crossing. The defendant denied negligence and pleaded contributory negligence.

Leslie Davis, a young white man about 30 years old, drove a truck selling bottled soft drinks in crates, for one W. F. Tyndall, who lived in Kinston, who was in the bottling business. Davis drove a Chevrolet truck weighing about 2,500 to 3,000 pounds, which usually carried a load of 3,000 to 4,000 pounds. The truck had a cab the width of about 3½ to 4 feet. The distance from the front of the truck to the back of the driver's seat was 7½ feet. The front of the truck was 6½ feet from the driver. On the morning of 6 April, 1927, he left the city of Kinston with a negro boy, Joe Smith. Davis was driving the truck; they went to Goldsboro, Pine Level, Selma and then to Smithfield. They drove across the railroad tracks on Johnson Street and stopped at Jim Obey's store on the east side of Johnson Street and on the east side of defendant's railroad. The store was on the south side of the street. Joe Smith usually handled the crates. After making a delivery at Obey's store, they got in the cab, Davis at the wheel and Smith beside him. The cab was the usual one of such trucks, closed with doors on both sides, six windows counting the front one—nothing to obstruct the view of one riding in the cab.

The railroad ran north and south, and Johnson Street east and west. There were four tracks of the defendant railroad that crossed Johnson

Street and a spur track branching out from the first east track leading to the ice plant on the north side of Johnson Street. The tracks of defendant are within the corporate limits of Smithfield. From the east side of the northbound main line track, the second east track which passenger train No. 80 was on, which killed Davis, to the side of Obey's store is 67 feet. There was a roadway, alley or lane about 20 feet wide to the west of Obey's store going south and back of and to the east of two railroad houses which faced the railroad, the two houses fronting on track one. A tool house 14.4 feet by 16.4 feet and 11.2 feet high, a few feet from Johnson Street, and a supply house a few feet south of the tool-house, which is 30.4 feet by 12¾ feet and 15.7 feet high. Before reaching Johnson Street, south of these two houses, the tracks of defendant company curve practically all the way down about a quarter of a mile south of Johnson Street. The tool-house is 10 feet from the eastern rail of the first track. From the tool-house to the northbound main line track, the eastern edge of same is about 26 or 27 feet. From the supply house to the east rail of the northbound main line track is about 24 or 25 feet. From the center of the sidetrack to the center of the main line track is 15 feet. The distance from the east rail of the northbound track to the east rail of the pass track that you reach before getting to the northbound track is 15 feet. Between the rails it is about 4.9 feet. A person driving from east to west on Johnson Street when he reached a point on Johnson Street 25 feet from the east rail of the main line, the track the train was on which killed Davis, looking south his view would hit the tool and supply houses. After he cleared the houses at a point 23 feet from the east rail of the main line, his view would hit the curve some 147 yards down the track—12 feet from the east edge of the rail of the northbound track he could see down the track 800 feet. Driving in a car the front end "would be on the side track (first track) adjoining the main line (second track) before he could see any distance towards the south down that main line track" in the direction the train No. 80 was coming, which killed Davis. "After clearing those buildings going towards the main line, I would say you could see 250 feet" (about 84 yards).

Numerous witnesses testified that they heard no whistle of the train or bell rung for Johnson Street crossing; no signal until the emergency whistle blew three short blows right close together about 50 feet of the crossing where Davis was killed. When the engineer applied the brakes from the looks of the rail there were blue places—two on each rail opposite each other, like something had rubbed it and turned it blue. "I know what they were; they looked like friction marks from the application of brakes." They were 30½ feet from the center of the plank crossing. No. 80 was a little late, running 35 to 40 miles an hour.

There was continuous traffic across Johnson Street used by automobiles, trucks, bicycles and all kinds of conveyances and as a walkway. At the time there was a negro school in session; about 500 children attend the school and about 75 per cent have to cross Johnson Street to go to school; near the crossing there are two stores on the south side and an ice-house on the north side. "There are probably 75 houses, stores, churches and schoolhouses on the east side of the railroad where Johnson Street runs; that is the way they get across there unless they go through and strike the old No. 10 about a quarter of a mile. Johnson Street is our only way in and out; it is used largely." At the crossing "there are no gates kept there by the railroad company, no bells, gongs or devices of any kind to warn of the approach of trains, and no watchman there." Near the ice plant, across the street from Obey's store, is a "N. C. Law Stop" sign facing the east approach of the crossing.

When Davis and the negro boy got in the cab of the truck the truck was facing east and within the zone between the railroad and the stop sign. The Chevrolet truck was in good condition, practically new; perfect mechanical condition. The motor was in fine condition. Davis was a good driver.

From the center of the intersection of Johnson Street to the main line of the defendant company's railroad to the center of the depot, which is north, is 223 feet. From the center of Johnson Street crossing to where the truck was found after the wreck and carried by the train, was 300 feet. The body of Davis was carried by the train 140 feet from the intersection of Johnson Street. The body of Davis was found between the two east tracks. The train that killed Davis was on track two, and the truck was thrown off on the same side as the body—both thrown on the east side of the main line track two that the train was on. Johnson Street crossing over the tracks was built of dirt and rock and timber, 10-inch plank, on both sides of the rails on the second track to make the approach even with the rails. The approach was on a slight incline. "On the pass tracks the rails are level with the street. The rails of the main line tracks are larger than the rails on the pass tracks—stand up higher on the track and are heavier." The train consisted of "four express cars, a mail storage, mail postage, baggage car, colored coach, white coach, and New York Pullman, and in addition to that the engine and tender." The average car is about 60 feet and the engine about 100 feet, total length of train 700 feet.

The train approaching Johnson Street, the rear end of the last coach was 5.8 feet lower than the front of the engine.

"The truck backed back from in front of Obey's store on the side just off to one side of the street, and that made it face the railroad, and it curved out and started on across the railroad track. Approaching the

railroad track from the east going along Johnson Street towards Smithfield you do not have any view down the track to begin with on account of the obstruction of these two houses until you get beyond those houses going toward the railroad. You would have to get down beyond, in other words, by these two houses on the right-of-way; that would put you about to the first sidetrack." "Johnson Street in front of Obey's store is about 20 to 25 feet." "As to the construction of the crossing, the only thing I know is there is a board on each side of the T-iron, and then there is dirt, and it is a narrow crossing about 10 feet wide." It was in evidence that trains were frequently crossing Johnson Street day and night.

Joe Davis, the negro boy, described what happened thus: "After we delivered the drinks to Obey's store this day we got in the truck and backed right short around Obey's store corner; there is a little lane down there; we backed the truck from in front of this first store, then we started on across the railroad. At that time I was in the truck—in the cab with Mr. Davis. I was looking to the right and he was looking to the left; the right is towards the depot. I did not hear any train blow until it was right on us. The first knowledge I had that there was a train coming, I looked toward the station to the right, and the people were all looking that way; looked like they were mad or something, and I looked down to the south and saw the train coming. At that time it was a little over 100 yards from us, and at that time the truck was between the first and second tracks, and the front wheel was on the track on which the train was coming. When the train got there right on us, it got almost on the running board when it blowed; he blowed the death blow, and I jumped out between the tracks. When I first saw the train it was a little further from us than from here to the rear of this court-room; I could not tell how fast it was traveling. When I saw the train I said, 'Lordy, Mr. Davis, there comes the train,' and he said 'Lord God,' and I jumped out. I had my foot on the running board when the train blew the three whistles; then when the train hit the truck I had just passed the back end of the truck running. . . . The truck was traveling about 10 miles an hour. We had not changed gears. He generally crossed clear across the track in low gear; he had not gotten out of low gear at the time the accident happened. When I jumped out the truck was running 10 miles an hour; when I jumped out I was facing towards the east; I jumped out backwards. I had to catch myself and start back the other way and run."

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

"1. Was the death of the intestate, Leslie Davis, caused by the negligence of the Atlantic Coast Line Railroad Company, as alleged in the complaint? Answer: Yes.

2. Did the said Leslie Davis, by his own negligence, contribute to his death, as alleged in the answer? Answer: No.

3. What amount of damages, if any, is the plaintiff entitled to recover for the death of the said Leslie Davis? Answer: $15,000."

The defendant made numerous exceptions and assignments of error, and appealed to the Supreme Court. The material ones will be considered in the opinion.

Manning & Manning and F. E. Wallace for plaintiff.
Rouse & Rouse for defendant.

CLARKSON, J. The first main assignment of error by the defendant was to the refusal of the court below at the close of plaintiff's evidence, and at the close of all the evidence, to dismiss the action or for judgment as in case of nonsuit. C. S., 567. This assignment of error cannot be sustained.

As often repeated: "It is the settled rule of practice and the accepted position in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim, and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is 'entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom.'" *Goss v. Williams,* 196 N. C., at p. 216.

The evidence was conflicting in many respects, but we must consider it in the light most favorable to the plaintiff, taking into consideration all the evidence. In the town of Smithfield plaintiff's intestate and his negro helper crossed the railroad tracks on Johnson Street going east in a truck. After delivering from the truck bottled drinks at the first store on the south side of Johnson Street, they started to recross. They both entered the cab, plaintiff's intestate at the wheel, the negro boy by his side. The cab was then facing east. The driver backed the truck into a lane or alley between the store and the first railroad track to turn so as to cross the railroad. The driver's seat was 6½ feet from the front of the truck. He had to cross the first track and the main northbound track (second) going west. The crossing on Johnson Street over the second track was only 10 feet wide—that was the width of Johnson Street at that point—at least that was the length of the timber placed on each side of the T-rails so that vehicles could climb over. He had to adjust the heavy truck to the narrow passage provided over the T-rails. The train was approaching this crossing on the main northbound track (second) running 35 to 40 miles an hour, without any signals being heard, either whistle or bell for the crossing. The crossing was in a

thickly settled portion of a town, much traveled, with no device of any kind or watchman to give warning of the approach of trains. The train was coming north around a curve, the vision of plaintiff's intestate was obstructed by a tool and supply house of defendant company. Plaintiff's intestate was looking to the left in the direction that the train was coming. It was impossible for him to see the oncoming train on account of the obstructions. He was a good driver, the machine in perfect mechanical condition, running 10 miles an hour in low gear. As he proceeded and passed where he could get a vision of the oncoming train from where he was sitting, it was only 23 feet from the main track on which the train was coming, and from the cab where he was sitting to the front of the machine was 6½ feet. He had only 16½ feet for the machine to travel before reaching track two, which the oncoming train was on, and could only see, by the testimony of one witness, about 84 yards, and another 147 yards, down the track. Thus, from the evidence, he got in this perilous danger zone. The machine did not get over the second track; the rails between the tracks were 4.9 feet. Plaintiff's intestate's body was carried about 140 feet and the truck carried about 300 feet, and both thrown off on the east side of the main track. As a matter of law, we think there was sufficient evidence to be submitted to the jury on the question of negligence and contributory negligence, and the court below correct in refusing to nonsuit plaintiff.

In *Russell v. R. R.*, 118 N. C., at p. 1108, it is said: "It is the duty of an engineer in charge of a moving train to give some signal of its approach to the crossing of a public highway over a railway track or to a crossing which the public have been habitually permitted to use; and where he fails to do so, the railway company is deemed negligent and answerable for any injury due to such omission of duty." *Perry v. R. R.*, 180 N. C., 290; *Rigsbee v. R. R.*, 190 N. C., 231; *Earwood v. R. R.*, 192 N. C., 27; *Franklin v. R. R.*, 192 N. C., 717; *Finch v. R. R.*, 195 N. C., 190.

In *Franklin v. R. R., supra,* at p. 719, it is said: "The plaintiff testified that he heard no signal prior to or at the time he stepped upon the crossing. This is some evidence that no signal was given. . . . The law makes it the duty of the person using a crossing of a railroad track to make diligent use of his senses in order to discover whether there is danger of injury or collision."

"Failure to stop before crossing a railroad track cannot be declared to be contributory negligence as matter of law, but that it should be considered by the jury in connection with the surrounding circumstances in determining whether the party was exercising the care of one of ordinary prudence." *Perry v. R. R., supra,* at p. 297.

In *Shepard v. R. R.*, 166 N. C., at p. 545, it is said: "It is also established by the weight of authority that it is not always imperative on a traveler to come to a complete stop before entering on a railroad crossing; but 'whether he must stop, in addition to looking and listening, depends upon the facts and circumstances to each particular case, and so is usually a question for the jury.' *Barber v. R. R.*, 193 N. C., at p. 694-5."

The law is thus stated in *Williams v. R. R.*, 187 N. C., at p. 353: "*Goff v. R. R.*, 179 N. C., 216, as already stated, cites the rule laid down in *Edwards v. R. R.* (129 N. C., 79), that the failure to hear signals is sufficient to carry the case to the jury, and it was further held: 'If his (plaintiff's) view is obstructed, or his hearing the approaching train is prevented, and especially if this is done by the fault of the defendant, and the company's servants fail to warn him of its approach, and, induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if it was dangerous ahead, negligence will not be imputed to him, but to the company, failure to warn him being regarded as the proximate cause of any injury received,' citing *Mesic v. R. R.*, 120 N. C., 490; *Osborne v. R. R.*, 160 N. C., 309."

"It is conceded by all the authorities that the standard by which to determine whether a person has been guilty of negligence is the conduct of the prudent or careful or diligent man." Bigelow, Torts, 261.

"Contributory negligence is the negligent act of a plaintiff which, concurring and coöperating with the negligent act of the defendant, is the proximate cause of the injury. The same rule of due care which the defendant is bound to observe applies equally to the plaintiff. There is really no distinction between negligence of the plaintiff and negligence of the defendant, except the plaintiff's negligence is called contributory negligence. The law further says, . . . that contributory negligence may consist of some act of omission or act of commission. It is the lack of due diligence or the lack of due care in doing the wrong thing at the time and place, or in doing nothing when something should have been done. That is to say, did the plaintiff fail to exercise due care which an ordinarily prudent man would have exercised under similar circumstances, and was said failure so to do the proximate cause of his injury?" *Inge v. R. R.*, 192 N. C., at p. 531. The above charge on contributory negligence held correct. *Certiorari* denied. 273 U. S., 753. It goes without saying, as it is so well settled, that the proximate cause of an injury is for the jury. A serious and troublesome question is continually arising as to how far a court will declare certain conduct of a defendant negligence and certain conduct of a plaintiff contributory negli-

gence and take away the question of negligence and contributory negligence from the jury. The right of trial by jury should be carefully preserved, and if there is any evidence, more than a scintilla, it is a matter for the jury and not the court.

"Plaintiff, while attempting to cross the tracks of defendant in the city of Sioux Falls collided with a train of defendant and the automobile in which he was riding damaged. Plaintiff claims the accident was caused by the negligence of defendant's employees by reason of their failure to blow the whistle or ring the bell of the engine when approaching the crossing. Defendant pleads contributory negligence on the part of plaintiff in not keeping a proper lookout for the train as he approached the crossing and in not using due care under all the circumstances: *Held,* that when it is considered that the space between the first view and the rail was only twenty-five feet, and the space within which a safe stop could be made was much less owing to the projection of the automobile ahead of the driver's seat and of the cars of the train over the rail, and after allowing time to look both ways, operate the brakes and come to a standstill the court cannot say respondent was negligent in failing to stop far enough from the track to escape injury. It is one's duty to use due care, but what acts constitute due care under all the circumstances cannot be prescribed in advance, and when not so prescribed, whether or not due care was exercised becomes a question of fact for a jury and not one of law for the court." *Morrisey v. Chicago, Milwaukee & St. Paul Ry. Co.,* So. Dakota, 226 Northwestern Reporter, p. 731.

In the case of *Harrison v. R. R.,* 194 N. C., 656, the plaintiff's witness testified, "there is nothing in the world to keep a man from seeing the train approaching from the south if he would look before he got on the track." Harrison's intestate, Lomax, had stopped his machine waiting for the freight train going southwardly to pass over the crossing. "If Mr. Lomax had looked from where he was sitting in his automobile, I would say, in my judgment, he could have seen the train, which struck him, approaching for a distance of 75 or 100 yards."

In the case at bar, plaintiff's intestate was looking to the left—the direction the train was approaching. His view had theretofore been obstructed by defendant's houses. His machine was running; whether he could have stopped in time was a question of due care for the jury. We think the *Harrison case* is distinguishable from the present action.

The second main assignment of error by defendant was to the effect that the court below improperly instructed the jury in regard to the duty of defendant in reference to safety device or watchman at the crossing where plaintiff's intestate was killed. This assignment of error cannot be sustained.

There was continuous traffic across Johnson Street used by automobiles, trucks bicycles, and all kinds of conveyances and as a walkway. At the time there was a negro school in session; about 500 children attend the school and about 75 per cent have to cross Johnson Street to go to the school; near the crossing there are two stores on the south side and an ice-house on the north side. "There are probably 75 houses, stores, churches and schoolhouses on the east side of the railroad where Johnson Street runs; that is the way they get across there unless they go through and strike the old No. 10 about a quarter of a mile. Johnson Street is our only way in and out; it is used largely." At the crossing "there are no gates kept there by the railroad company, no bells, gongs or devices of any kind to warn the approach of trains and no watchman there."

On the evidence the court below charged the jury as follows: "A railroad company is not legally bound to provide and maintain gates at street and highway crossings along its line, unless so required by statute or ordinance, or unless it appears that the particular crossing is peculiarly dangerous. In the absence of a statutory requirement it is not negligence *per se* (in itself) for a railroad company to fail to maintain a flagman or watchman at a grade crossing of its track and a public road to warn travelers on such road of approaching trains. The mere absence of a statute requiring a flagman or watchman at crossings will not, however, of itself relieve the railroad company from the duty to maintain one, and where a crossing is so peculiarly dangerous that the reasonable safety of the traveling public requires the presence of a flagman or other extraordinary means to signal the approach of the trains, it is incumbent upon the railroad company to employ such means. It is for the jury to say whether under all the circumstances of a particular case the railroad has been guilty of negligence in not maintaining a flagman or watchman at a particular crossing. Before a jury will be warranted in saying, in the absence of any statutory direction to that effect, that a railroad company should keep a flagman or watchman at a crossing, it must first be shown that such crossing is more than ordinarily hazardous, as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves. The frequency with which trains are passing, and the amount of travel, or noise, are also material circumstances in considering the question of danger."

It will be noted that the court below charged in the present action on the evidence: "It must first be shown that such crossing is more than ordinarily hazardous, as for instance, that it is in a thickly populated portion of a town or city, or that the view of the track is obstructed either by the company itself or by other objects proper in themselves.

The frequency with which trains are passing, and the amount of travel, or noise, are also material circumstances in considering the question of danger."

In *Batchelor v. R. R.*, 196 N. C., at p. 87, speaking to the subject, it is said: "Applying these principles of law to the facts disclosed by the record, there is no evidence of obstruction existing at this crossing; neither is there evidence that the vision of a traveler was obscured by curves, embankments, buildings or other conditions, which rendered the crossing more than ordinarily hazardous, nor does the record disclose any condition of peculiar danger. Therefore, we hold that the failure of the defendant to maintain gates or gongs at this crossing was no evidence of negligence."

In the present action the evidence was plenary to be submitted to the jury that the vision of the traveler was obstructed which rendered the crossing more than ordinarily hazardous and peculiarly dangerous. It must be borne in mind that this was not a country crossing, or in a thinly settled community, but a street of a town thickly populated, much traveled, a busy thoroughfare. Defendant's train frequently passed it day and night. *R. R. v. Ives*, 144 U. S., 408; *Dudley v. R. R.*, 180 N. C., 34; *Blum v. R. R.*, 187 N. C., 640; *Finch v. R. R., supra.*

It will be noted that in all the cases in this jurisdiction where the question was left to the jury, the evidence was similar to that in the present action. The evidence was different in the *Batchelor case, supra,* the evidence was that "plaintiff's intestate was traveling on a much traveled road as a county road, but not as a highway." The *Batchelor case, supra,* is annotated in 60 A. L. R., 1091. The annotations give numerous citations from many States and cites the *Batchelor case* under the following, at p. 1096(a): "It may be stated generally that, unless required by statute or order, a railroad company is under no duty to provide gates, gongs, or other safety devices at public crossings, and that, therefore, the failure to do so at any particular crossing is not negligence *per se.*" The *Dudley* and *Blum cases, supra,* are annotated at p. 1196(b): "Where the evidence shows that a railroad crossing is for any reason peculiarly dangerous, it is a question for the jury whether the degree of care which a railroad company is required to exercise to avoid accidents at crossings imposes on the company the duty to provide safety devices at that crossing." The *Batchelor case, supra,* sustains this position.

The following is set forth in Roses' Notes on United States Reports, Revised Ed., Supplement, Vol. 3, at p. 197: "Whether ordinary care requires flagman at crossing is for jury. Followed in *Panama Railroad Company v. Pigot,* 254 U. S., 553, 65 L. Ed., 43, 41 Sup. Ct., 200, in action for death of minor of seven years, question of whether proper

care required railroad to have flagman or gate at crossing was for jury. *Lofland's Brickyard Crossing Cases,* 5 Boyce (Del.), 157, 91 Atl., 288, in action for injuries in crossing accident, failure of railroad to station flagman at crossing is evidence to be submitted to jury; *Glanville v. Chicago R. I. & P. R. Co.,* 190 Iowa, 180, 180 N. W., 155, in action for injuries received in collision of automobile with train, failure to maintain flagman or signaling device is not basis for charge of negligence, *in absence of showing crossing is unusually dangerous; Wichita Falls & N. W. Co. v. Grovers,* 81 Okla., 53, 196 Pac., 678, in action for death from backing of train at railroad crossing, whether railroad was negligent in not maintaining flagman or automatic signals, though no statute or ordinance required them, was for jury." (Italics ours.)

We think the court laid down the rule in the charge approved in this jurisdiction in this particular action. The generalities in the charge on the subject is not so antagonistic or conflicting as would be held prejudicial or reversible error, as was held in *May v. Grove,* 195 N. C., 235.

The third main assignment of error by defendant was in regard to the charge on sudden peril and emergencies. We do not think this can be sustained. *Parker v. R. R.,* 181 N. C., at p. 103; *Odom v. R. R.,* 193 N. C., 442. The other assignments of error as to admissibility of testimony and other exceptions to the charge, we do not think, if error, are reversible or prejudicial. On the whole record it appears that the court below tried the action with care and the charge covered every phase of the law bearing on the evidence. We can find in law

No error.

W. B. BRYANT v. BURNS-HAMMOND CONSTRUCTION COMPANY.

(Filed 30 October, 1929.)

1. Appeal and Error G b—Exceptions not discussed in briefs are deemed abandoned.

Where in grouping exceptions taken upon the trial the appellant does not bring forward in his brief others he has taken, the latter will be regarded as abandoned. Rules of Practice, 192 N. C., 853, 28.

2. Appeal and Error J c—Admission of testimony of matters admitted in pleadings and testified to by others will not be held for error.

Where the physician of the plaintiff who attended him after a personal injury he had received testifies as to matters the plaintiff had told him after the injury, the admission in evidence of the testimony of the physician will not be taken as error when the matter objected to has been admitted in the pleadings and is cumulative of evidence of other witnesses not objected to.

3. Evidence K b—Expert witness may testify to symptoms complained of at time of examination by the person injured.

In an action to recover damages for an alleged personal injury it is competent for the attending physician to testify as to what his patient told him of his symptoms and physical condition at the time of the physician's examination.

4. Trial B c—Where objection is not made to question a motion to strike out responsive answer will not be allowed.

Where the master is sued for damages for a negligent injury inflicted on his servant by reason of defective tools or appliances furnished the latter to do his work, an exception must be duly taken to an incompetent question calling forth admission of the master's vice-principal, and when taken only to the answer of the witness on motion to strike out, the exception will not ordinarily be considered on appeal when the answer is responsive to the question.

5. Master and Servant C b—Doctrine of res ipsa loquitur applies in this case.

Where it is shown that the servant in using an electrically driven saw furnished him by the master and under the master's control, has been injured in its use by an electrical shock which would not ordinarily occur under the circumstances, a presumption of the master's negligence in furnishing an improper appliance will arise, which does not affect the burden of proof in the servant's action, but which is sufficient to sustain an affirmative answer to the issue of negligence unless the defendant has satisfied the jury otherwise under the evidence.

APPEAL by defendant from *Sinclair, J.*, at May Term, 1929, of ALAMANCE. No error.

The defendant is a corporation, and on 6 August, 1928, was engaged in the construction of a manufacturing building in the city of Burlington. The plaintiff was employed by the defendant as a laborer on the building, and was required or permitted by the defendant to use a saw which was propelled by electricity. He alleges that the defendant negligently provided for him a defective saw, and that by reason of the defect, while engaged in the performance of the duties for which he was employed, he was injured by an electric shock transmitted by means of or on account of the defective tool with which he was required to work. The defendant denied the material allegations of the plaintiff, and at the trial the issues of negligence, assumption of risk, and contributory negligence were answered against the defendant and damages were duly assessed. Upon the verdict judgment was rendered for the plaintiff and the defendant excepted and appealed upon assignments of error pointed out in the opinion.

Long & Allen for plaintiff.

Coulter, Cooper & Carr for defendant.

ADAMS, J. The defendant groups some of its exceptions under four assignments of error and abandons several others which were taken on the trial, but were not brought forward in its brief. Rules of Practice, 192 N. C., 853, 28. In our opinion neither assignment can be sustained.

In the first it is contended that Dr. Brooks was permitted in his direct examination to relate what the plaintiff had told him in reference to his past condition—that, in consequence, the physician's testimony consisted of a statement of past occurrences which should not have been admitted in evidence. The witness said, "He (the plaintiff) told me he received an electric shock last August in his right shoulder." This is the only reference to the plaintiff's previous condition. That he had received an electric shock was admitted in the defendant's answer, and this admission was not controverted on the trial. Evidence that the plaintiff, when examined by the witness, described his physical condition and complained of headache and dizziness was clearly competent. *Roulhac v. White,* 31 N. C., 63; *Biles v. Holmes,* 33 N. C., 16; *Howard v. Wright,* 173 N. C., 339; *Martin v. Hanes Co.,* 189 N. C., 644.

G. A. Barkley, a witness for the plaintiff, testified as follows:

"Q. State what, if anything, Mr. Lloyd said about this saw Mr. Bryant was using? A. He said there was a shortage in the saw."

Defendant objects and moves to strike out. *Decision reserved.*

"Q. Who said that? A. The superintendent.

Q. When was this? A. Some two weeks after he was hurt.

Q. Was Mr. Lloyd connected with the Burns-Hammond Construction Company at the time of the conversation? A. I don't know. Mr. Bryant said he was.

Q. Where did you find Mr. Lloyd at the time? A. On the job up there."

Defendant renews motion to strike out the testimony concerning what Mr. Lloyd, the superintendent, said about the saw some two weeks after the occurrence. Overruled.

It will be observed that the defendant did not object to the first question, but moved to strike out the answer. Such motions are often allowed when the answer is not responsive to the question and contains prejudicial testimony of a fact concerning which the objecting party was not put on notice. But when the answer is directly responsive it will usually be permitted to stand unless in apt time objection was made to the question propounded. In *Dobson v. R. R.,* 132 N. C., 900, it is said: "A party may waive his right to the exclusion of incompetent testimony, ever so objectionable, if he fails to assert his right in due time; and so, when a witness is being examined in an improper manner, the objection to the character of the examination should be made known in apt time; otherwise the party prejudiced will be deemed to have waived it. A

large part of the testimony of the witness Finch was incompetent because it was hearsay; but the defendant, so far as the record discloses, did not enter any objection in the manner required by law. Objection should be interposed when the incompetent questions are asked. It will not do to object after the question has been asked and answered. This would give the objector two chances, one to exclude the testimony if unfavorable to him and the other to make use of it if favorable; and for this reason the law requires that parties should act promptly or else the right to have testimony excluded, or the examination conducted within proper limits, will be waived." *Brown v. Hillsboro,* 185 N. C., 368, 373; *S. v. Stancill,* 178 N. C., 683. The admission of incompetent evidence without objection is assignable as error only when the evidence is made incompetent by statute. *Johnson v. Allen,* 100 N. C., 131. In any event, the evidence excepted to was cumulative. After Barkley had concluded, T. L. Starling testified on behalf of the plaintiff, without objection, to the identical fact mentioned by Barkley. In these circumstances the exceptions addressed to the admission of Barkley's testimony must be overruled. *Tilghman v. Hancock,* 196 N. C., 780; *Holeman v. Shipbuilding Co.,* 192 N. C., 236; *Gentry v. Utilities Co.,* 185 N. C., 285.

The defendant excepted to the following instruction: "There is no presumption of negligence in this case unless you find by the greater weight of the evidence that the plaintiff received an electric shock which injured him from this electric machine. If you find by the greater weight of the evidence that Bryant was injured by an electric shock, and that it was caused by that electric saw, then I charge you that that would make out a prima facie case of negligence against the defendant; the law would raise a presumption that it came from some negligence on the part of the defendant; that would not be conclusive presumption and would not shift the burden to the plaintiff, but nothing else appearing the jury would be justified in rendering a verdict against the defendant upon the issue of negligence. It simply means that there was a presumption raised and that the defendant can come forward with his evidence and explain away the presumption so as to destroy the presumption, if the jury finds from the evidence that it has done so."

The point of attack in this instruction is the asserted misapplication of the doctrine of *res ipsa loquitur.* This phrase, it will be noticed, was not used here; but the jury was told that a finding that the plaintiff had been injured by an electric shock caused by the electric saw would make a prima facie case against the defendant—that it would raise a presumption of the defendant's negligence. In close relation with this, his Honor gave the further instruction that to establish actionable negligence the plaintiff was required to show by the greater weight of the evidence that the defendant failed to exercise proper care in the performance of a

legal duty which the defendant owed the plaintiff, and that such negligent breach of duty was the proximate cause of the plaintiff's injury.

A presumption of fact is defined as an inference of the existence of one fact from the existence of some other fact, or an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known. Jones on Evidence, sec. 9; Starkie on Evidence, 742; *Home Ins. Co. v. Weide,* 11 Wallace, 438, 20 Law Ed., 197. A prima facie case is one in which the evidence in favor of the litigating party is sufficiently strong to call for an answer from his opponent. Black's Law Dictionary, 938; 31 Cyc., 1172; *Brock v. Ins. Co.,* 156 N. C., 112. In *White v. Hines,* 182 N. C., 275, 287, it is said: "A prima facie case or evidence is that which is received or continues until the contrary is shown. It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. *Troy v. Evans,* 97 U. S., 3; *Kelly v. Johnson,* 6 Pet., U. S., 622; Jones on Evidence, sec. 8; *S. v. Floyd,* 35 N. C., 385; *S. v. Wilkerson, supra.* Even if the prima facie case be called a presumption of negligence, the presumption still is only evidence of negligence for the consideration of the jury. *Overcash v. Electric Co., supra; Shepard v. Telephone Co., supra; Mumpower v. R. R., supra.* In some of our decisions the expressions *res ipsa loquitur,* prima facie evidence, prima facie case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury. *Womble v. Grocery Co., supra; Stewart v. Carpet Co., supra; Ross v. Cotton Mills, supra; Shepard v. Telegraph Co., supra; Mumpower v. R. R., supra; Perry v. Mfg. Co.,* 176 N. C., 69."

When it is shown that an instrumentality which has caused personal injury was under the control of the defendant and the injury was such as does not happen in the ordinary course of things if due care is observed, the evidence should be submitted to the jury as tending to show that the injury resulted from the want of due care. It was upon this theory that the trial court gave the instruction to which exception was taken—an instruction which finds support in a number of our decisions. *O'Brien v. Parks Cramer Co.,* 196 N. C., 359; *Ramsey v. Power Co.,* 195 N. C., 788; *McAllister v. Pryor,* 187 N. C., 832; *Haynes v. Gas Co.,* 114 N. C., 204; *Houston v. Traction Co.,* 155 N. C., 4.

The exceptions in the fourth assignment of error, relating to the action of the judge in refusing to set aside the verdict and in signing the judgment, are formal and were intended to preserve the defendant's right to present the appeal in its entirety. We find

No error.

GEORGE W. BOYD AND HIS WIFE, BETTIE BOYD, v. F. H. BROOKS AND HIS WIFE, LELIA BROOKS.

(Filed 30 October, 1929.)

1. **Appeal and Error J k—Agreement to foreclosure is abandonment of appeal upon exceptions to decree therefor.**

Where the plaintiff seeks injunction against the sale of a certain part of the lands under foreclosure of a mortgage, and appeals from the refusal of the court to continue the temporary restraining order to the final hearing, and then agrees that the foreclosure sale should not be restrained as to this part, his agreement is in effect a withdrawal of his appeal in relation to such lands, and he may not successfully prosecute it further in the Supreme Court.

2. **Appeal and Error J a—An appeal from the dissolution of a temporary restraining order will not be considered when the act sought to be restrained has been done.**

An appeal involving only the validity of an order dissolving a temporary restraining order made upon a motion to show cause will not be considered on appeal to the Supreme Court when it appears that the act sought to be restrained has already been done.

3. **Home Site A a—Property constituting a "Home Site."**

Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of C. S., 4103, and held in this case that a 54.75 acres of farm land is not excessive for the purpose.

4. **Same—Rights of parties under foreclosure of mortgage on "home site" in which the wife did not join.**

Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of C. S., 4103, and the purchaser at the foreclosure of such mortgage sale does not acquire under his deed the right to immediate title or possession to the land.

5. **Same—Deed to home site without joinder of wife is not void.**

C. S., 4103, limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of the "home site" under such deed until the death of the husband, when it then passes to the grantee subject only to the dower right of the wife if she survives him.

6. **Statutes A d—C. S., 4103 is not so vague, contradictory, and incapable of construction as to be void.**

C. S., 4103, limiting the effect of a conveyance by the husband of the "home site" without the voluntary signature and assent of his wife signified by her private examination according to law, is valid, and does not

fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void.

STACY, C. J., dissenting.

APPEAL by both plaintiffs and defendants from order of *Grady, J.*, at Chambers in Goldsboro, N. C., on 10 April, 1929. Plaintiffs' appeal dismissed. Affirmed on defendants' appeal.

This is an action to enjoin defendants from selling under the power of sale contained in a mortgage executed by the plaintiff, Geo. W. Boyd, to the defendant, F. H. Brooks, two certain tracts of land situate in Johnston County, North Carolina. The plaintiff, Bettie Boyd, wife of the said Geo. W. Boyd, did not sign said mortgage. Both said tracts of land are conveyed by said mortgage to the said F. H. Brooks.

The notes secured by said mortgage were executed by the said Geo. W. Boyd and are payable to the defendants.

The consideration for said notes is part of the purchase money for one of said tracts of land. This tract of land was conveyed to the said Geo. W. Boyd by the defendants, and contains 330 acres. It is conceded that the mortgage was valid as a conveyance of said tract of land, at the date of its execution, notwithstanding Bettie Boyd, wife of the said Geo. W. Boyd, did not sign the same. C. S., 4101.

At and prior to the date of said mortgage, the plaintiffs, Geo. W. Boyd and his wife, Bettie Boyd, occupied the other tract of land conveyed by said mortgage as their home. This tract of land contains 54.75 acres, and is owned by the plaintiff, Geo. W. Boyd. The residence which was occupied by the plaintiffs at and prior to the date of said mortgage, together with other buildings used in connection therewith, is located on this tract of land. After the execution of said mortgage, the plaintiffs moved from said tract of land to the tract of land which the said Geo. W. Boyd had purchased from the defendants, and thereafter occupied the same as their home. The 54.75-acre tract had not been allotted to the said Geo. W. Boyd as his homestead, in accordance with the provisions of the Constitution of this State. Plaintiffs allege, however, that said tract of land, at the date of said mortgage, was the "home site" of the said Geo. W. Boyd, as defined in C. S., 4103.

Upon the allegations of their complaint, plaintiffs pray judgment not only that defendants be enjoined permanently from selling, under the power of sale contained therein, the lands described in the mortgage from Geo. W. Boyd to F. H. Brooks, but also that the notes described in said mortgage be declared void, and ordered canceled, and that plaintiffs have such other and further relief, both specific and general, as they may be entitled to. Defendants in their answer denied the material allegations of the complaint, upon which plaintiffs pray judgment.

Plaintiffs prayed judgment that in any event it be ordered and decreed that no deed which may be made by the defendant, F. H. Brooks, under the power of sale contained in said mortgage, shall be effective to pass to the grantee the right to possession of or title to the tract of land containing 54.75 acres, during the lifetime of the plaintiff, Bettie Boyd.

The issues of fact arising on the pleadings have not been tried or determined.

The action was heard upon an order to show cause why a temporary restraining order procured herein by the plaintiffs should not be continued to the final hearing. Defendants resisted a continuance of said order, and moved that same be dissolved and vacated.

The court was of opinion, after hearing the evidence and the argument of counsel, that plaintiffs were not entitled to a continuance of the restraining order, and in accordance with said opinion the said restraining order was dissolved and vacated.

The court was further of the opinion, however, that upon the admissions in the pleadings, with respect to the 54.75-acre tract of land, conveyed thereby to the defendant, F. H. Brooks, the mortgage executed by the plaintiff, Geo. W. Boyd, without the voluntary signature and assent of the wife, Bettie Boyd, signified on her private examination according to law, by reason of the provisions of C. S., 4103, was not valid as a conveyance to pass possession of or title to said tract of land to the defendant, F. H. Brooks, during the lifetime of the said Bettie Boyd, and that no deed executed pursuant to the power of sale in said mortgage to a purchaser at a sale made thereunder will be effective to pass possession or title to such purchaser during the lifetime of the said Bettie Boyd, and in accordance with said opinion it was considered, ordered and decreed that no deed which may be executed by the said F. H. Brooks, under the power of sale in said mortgage, shall pass possession of or title to said tract of land to the grantee during the lifetime of said Bettie Boyd, and that such deed shall be of no effect whatever so long as the said Bettie Boyd shall live.

To the order, refusing to continue the temporary restraining order to the final hearing, and dissolving and vacating said order, plaintiffs excepted.

To the order adjudging and decreeing that no deed from F. H. Brooks to a purchaser at a sale made by him under the power of sale contained in the mortgage, shall be effective to pass possession of or title to the 54.75 acres during the lifetime of Bettie Boyd, wife of Geo. W. Boyd, and that such deed shall be of no effect whatever so long as Bettie Boyd shall live, defendants excepted.

Both plaintiffs and defendants appealed to the Supreme Court, each assigning error based on their respective exception.

After notices of appeal had been duly given by both plaintiffs and defendants, the following entry, over the signature of the judge, was made in the record:

"It is agreed that the 330 acres of the Cox Farm may be sold under this mortgage, and this appeal only has reference to the 54.75 acres."

Plaintiffs have not formally withdrawn or abandoned their appeal; they caused the same to be docketed in this Court. Their counsel filed a brief in their behalf and argued the appeal when the same was called for hearing in this Court.

Abell & Shepard and E. J. Wellons for plaintiffs.
Wellons & Wellons and Manning & Manning for defendants.

CONNOR, J. Plaintiffs' only assignment of error upon their appeal to this Court is founded on their exception to the order denying their motion that the temporary restraining order be continued to the final hearing, and allowing defendants' motion that said order be dissolved and vacated. The effect of this order was to relieve the defendants from the injunction imposed upon them by the temporary restraining order. Upon failure of plaintiffs to file the bond in the sum fixed by the court (C. S., 858(a), after they had given notice of their appeal to this Court, the defendants were as free to proceed with the sale of the lands described in the mortgage, under the power of sale contained therein, as they were before the temporary restraining order was signed.

Plaintiffs contended that there was error in the order, and appealed to this Court to the end that same might be reversed. Thereafter, and before the appeal was docketed in this Court, plaintiffs agreed that the 330-acre tract might be sold by the defendants under the power of sale in the mortgage, and that the only question to be presented to this Court was whether there was error in the order with respect to the 54.75 acres. Plaintiffs, therefore, agreed that defendants might do what the order to which plaintiffs excepted permitted them to do, with respect to the 330-acre tract. Whether or not there was error in the order as contended by plaintiffs, is now, by reason of plaintiffs' agreement, a moot question, which this Court will not consider.

The agreement was in effect a withdrawal by plaintiffs of their appeal, and an abandonment of their exception. Whether or not the agreement has any other or further effect than to withdraw plaintiffs' objection to a sale of the 330-acre tract by the defendants, prior to the trial of the issues raised by the pleadings, is not now presented for decision.

Plaintiffs' appeal must be dismissed. An appeal involving only the validity of an order dissolving a temporary restraining order, made upon an order to show cause, will not be considered by this Court when it

appears that the act sought to be restrained has already been done, or that the appellant, after noting an exception to the order, has agreed that the act may be done. This Court will not reverse an order, although erroneously made, when appellant, notwithstanding his exception thereto, has subsequently agreed that the appellee may proceed in accordance with the order. *Kilpatrick v. Harvey,* 170 N. C., 668, 86 S. E., 596; *Moore v. Monument Co.,* 166 N. C., 211, 81 S. E., 170; *Yates v. Ins. Co.,* 166 N. C., 134, 81 S. E., 1062.

Defendants' appeal from the order made at the hearing of the order to show cause presents for decision but one question, to wit: Is C. S., 4103, constitutional and valid? The statute is as follows:

"No deed or other conveyance, except to secure purchase money, made by the owner of a home site, which shall include the residence and other buildings, together with the particular lot or tract of land upon which the residence is situate, whether actually occupied by said owner or not, shall be valid to pass possession or title during the lifetime of the wife, without the voluntary signature and assent of his wife, signified on her private examination according to law: *Provided,* the wife does not commit adultery, or has not and does not abandon the husband and live separate and apart from him."

It must be conceded, we think, that at the date of the execution of the mortgage by Geo. W. Boyd to F. H. Brooks, the 54.75-acre tract of land was a home site, within the statutory definition. It was a particular tract of land; it was owned by said Geo. W. Boyd; it was occupied by him and his wife as their home. The residence and other buildings used in connection therewith were located on said tract of land, and were included therein. There is no suggestion in the record that said tract of land was used or was susceptible of use for any purpose other than as a home. The acreage is not excessive for that purpose. Criticisms of the statutory definition, on the ground that it is vague and uncertain in some respects, and that for this reason it may be difficult to determine whether or not other tracts of land of larger acreage, and used by the owners for other purposes as well as a home, do not apply to this tract of land.

The mortgage conveying this tract of land, which was the "home site" of the owner within the statutory definition, was executed by said owner, without the voluntary signature and assent of his wife, signified on her private examination according to law. It was, therefore, not valid, under the provisions of the statute, to pass possession or title during the lifetime of the wife, and was without any effect whatever as to her so long as she shall live. Nor will a deed made under and pursuant to the power of sale contained in said mortgage be valid to pass such possession or title. There was no error in the order from which defendants have appealed unless it must be held that the statute is unconstitutional or void.

The statute was first enacted by the General Assembly of this State as chapter 123 of the Public Laws of North Carolina, session 1919. It was entitled "An act to protect the inchoate right of dower, and to prohibit the sale of the home by the husband, without the written assent of the wife." It was subsequently reënacted as a subsection of Article 2 (entitled "Dower") of chapter 80 (entitled "Widows"), of the Consolidated Statutes of North Carolina, 1919, and is now C. S., 4103. When the statute was first enacted, all laws and clauses of laws in conflict with its provisions, were expressly repealed. The statute became effective, according to its terms on the date of its ratification, to wit, 4 March, 1919. Notwithstanding the provisions of C. S., 4103, the husband may convey all his title to and estate in his land, in which his wife has an inchoate right of dower, without her joinder in his deed, provided the land conveyed is not a home site, as defined by the statute. C. S., 4101. His grantee in such deed, becomes the owner of the land, subject only to the wife's right of dower.

In *Johnson v. Leavitt,* 188 N. C., 682, 125 S. E., 490, *Stacy, J.,* with respect to this statute, says: "The homestead exemption should not be confused with the wife's interest in the husband's 'home site' (chapter 123, Public Laws 1919), when sought to be conveyed without her signature, which is also statutory." It is provided by the Constitution of this State that "no deed made by the owner of a homestead shall be valid without the voluntary signature and assent of the wife, signified on her private examination according to law." Const. of N. C., Art. X, sec. 8. The homestead, as defined by the Constitution, is clearly distinguishable from the home site as defined by the statute. The homestead, which consists of a lot or tract of land, which with the buildings, if any, situate thereon does not exceed in value the sum of one thousand dollars, is exempt from sale under execution or other final process for the satisfaction of the claims of creditors. When the homestead has been allotted for the purpose of the exemption, it can be conveyed by the husband only with the joinder of the wife. The home site also consists of a lot or tract of land; the said lot or tract of land, with the residence and other buildings situate thereon must be used or susceptible of use by the owner as a home for himself and wife. The value of the lot or tract of land, with the residence and other buildings is immaterial. No conveyance by the husband of his home site without the joinder of the wife is valid as against her, so long as she shall live.

The statute prohibiting the conveyance of the home site by the husband, without the joinder of his wife, does not affect or purport to affect creditors of the husband, who may, notwithstanding its provisions, subject the home site, if not included within his allotted homestead, to sale under execution for the satisfaction of their claims.

At the death of the husband, the wife surviving him, she is entitled to her dower in the land which during their joint lives was the home site of the husband. The statute does not undertake to confer upon or vest in the wife any title to or estate in the home site of the husband, during their joint lives or at his death, either before or after its conveyance by the husband, without her joinder. During the life of the husband, the wife has only an inchoate right of dower in the home site; at his death, she surviving him, her right of dower becomes consummate. The conveyance by the husband, without her joinder, does not deprive her of her right of dower, either inchoate or consummate; nor does such conveyance confer upon or vest in her any title to or estate in the home site, during his life or at his death. She is entitled to her dower in the home site, after the conveyance, just as she was before the conveyance.

Upon the death of the husband, intestate, nothing else appearing, his statutory home site descends to his heirs, subject to the dower right of his widow. If the husband has conveyed his home site, with or without the joinder of his wife, the heirs acquire no title to or estate in the home site. If he has conveyed the home site with the proper joinder of his wife, his grantee is entitled to the immediate possession of the home site under his deed. If he has conveyed his home site, without such joinder, the grantee is not entitled to possession as against the husband, during the joint lives of the husband and wife; the wife, however, has no title to or right to possession of the home site during the life of the husband. At his death, she has only the right to have dower allotted to her in the home site. If the husband has conveyed his home site, without her joinder, his grantee, claiming under him, and not his heirs, who are barred by his deed, acquire both the title to and the right to possession of the land, which during the lifetime of the husband was his statutory home site.

In *Bank v. Sumner,* 188 N. C., 687, 125 S. E., 489, *Stacy, J.,* after reference to certain provisions of the statute, which make its interpretation difficult, says: "It has been suggested that the statute may apply, and probably was intended to apply, only as against those claiming under a deed from the husband without his wife's proper joinder. We leave its interpretation for future consideration." We think this suggestion well founded. The statute, properly interpreted and construed, does not apply to creditors or heirs of a husband, who is the owner of a statutory home site, and who has conveyed said home site, without the joinder of his wife. Nor does the statute affect the homestead, as defined, and provided by the Constitution.

The purpose of the statute, as appears from both its provisions and its title, is (1) to protect both the husband and the wife so long as the wife shall live, and the husband is under obligation, both legal and moral, to

provide and maintain a home for them both, and (2) at the death of the husband, intestate, the wife surviving him, upon which event her inchoate right of dower becomes consummate, to protect her from controversies and litigation with respect to the allotment of her dower in the lands of which the husband was seized and possessed during the coverture, and which but for the statute he could have conveyed, passing title and possession by his deed, immediately upon its delivery, subject to her dower. That this purpose is in accord with the well-settled policy of this State to encourage the ownership of homes, and to safeguard the family as essential to the good order of society, is, we think manifest.

The statute does not deprive the husband who is the owner of a home site as defined therein, of his *jus disponendi* with respect to such home site. His right of alienation is recognized. This right is only limited and regulated by the provisions of the statute.

The statute limits the effect of a conveyance of his home site made by the husband, without the joinder of his wife, but does not declare such conveyance void. The right to the possession of the home site does not pass to the grantee immediately upon the execution of the deed; nor does the grantee acquire title under the deed upon its execution and delivery. Both the right to possession and the title are postponed until the death of the husband. The title conveyed by the deed, with the right of possession under such title, then passes to the grantee, subject only to the dower right of the wife, if she survives her husband.

The statute further regulates the manner in which the deed for a home site owned by the husband must be executed, where it is contemplated by both the husband and the grantee that possession and title shall pass immediately upon its execution. The wife must assent to and sign the deed voluntarily, which fact must be shown on her private examination according to law. A deed thus executed is sufficient as a conveyance of the statutory home site by the husband, and passes both the possession and the title upon its execution and delivery.

In *Thomas v. Sanderlin*, 173 N. C., 329, 91 S. E., 1028, *Hoke, J.*, says: "While the *jus disponendi* is fully recognized with us as a substantial incident of ownership coming under the constitutional guarantees for the protection of private property, it is also established in this jurisdiction that neither this nor any other proprietary right is absolute in its nature, but the same is enjoyed and held subject to legislative regulation in the reasonable exercise of the police power." Upon this principle, C. S., 2577, first enacted in 1891, and providing that "all conveyances of household and kitchen furniture by a married man, made to secure the payment of money or other thing of value, are void, unless the wife joins therein and her privy examination is taken in the manner prescribed by law, in conveyances of real estate," was sustained. Upon

the same principle, we hold that C. S., 4103, is constitutional. A distinction between C. S., 2577 and C. S., 4103, should be noted. In the former statute, the conveyance without the joinder of the wife is declared to be void; while in the latter statute, such conveyance is declared to be invalid only for certain purposes. The owner of household and kitchen furniture is deprived absolutely of the right to convey said property by mortgage, without the consent of his wife, whereas the owner of a home site is deprived of such right only to a limited extent. If the former statute is constitutional, as held by this Court, it seems that there can be no question as to the constitutionality of C. S., 4103.

C. S., 4103, is not unconstitutional for the reason that the statute is in violation of principles of constitutional law established for the protection of property rights. Nor is the statute void because its provisions are too vague and uncertain for administration. The principle upon which it was held by this Court that the statute involved in *Supply Co. v. Eastern Star Home,* 163 N. C., 513, 79 S. E., 964, was void, does not apply in this case. The provisions of C. S., 4103 are not contradictory or self-destructive, as was held of the provisions of that statute. There may and doubtless will be cases in which it will be difficult to interpret and construe the provisions of this statute in order to determine the rights of the parties. This does not, however, affect the question presented by defendants' appeal in this case. We now hold only that the statute is constitutional and valid and that upon the facts admitted in the pleadings with respect to the 54.75-acre tract of land, the said tract of land, at the date of the execution of the mortgage by Geo. W. Boyd, was his statutory home site, and that therefore there was no error in the order with respect to said tract of land.

The order from which defendants appealed to this Court is

Affirmed.

STACY, C. J., dissenting: I regret to disagree with my brethren on a question of statutory construction, and would not do so, if the decision affected only the immediate parties or would not serve as a precedent in future cases, but after testing C. S., 4103, by all the known rules of interpretation, I am unable to determine, with any reasonable degree of certainty, its meaning or what the Legislature intended to accomplish by its enactment. *S. v. Diamond,* 202 Pac. (N. M.), 988, 20 A. L. R., 1527.

It is the declared law of this jurisdiction that "a statute must be capable of construction and interpretation; otherwise it will be inoperative and void. The Court must use every authorized means to ascertain and give it an intelligible meaning; but if after such effort it is found to be impossible to solve the doubt and dispel the obscurity, if no judicial

certainty can be settled upon as to the meaning, the Court is not at liberty to supply—to make one. The Court may not allow 'conjectural interpretation to usurp the place of judicial exposition.' There must be a competent and efficient expression of the legislative will." *S. v. Partlow,* 91 N. C., 550.

Speaking to the same question in *Drake v. Drake,* 15 N. C., 110, *Ruffin, C. J.,* delivering the opinion of the Court, said: "Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative. The law must remain as it was, unless that which professes to change it be itself intelligible."

And such is the substance of the law as declared by the Supreme Court of the United States in *Yu Cong Eng v. Trinidad,* 271 U. S., 500; *Connally v. General Const. Co.,* 269 U. S., 385; *U. S. v. Cohen Grocery Co.,* 255 U. S., 81; *Collins v. Kentucky,* 234 U. S., 634, and *International Harvester Co. v. Kentucky,* 234 U. S., 216.

To like effect, also, is the law in other jurisdictions. *Wilkerson, District Judge,* in *Re. Di Torio,* 8 F. (2nd), 279, states the general rule as follows: "An act which is so uncertain that its meaning cannot be determined by any known rules of construction cannot be enforced. If no judicial certainty can be settled upon as to the meaning of a statute, the courts are not at liberty to supply one. It must be capable of construction and an interpretation; otherwise it will be inoperative and void. An act is void where its language appears on its face to have a meaning, but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate," citing as authority for the position: *People v. Sweitzer,* 266 Ill., 459, 107 N. E., 902, Ann. Cas., 1916B, 586; *People v. Briggs,* 193 N. Y., 457, 86 N. E., 522; *S. v. Partlow,* 91 N. C., 550, 49 Am. Rep., 652; *S. v. West Side Street Ry. Co.,* 146 Mo., 155, 47 S. W., 959; 25 R. C. L., 811.

Nor is it necessary to look beyond the Court's own opinion in the instant case to demonstrate the ambiguity and uncertainty, and I think invalidity, of the statute.

It is said, in the first place, that the deed of the husband for the undetermined and undefined home site, without the voluntary signature and assent of his wife, is "not valid, under the provisions of the statute, to pass possession or title during the lifetime of the wife, and was without any effect as to her so long as she shall live."

Realizing, however, that the statute gives the wife no estate or interest in the home site as such, and that the possession and title thereto, when conveyed by the husband without the voluntary signature and assent of

his wife, would, under the above statement, be *in nubibus* during her widowhood, it is said that "Both the right to possession and the title are postponed until the death of the husband. The title conveyed by the deed, with the right of possession under such title, then passes to the grantee, subject only to the dower right of the wife, if she survives her husband."

Again, it is stated that "at the death of the husband, intestate, the wife surviving him, upon which event her inchoate right of dower becomes consummate," the purpose of the statute is "to protect her from controversies and litigation with respect to the allotment of her dower in the lands of which the husband was seized and possessed during coverture, and which but for the statute he could have conveyed, passing title and possession by his deed, immediately upon its delivery, subject to her dower."

Thus, it is declared that the deed of the husband for the undetermined and undefined home site, without the voluntary signature and assent of his wife, is invalid to pass possession or title thereto:

1. During the lifetime of the wife or so long as she shall live.
2. Until the death of the husband.
3. Until the widow can have her dower allotted.

These three interpretations are all variant, and the question still remains: What is the real meaning of the statute? I am not criticising the Court's opinion. It is the result of an earnest effort to find a rational interpretation and to give clarity to cloudiness. A majority of the Court considers that this has been done; I think otherwise; and from this difference, springs our divergence of opinion.

Other objections to the workableness of the statute readily suggest themselves:

Is the statute self-executing, or must the home site be claimed, and, if so, by whom?

Who is to determine what the home site shall include, and what not? Is this a question of law for the court or a question of fact for a jury?

Was it intended to be in addition to, or included within, the homestead right?

Is it limited or unlimited in extent and value?

Having once conveyed the home site, without the wife's signature, could it later be taken under execution against the husband, or sold by the husband and the wife, and, if so, for what length of time?

Would a subsequent deed by the husband and wife defeat the husband's prior grantee of all rights in the premises?

What effect would a prior or subsequent separation or divorce have upon the deed executed by the husband without the wife's proper joinder?

On all these matters the statute is silent, and it would require considerable amendment, by way of judicial legislation, to answer them. But this is not the province of the Court. It is ours only to declare the law, not to make it. *Moore v. Jones,* 76 N. C., 187.

It is not possible to weld a pewter handle to a wooden spoon, and, in my opinion, the statute falls within the rule of law, stated in 25 R. C. L., 810, as follows:

"Where an act of the Legislature is so vague, indefinite and uncertain that the courts are unable to determine, with any reasonable degree of certainty, what the Legislature intended, or is so incomplete or is so conflicting and inconsistent in its provisions that it cannot be executed, it will be declared to be inoperative and void."

M. A. BUIE AND WIFE, MRS. M. A. BUIE, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 October, 1929.)

Appeal and Error J c—Findings of fact are presumed correct on appeal.

Where the finding of fact and conclusions of law of the referee are supported by competent evidence and approved by the trial judge, they are presumed correct on appeal, and upon failure of the appellant to show error the judgment will be affirmed.

APPEAL by plaintiff from *Cranmer, J.,* at Chambers, Southport, N. C., 6 July, 1929. From ROBESON. Affirmed.

The summons in this action was dated 16 December, 1920. The original complaint was filed in 1922. Answer filed 6 February, 1924. Amended complaint filed 7 April, 1926. Amended answer filed 11 June, 1926. October Term, 1926, the action was referred to the Hon. J. Bayard Clark, referee. The referee met the parties and their counsel at Red Springs 26 May, 1927, for the purpose of viewing the premises in controversy, and began taking testimony the same day in Lumberton. The final taking of testimony and hearing argument took place at Lumberton on 27 October, 1927. The referee in minute detail found the facts and gave his conclusions of law favorable to defendant. Plaintiff filed exceptions to the report on 10 June, 1929, and the matter was heard on 6 July, 1929. From the judgment of the court below sustaining the referee's finding of fact and conclusions of law, the plaintiff filed exceptions and made assignments of error and appealed to this Court.

Johnson & Floyd and Clyde A. Douglass for plaintiffs.
Dickson McLean and H. E. Stacy for defendants.

PER CURIAM. The main contentions of the parties the Hon. J. Bayard Clark, referee, stated as follows:

"The controversy relates to a small triangular piece of land adjoining defendant's tracks in Red Springs. Plaintiffs allege their ownership in fee of the land and wrongful entry and trespass thereon by defendant; that defendant is estopped from claiming the right to occupy the land by reason of any charter rights because on 1 July, 1884, it took a deed from Hector McNeill for its roadbed proper adjacent to the land in controversy, thereby limiting its charter rights; that defendant has acquired no right to the land in controversy by purchase, condemnation, charter rights or otherwise, and its assertion of the right thereto is a cloud upon plaintiffs' title; that defendant has wrongfully entered and is unlawfully in possession; and plaintiffs ask that they be declared the owners in fee, that the cloud be removed, and that they recover damage. Defendant denies plaintiffs' ownership, and alleges that many years ago its predecessor in title entered into possession of the land in controversy for railroad purposes pursuant to certain charter rights, and that they and it have ever since been in actual possession, using the land for railroad purposes; that it is entitled to an easement of sufficient width on each side of its main line to include the land in controversy; that the land in controversy is necessary in conducting and carrying on both its inter and intra-State business as a common carrier; that any claim which plaintiffs may ever have had to the land in controversy or damages arising from its use is barred by the several statutes of limitations, which it pleads. Upon the hearing a controversy quickly developed as to whether conveyances offered by plaintiffs in proof of title do or do not cover the land in controversy, plaintiffs contending they do and defendants contending they do not."

A carefully prepared map showing the contentions of the litigants, in regard to the disputed *locus in quo,* was filed in the action.

The findings of fact and conclusions of law by the referee comprise fifteen pages of the record. We have carefully read the findings of fact and conclusions of law.

It is well settled in this jurisdiction that error will not be presumed; it must be affirmatively established. The appellant is required to show error, and he must make it appear plainly, as the presumption is against him.

From the findings of fact and conclusions of law by the referee, sustained by the court below, we cannot find any prejudicial or reversible error. The judgment is

Affirmed.

STATE v. DR. MIKE ROBERSON.

(Filed 6 November, 1929.)

Criminal Law G c—Where defendant does not offer character evidence, evidence of his bad character affects only his credibility.

Where a defendant in a criminal action testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence affects only his credibility as a witness, and an instruction that such evidence might be taken as substantive evidence of guilt will be held for reversible error.

APPEAL by defendant from *Sinclair, J.*, at February Term, 1929, of DURHAM. New trial.

Criminal action tried upon an indictment charging defendant with the crime of causing an abortion. C. S., 4226.

From judgment on a verdict of guilty, defendant appealed to the Supreme Court.

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

R. P. Reade and R. O. Everett for defendant.

CONNOR, J. The evidence offered by the State at the trial of this action tended to show that the crime charged in the indictment was committed by the defendant at his office in the city of Durham, on 1 June, 1928. Defendant, as a witness in his own behalf, testified that he was not in his office on that day. His testimony contradicted in every material respect the evidence for the State tending to show that defendant committed the crime. He offered no evidence as to his general character. He relied upon the testimony of his witnesses as tending to corroborate him as a witness in his own behalf.

The State, after defendant had testified as a witness, offered evidence tending to show that the general character of defendant is bad. Defendant offered no evidence to the contrary, either by his own witnesses or upon cross-examination of witnesses for the State. He contended that the jury should find him a credible witness because his testimony was corroborated.

With respect to the evidence as to the character of the defendant, the court instructed the jury as follows:

"Whenever character evidence is offered, however, upon the character of a defendant in a criminal action, the law says that that becomes substantive evidence—when his character is put in issue, as the defendant

has done in this case. So character evidence offered for or against the defendant is substantive evidence, and it is proper for you to consider it as bearing upon the question of his guilt or innocence, upon the theory that a man of bad character would be more apt to commit crimes than a man of good character, or the contrary as the facts may be."

This instruction is not in accord with the well-settled rule with respect to this matter, established and in force in this jurisdiction. The rule is stated by *Brogden, J.*, in *S. v. Nance,* 195 N. C., 47, 141 S. E., 468, as follows:

"If a defendant testified in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence should affect only his credibility as a witness."

In *S. v. Colson,* 193 N. C., 236, 136 S. E., 730, it is said by *Stacy, C. J.*: "In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue, and thus produce evidence of his good reputation and standing in the community (*S. v. Hice,* 117 N. C., 782); but if this be not done, the State cannot offer evidence of his bad character, unless and until he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect only his credibility as a witness and not the question of his guilt or innocence. *Marcom v. Adams,* 122 N. C., 222; *S. v. Traylor,* 121 N. C., 674. Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, pro and con, then becomes substantive proof, and may be considered by the jury as such. *S. v. Morse,* 171 N. C., 777; *S. v. Cloninger,* 149 N. C., 567; *In re McKay,* 183 N. C., 226."

The rule as thus declared has been uniformly enforced by this Court. *S. v. Nance,* 195 N. C., 47, 141 S. E., 468; *S. v. Idol,* 195 N. C., 497, 142 S. E., 588; *S. v. Adams,* 193 N. C., 581, 137 S. E., 357.

In each of the cited cases, new trials were ordered by this Court for error in the failure of the trial judge to observe this rule in his charge to the jury. The learned judge who presided at the trial of this action was evidently inadvertent, while instructing the jury, to the fact, as disclosed by the record, that defendant had offered no evidence as to his character, and therefore had not put his character in issue.

For the error in the instruction defendant is entitled to a

New trial.

ELBERT E. COLLINS BY HIS GENERAL GUARDIAN, ERNEST F. COLLINS, v. NORFLEET-BAGGS, INC.

(Filed 6 November, 1929.)

1. Infants B c—Market value and not contract price of property traded may be recovered by infant upon his disaffirmance of contract.

Where in a contract for the purchase of an automobile an infant is allowed a certain sum for a truck traded in by him, upon disaffirmance of the contract by the infant during his minority and his suit, brought by his next friend, to recover the consideration paid by him, the contract is binding upon neither party thereto, and he is entitled to recover such sums as he has paid on the purchase price and the reasonable market value of the truck at the time of the trade, and if the truck is returned to him, the market value at the time of the trade should be fixed by assessing a reasonable amount for depreciation and use, if any, while in the possession of the defendant, and an instruction that fixes the value of the truck at the amount allowed therefor in the contract is reversible error.

2. Infants B d—Liability of infant for tortious use or destruction of property received by him under contract he has disaffirmed.

Where an infant disaffirms his contract for the purchase of personal property during his minority he is not required by law to account for its use while in his possession or for its loss if squandered or destroyed by him before avoidance of the contract, but he is accountable for its tortious use or destruction after such avoidance and before its surrender.

APPEAL by defendant from *Moore, J.*, at February Term, 1929, of FORSYTH.

Civil action to recover the value of a Chevrolet truck and the sum of $40.95.

On 21 April, 1928, the plaintiff, being a minor, entered into a contract with the defendant, by the terms of which he traded a Chevrolet truck, valued at $250, for a Dodge sport roadster, valued at $659.50, and executed note and mortgage on the Dodge roadster for the balance of $409.50. On 21 May, 1928, the plaintiff made a payment of $40.95 on his note.

Thereafter the Dodge sport roadster was destroyed in a wreck; whereupon, the plaintiff elected to disaffirm his contract, and now sues to recover $290.95, being the sum of the value placed upon the Chevrolet truck at the time of the trade, to wit, $250, and the payment of $40.95, subsequently made on the note.

The trial court instructed the jury that if the plaintiff was a minor at the time of the trade, he would be entitled to recover $290.95, with interest from 22 September, 1928. Exception by defendant.

The jury found that the plaintiff was a minor, and answered the issue of indebtedness in accordance with the above instruction.

From the judgment entered thereon the defendant appeals, assigning errors.

Geo. R. Holton and W. Reade Johnson for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

STACY, C. J. When an infant elects to disaffirm a contract, relative to the sale or purchase of personal property, other than one authorized by statute or for necessaries, what are the rights of the parties?

1. An infant may avoid such a contract, either during his minority or upon arrival at full age. *Pippen v. Insurance Co.*, 130 N. C., 23, 40 S. E., 822.

2. Upon such avoidance, the infant may recover the consideration paid by him, either in money or property, with the limitation that he must restore whatever part of that which came to him under the contract he still has, or account for so much of its value as may have been invested in other property which he has in hand or owns and controls. *Hight v. Harris,* 188 N. C., 328, 124 S. E., 623; *Millsaps v. Estes,* 137 N. C., 536, 50 S. E., 227, 14 R. C. L., 238.

3. But the infant is not required to account for the use or depreciation of the property while in his possession, or for its loss, if squandered or destroyed, for this is the very improvidence against which the law seeks to protect him *(Utterstorm v. Kidder,* 124 Me., 10, 124 Atl., 725), with the exception, perhaps, that he might be required to account for any insurance money received by him, on the theory that such money was a substitute for the property destroyed. *Morris Plan Co. v. Palmer,* 185 N. C., 109, 116 S. E., 261; *Devries v. Summit,* 86 N. C., 132.

4. The infant, however, would be liable for any tortious use or disposition of the property after such avoidance and before its surrender to those from whom it was obtained. *Devries v. Summit, supra.*

5. Where the infant parts with personal property he may, upon disaffirmance, recover the value of such property, as of the date of the contract, but he is neither bound by, nor entitled to be awarded, the price fixed by the contract, for its real value may be more or less than the amount so stipulated. *Carpenter v. Grow,* 247 Mass., 133; *Beickler v. Guenther,* 121 Iowa, 419. Neither side is bound by any part of the contract, when once rescinded. *Morris Plan Co. v. Palmer, supra.*

In the instant case the plaintiff is entitled to recover the $40.95 which he paid on his note, together with the fair market value of the Chevrolet truck at the time of the trade. But he is not entitled, as a matter of law, to the sum of $250, the stipulated exchange value of said truck. In so instructing the jury, the trial court committed error. Its market value may be more or less than its stipulated exchange value.

If the Chevrolet truck is to be returned to the plaintiff, the jury will fix its value, as of the date of the contract, by assessing a reasonable amount for depreciation and use, if any, while in the possession of the defendant.

For the error, as indicated, in the court's instruction on the measure of damages, a new trial must be awarded; and it is so ordered.

New trial.

CHARLES R. REECE v. DURHAM COCA-COLA BOTTLING COMPANY.

(Filed 6 November, 1929.)

Food A a—In this action to recover damages for foreign substance in bottled drink plaintiff's evidence held insufficient.

In his action to recover damages resulting from foreign and deleterious substances in a bottled drink the burden is on the plaintiff to show the presence of foreign or deleterious substances therein, and where the plaintiff's evidence is to the effect that he swallowed something and spit, and that where he spit a fly was immediately found, but that he could not swear that the fly was ever in his mouth, with evidence of another witness that he had found a substance in a drink bottled by the defendant, but could not swear in what year he found it, the plaintiff's evidence is too vague and indefinite to establish the defendant's negligence, and his motion as of nonsuit should have been granted.

CIVIL ACTION, before *Sinclair, J.*, April Term, 1929, of GRANVILLE.

The plaintiff alleged "that on the morning of 8 July, 1926, plaintiff entered the store of said C. H. Breedlove in the town of Oxford, and purchased a bottled coca-cola, which had been bottled and distributed by the defendant; that while plaintiff was engaged in drinking said bottled coca-cola, and after he had drunk about all of the contents of said bottle he discovered something hard in his mouth; that he immediately spat out what was in his mouth, and upon examination discovered that it was a large green bottle fly, which had entered plaintiff's mouth with the other contents of said bottle." Plaintiff further alleged that by reason of the presence of said fly in the beverage he became sick and was unable to eat for several days.

Issues were submitted to the jury and answered in favor of plaintiff. The verdict awarded damages in the sum of $50. The defendant offered no evidence.

From judgment upon the verdict defendant appealed.

No counsel for plaintiff.
Brawley & Gantt for defendant.

BROGDEN, J. Plaintiff testified: "I was talking with Mr. Lanier while I was drinking. I swallowed something and spit, but don't know what it was. It scratched like a piece of trash. As soon as that hit my throat I spit the balance on the floor. I knew I swallowed something, but I did not feel anything else in my mouth. I did not feel the fly in my mouth. I would not swear that it was ever in my mouth."

There was uncontradicted evidence that at the place on the floor where plaintiff spit a fly was immediately found. However, it is apparent that plaintiff's own narrative fails to disclose the actual presence of a fly in the beverage.

Plaintiff offered the testimony of a witness who stated that he discovered something in a bottle once or twice "while working in a filling station that sold beverage bottled by the defendant." Witness further testified: "I know almost that it was in 1926 that I found the substance in the bottle, but I do not know entirely, and I would not swear to it. . . . I would not swear that it was 1926 or 1927 when I found that substance in the bottle." . . .

This evidence was too vague and indefinite to establish negligent default.

The law imposed upon the plaintiff the burden of offering evidence tending to show the presence of foreign and deleterious substance in the beverage. The principle was thus stated in *Perry v. Bottling Co.*, 196 175, 145 S. E., 14. "It is settled law in this jurisdiction that the principle of *res ipsa loquitur* does not apply to personal injury occasioned by bursting bottles or from eating food alleged to be unwholesome, or for partaking of a bottled beverage when there is no evidence tending to show negligence in the preparation of the food or beverage and no deleterious or harmful substance is found therein." *Lamb v. Boyles*, 192 N. C., 542, 135 S. E., 464.

We are of the opinion that the motion for nonsuit should have been allowed.

Reversed.

STATE v. U. W. ROBERTS.

(Filed 6 November, 1929.)

Husband and Wife A a—Wilfulness is essential of criminal abandonment.

Where the defendant is indicted under C. S., 4447, for failure to provide adequate support for his minor children, and in the prosecution of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action

by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support, C. S., 4448, and an instruction that leaves out this essential element of the crime will be held for reversible error.

CRIMINAL ACTION, before *Sinclair, J.*, at March Term, 1929, of ORANGE.

The defendant was indicted for failure to provide adequate support for his children under C. S., 4447. The evidence tended to show that the defendant and his wife were not living together and he had not provided any support for his minor children since 1 January, 1928.

The evidence further tended to show that Lizzie Belle Roberts, wife of defendant, instituted a civil action against him for the purpose of obtaining alimony without divorce and for an allowance out of the property of the defendant for the support of the wife and the minor children of the marriage. Thereafter, at June Term, 1927, a consent judgment was signed, awarding all the personal property of defendant except his wearing apparel, farming tools, automobile, photographs of himself and members of his family, and half of the crop of 1926, to the wife. It is further recited in said judgment that the defendant, U. W. Roberts, had executed a deed to his daughter, conveying all of his real estate to said daughter for the benefit of his wife and children.

The defendant was convicted and sentenced to serve a term of twelve months on the roads.

From judgment pronounced defendant appealed.

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

Gattis & Gattis for defendant.

BROGDEN, J. The trial judge charged the jury as follows: "If you find from all the evidence beyond a reasonable doubt that—under these circumstances I have given you—that he has not provided adequate support during that time, taking in consideration his circumstances in life and his means, you will return a verdict of guilty; if you are not so satisfied, or if you have a reasonable doubt about it, you will return a verdict of not guilty."

The defendant excepted to the charge as given upon the ground that it omitted the essential element of wilfulness. The exception is sustained. *S. v. Yelverton,* 196 N. C., 64, 144 S. E., 534.

The State relies upon the presumption of wilfulness arising from the application of C. S., 4448. However, C. S., 4448, was construed in *S. v.*

Falkner, 182 N. C., 793, 108 S. E., 756. The opinion declares: "In this connection it may be well to observe that the next section, C. S., 4448, dealing with what shall be deemed presumptive evidence of a wilful abandonment, requires the showing of something more than a mere separation and failure to provide adequate support."

New trial.

W. A. SHOFFNER v. W. N. THOMPSON, ATLANTIC COAST REALTY COMPANY AND J. W. FERRELL.

(Filed 6 November, 1929.)

False Pretense A a—In this case held representations were not of subsisting fact and defendant was not liable therefor.

Where the owner of land employs agents to subdivide and sell it at public auction, and there is an existing registered deed of trust on the land of which the selling agents had knowledge, and at the sale the selling agents stated that "we guarantee a good, clear title and no encumbrance" to purchasers, the statement of the agents was not a representation that there was no encumbrance on the land, but a promissory statement that the lots would be conveyed to the purchasers with a covenant against encumbrances, and where the owner delivers to the purchasers such a deed, but fails to apply the proceeds of the sale received by him to the deed of trust, and the land is sold under foreclosure thereof, a purchaser at the auction sale may not recover against the selling agents on the representation made by them.

APPEAL by defendants, Atlantic Coast Realty Company and J. W. Ferrell, from *Sinclair, J.,* at April Term, 1929, of ALAMANCE. Reversed.

Action to recover damages resulting from the purchase by plaintiff of land from defendant, W. N. Thompson. The said land was sold for the said W. N. Thompson by the defendant, Atlantic Coast Realty Company, as his agent. The defendant, J. W. Ferrell, is an officer of the said Atlantic Coast Realty Company, a corporation.

After the plaintiff had paid the purchase price for said land, the same was sold under the power of sale contained in a deed of trust from W. N. Thompson to E. S. Parker, Jr., trustee. The said deed of trust was recorded prior to the date of the deed from W. N. Thompson to plaintiff. Plaintiff has thus lost the land which he purchased from the said W. N. Thompson and has suffered damages in the sum of $480, the purchase price which he paid for same.

Plaintiff alleged that he was induced to purchase said land from W. N. Thompson by false and fraudulent representations made to him

by J. W. Ferrell, acting for and in behalf of the Atlantic Coast Realty Company, the agent of the defendant, W. N. Thompson. Plaintiff alleged that said representations were to the effect that there was no encumbrance on said land at the time it was sold to and purchased by plaintiff.

The defendants, Atlantic Coast Realty Company and J. W. Ferrell, denied that they made the representation as alleged in the complaint. They allege that in the sale of the said land to the plaintiff they acted as agent for the defendant, W. N. Thompson, as was well known to the plaintiff. They deny that they are liable to plaintiff for any damage he has sustained resulting from his purchase of said land.

The defendant, W. N. Thompson, filed no answer to the complaint. There was a judgment in favor of the plaintiff and against the defendant, W. N. Thompson, for damages resulting from a breach of his covenant against encumbrances contained in his deed to plaintiff. The defendant, W. N. Thompson, did not except to or appeal from said judgment.

The issues submitted to the jury were answered in accordance with the contentions of the plaintiff.

From judgment on the verdict the defendants appealed to the Supreme Court.

Carroll & Carroll for plaintiff.
Shuping & Hampton for defendants.

CONNOR, J. On 16 August, 1923, the defendant, Atlantic Coast Realty Company, a corporation, conducted a sale of land, at or near the town of Burlington, in Alamance County, North Carolina, for its co-defendant, W. N. Thompson. The said land had been subdivided into lots for the purpose of said sale. The lots were offered for sale by auction. The plaintiff attended said sale as a prospective purchaser of lots.

Plaintiff testified that after the terms of the sale had been announced the defendant, J. W. Ferrell, acting for and in behalf of the defendant, Atlantic Coast Realty Company, stated to those present, including himself, that the lots were offered for sale for W. N. Thompson, as owner, and that the Atlantic Coast Realty Company was selling the lots as his agent. He then made the following statement: "We guarantee a good, clear title, and no encumbrances to any man or woman who buys a lot at this sale." After a few lots had been sold, there was some discussion among the prospective bidders for the other lots as to whether purchasers of lots at said sale would get a good title. The sale was

stopped for a few moments. J. W. Ferrell then repeated his statement to the effect that "we guarantee a good, clear title and no encumbrance to any man or woman who buys a lot at this sale." The defendant, W. N. Thompson, was present when both these statements were made by his agent.

After the said statements were made, the plaintiff purchased several of the lots. The aggregate purchase price for said lots was $480. At the close of the sale, a deed executed by W. N. Thompson and his wife, and conveying to plaintiff the lots purchased by him was delivered to and accepted by plaintiff. This deed contains the usual warranty clause in words as follows: "And the said parties of the first part covenant that they are seized of said premises in fee, and have the right to convey the same in fee simple; that the same are free and clear from all encumbrances and that they, the parties of the first part, will warrant and defend the title to the same against the lawful claims of all persons whomsoever."

Part of the purchase price for the lots conveyed to plaintiff by W. N. Thompson and his wife was paid by him in cash; the balance was evidenced by his notes, secured by a mortgage on said lots. Plaintiff paid these notes as they became due. After the payment of the entire purchase price for said lots by the plaintiff, the said lots were sold by E. S. Parker, Jr., trustee, under the power of sale contained in a deed of trust executed by the said W. N. Thompson to the said E. S. Parker, Jr., trustee. This deed of trust was executed on 12 September, 1922, and was recorded prior to the date of the conveyance of the lots to the plaintiff. It is admitted that by the foreclosure of said deed of trust, plaintiff has lost the lots conveyed to him by W. N. Thompson and his wife, and that he has thereby sustained damages in the sum of $480.

At the date of the sale, at which plaintiff purchased the lots conveyed to him by W. N. Thompson and wife, the defendants, Atlantic Coast Realty Company and J. W. Ferrell, knew that the deed of trust executed by W. N. Thompson to E. S. Parker, Jr., trustee, and duly recorded in Alamance County, was outstanding and in full force. They were informed by W. N. Thompson that he had made arrangements with the holders of the notes secured by said deed of trust, and with the trustee, for the cancellation of the same. The proceeds of the sale made by the Atlantic Coast Realty Company for the said W. N. Thompson were sufficient in amount for the payment of said notes. These proceeds went into the possession of W. N. Thompson. He failed to pay the notes secured by the deed of trust to E. S. Parker, Jr., trustee, and on 18 October, 1927, the said deed of trust was foreclosed, and the land conveyed thereby, including the lots purchased by plaintiff, was conveyed by the trustee to James N. Williamson.

Upon the facts shown by all the evidence offered at the trial of this action—such evidence being viewed in the light most favorable to the plaintiff—there was error in the refusal of the motion of defendants for judgment as of nonsuit. For this error, the judgment must be reversed.

Conceding, for the purposes of this appeal, that the defendants would be liable for false and fraudulent representations made by them as agents of W. N. Thompson, by which plaintiff was induced to purchase lots at the sale, as alleged in the complaint, notwithstanding plaintiff knew that defendants were acting as agents of W. N. Thompson in making said representations, and said representations were made in the presence and with the knowledge of the said W. N. Thompson, the evidence fails to show that the statements made by J. W. Ferrell, acting for and in behalf of the Atlantic Coast Realty Company, were representations of a subsisting fact. Defendants did not represent to plaintiff that there was no encumbrance on the lots which they proposed to sell to him, and which plaintiff afterwards purchased; plaintiff's testimony shows only a promissory statement made by defendants which induced him to bid for lots offered for sale by defendants, as agents for the owner. Plaintiff paid for the lots upon the execution and delivery to him of the deed of W. N. Thompson and wife, containing their covenant against encumbrances. The damages sustained by plaintiff resulted from a breach of this covenant. For these damages plaintiff has recovered judgment against W. N. Thompson, from which the said Thompson has not appealed. It is not contended by plaintiff that the defendants are liable on the covenant.

In *Bank v. Yelverton,* 185 N. C., 314, 117 S. E., 299, it is said: "As a general rule fraud cannot be predicated upon promissory representations *(Pritchard v. Dailey,* 168 N. C., 330), because a promise to perform an act in the future is not in the legal sense a representation, but it may be predicated upon the nonperformance of a promise, when the promise is a device to accomplish a fraud. 12 R. C. L., 254, *et seq.*" When the evidence shows only a promise, which has been performed, there is nothing to support an inference that the promise was a device to accomplish a fraud. In the instant case, the defendants represented to plaintiff that if he purchased lots at the sale, which they were conducting as agents for the owner of the lots, the lots would be conveyed to him with a guaranty or covenant that there was no encumbrance on them. The deed tendered to plaintiff by the owner and accepted by him, contained a covenant against encumbrances. If W. N. Thompson, the owner of the lots, who was present when the statements were made by his agent, as testified by plaintiff, was not liable in this action for false and fraudulent representations, as held by the trial court, it is difficult to see how the agent can be liable. If the judgment which plaintiff has recovered in

this action is not collectable because the judgment debtor is insolvent, that is the misfortune of the plaintiff. He has failed to show that appellants are liable to him for the damages which he has sustained by the breach of the covenant in his deed. The judgment against them is

Reversed.

STATE v. C. W. SNEED.

(Filed 6 November, 1929.)

Criminal Law D a—In this case held abandonment was in this State and State court has jurisdiction.

The constructive domicile of the wife is that of her husband, and where he has resided in another State and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. C. S., 4447.

APPEAL by defendant from *Barnhill, J.*, and a jury, at May Criminal Term, 1929, of DURHAM. No error.

This is a criminal action against the defendant for abandonment under C. S., 4447.

Mrs. C. W. Sneed testified in part: That she married the defendant 7 May, 1927, in DeLand, Florida; that her home had been in Daytona, Florida. She and her husband lived in Daytona until 11 July, 1927, and went to Atlanta, Ga. On 1 January, 1928, in Atlanta, Ga., there was born to the union a boy. About three weeks after the birth of their child her husband sent her back to Daytona, where she came from, until he could find work; that she lived there in "the small garage apartment of her mother's home." He was to go to Durham to find work and promised to send for her. She frequently heard from him while in Durham, but he did not send for her. She went to Durham on 8 June, 1928, as she had nowhere else to stay, and he was her husband and she thought her place was with him. She stayed in Durham five days at the Washington Duke Hotel, where he registered her, and saw her husband while there, and he paid her hotel bill, $15. He then took her and their child to Raleigh, and at the station in Raleigh he gave her $30 and sent her back. Said he didn't want to live with her any longer and sent her back; that he had not told any one he was married, and was out for a *"big time."* She came back to Durham about 14 September, but did not write she was coming. She went to the home of her husband in

West Durham with her grip, but the defendant refused to let her stay there. He had contributed nothing towards her support for a week before she swore out the warrant. He gave her $154 from January to June, and $100 from June to September. She received a card from him, mailed at Winchester, Va. The message on the card was *"Drunk again, still traveling, having a big time. Bill."* The card was sent to Daytona Beach. She was there with her child at the time. The last time defendant contributed anything to her support was 8 September, 1928. He had not contributed anything to her support or to the child's support since 8 September, 1928. She came to Durham after she received the last remittance. Defendant did not give her anything the last time she was in Durham. The trial in recorder's court was on 19 September. She was working at a salary of $15 a week. She had no other means of support for herself and child. At the time she was making $15 a week she had to employ a nurse to look after the child; she had to pay her $10 a week.

The defendant introduced no evidence.

The jury rendered a verdict of guilty. Judgment was rendered in the court below on the verdict and the defendant appealed to the Supreme Court, assigning error.

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

McLendon & Hedrick for defendant.

CLARKSON, J. The defendant assigns error:

The refusal of the court below to allow the defendant's motion of nonsuit upon the ground that if any offense was committed it was not committed in the State of North Carolina, and, therefore, not within the jurisdiction of this Court.

We do not think the assignment of error can be sustained.

The law pertinent, C. S., 4447, in part is as follows: "If any husband shall wilfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

There is no assignment of error to the charge of the court below. The major contention made by defendant was to the effect that if any offense was committed, it was not committed in the State of North Carolina; therefore, the court had no jurisdiction.

The court charged fully the elements of the crime that the State had to establish beyond a reasonable doubt before the defendant could be convicted.

"There are two elements of this offense—wilful abandonment and failure to support—and both must be alleged and proved. *S. v. Toney,*

162 N. C., 635; *S. v. May,* 132 N. C., 1021; *S. v. Smith,* 164 N. C., 476; *S. v. Hopkins,* 130 N. C., 647. Abandonment is not a continuing offense, day by day *(S. v. Hannon,* 168 N. C., 215), but the duty to support the wife is a continuing one during the existence of the marital union, and must be performed unless there is some legal excuse for nonperformance of it, and when defendant withdrew his support from his wife he became indictable under the statute, even though he lived in another State and had kept his promise and supported his wife for several years. His last delinquency must fix the beginning of his criminal liability." *S. v. Beam,* 181 N. C., 599; *S. v. Yelverton,* 196 N. C., 64.

It was contended by the State that the defendant wilfully abandoned his wife and child without providing adequate support in Durham, N. C. The defendant contended that if he did wilfully abandon his wife and child without providing adequate support that this took place in Georgia and he committed no offense in North Carolina. These contentions were fully set forth in the charge by the court below, and the court charged: "It is a question of fact for you to determine upon the evidence."

In 30 C. J., at page 511, part section 18, we find the following: "It is the husband's right to choose and establish the matrimonial domicile, and in general it is the duty of the wife to submit to the determination of the husband and to follow him to the domicile of his choice. On a change of domicile by the husband, it is the duty of the wife to follow him to the new domicile. The right of the husband to determine the domicile must be reasonable and not arbitrarily exercised. In exercising the right, the husband should have due regard for the comfort, health, welfare, safety and peace of mind of the wife." 13 R. C. L., at p. 989, sec. 9.

"Where a husband changes his residence from a consideration of convenience or business advantage it is, generally speaking, the duty of his wife to accompany him." *Monahan v. Auman,* 39 Pa. Super., 150, 153; 30 C. J., *supra.*

The record shows that the husband's domicile was in Durham. *In re Ellis,* 187 N. C., 840; *Gower v. Carter,* 194 N. C., 293, 195 N. C., 697. In *Hicks v. Skinner,* 71 N. C., at p. 543, it is said: "It must be held, however, that upon marriage the domicile of the wife by construction of law, became that of the husband."

Under the facts and circumstances of this case, we think that there was sufficient evidence to be submitted to the jury that the abandonment was wilful, and that there was a failure to provide adequate support, and both took place in Durham, N. C. We find

No error.

T. C. BOWIE v. H. C. TUCKER AND MARTHA TUCKER.

(Filed 6 November, 1929.)

1. Judgments K b—Finding of meritorious defense necessary to setting aside judgment for excusable neglect.

Where the judge presiding at a term of the Superior Court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, C. S., 600, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed.

2. Trespass B b—Action of trespass was alleged in this case.

Where an alley has been dedicated to the public and accepted by it, an allegation of the complaint in an action against an abutting owner that he has closed the alley with an obstruction and fastened the end on to the plaintiff's abutting property on the other side is one to the effect that the defendant has trespassed upon the property rights of the plaintiff and is sufficient to allege a good cause of action.

3. Judgments L a—Judgment sustaining demurrer and granting time for filing amended pleadings does not estop plaintiff.

Where the trial court enters a judgment sustaining a demurrer to the complaint and therein grants the parties additional time to file amended pleadings in his plenary discretionary power, the order sustaining the demurrer, unappealed from, does not work an estoppel upon the plaintiff to proceed on the amended pleading.

APPEAL by plaintiff from *McElroy, J.*, at July Term, 1929, of ASHE.

The plaintiff brought suit to recover damages for wrongfully closing an alley dedicated to public use and wrongfully connecting fences of the defendants with a brick and concrete wall erected on the plaintiff's property.

Judge Clement sustained a demurrer to the complaint and said at the time that he would grant the plaintiff time to file an amended complaint and the defendants time to answer. The parties were then in court at a regular term. Judge Clement inadvertently signed a judgment dismissing the action. This judgment was not tendered to the plaintiff or his attorney. Upon discovering the mistake, without notice given to the defendants or their attorney he canceled the first judgment and rendered another in accordance with his announced purpose, sustaining the demurrer and allowing the plaintiff 40 days in which to file an amended complaint, and the defendants 40 days thereafter in which to answer. Within the time allowed him the plaintiff filed an amended complaint, a

copy of which was given the clerk and by the clerk mailed to, but not received by, the defendants' attorney. The defendants filed no answer to the amended complaint, and on 4 March, 1929, the clerk signed a judgment by default and inquiry. The defendants appealed and Judge McElroy, upon facts found and set out in his judgment, adjudged that the defendants were entitled to have the judgment by default and inquiry set aside on the ground of excusable neglect and reversed the judgment of the clerk. To Judge McElroy's judgment plaintiff excepted and appealed therefrom to the Supreme Court.

C. W. Higgins for plaintiff.
W. R. Bauguess for defendants.

ADAMS, J. The clerk gave judgment by default and inquiry and the defendants made a motion before him to set aside the judgment on the ground of surprise and excusable neglect. The motion was denied, and upon appeal the clerk's judgment was reversed. C. S., 600. An applicant for relief under this section must show a meritorious defense, as well as excusable neglect. *Dunn v. Jones,* 195 N. C., 354; *Crye v. Stoltz,* 193 N. C., 802; *Helderman v. Mills Co.,* 192 N. C., 626. Conceding that there is sufficient evidence of excusable neglect to support the finding to this effect, we have discovered no evidence whatever, and of course there is no finding, of a meritorious defense.

The defendants contend that this principle is not applicable because the complaint does not state a cause of action. We do not concur in this conclusion. The allegations are that the brick wall is entirely on the property of the plaintiff; that between his property and that of the defendants there is an alley which has been dedicated to the public use; that it has been closed by the defendants; and in effect that the defendants have trespassed on the plaintiff's property by connecting their fences with his wall. In *Milliken v. Denny,* 135 N. C., 19, cited and relied on by the defendants, it was said, "We find no suggestion in the complaint that the alleged alley was dedicated to any public use"; and the absence of an allegation of dedication marks the difference between the complaint in that case and the one in the case before us. Where there is a dedication and acceptance of property to the use of the public the right of user at once arises and time is no longer material. *Tise v. Whitaker,* 146 N. C., 374. This is the substance of the amended complaint, which the plaintiff is entitled to establish by competent evidence, unless the defendants disconnect their fence from the plaintiff's wall and reopen the alley, the plaintiff alternately asking either this relief or damages for the alleged wrong.

The defendants finally advert to the principle that an unappealed judgment sustaining a demurrer to the merits of an action estops the plaintiff from further proceedings. If nothing more than a judgment sustaining the demurrer appeared in the present record the position would merit serious consideration. *Bank v. Dew,* 175 N. C., 79; *Swain v. Goodman,* 183 N. C., 531. But Judge Clement, during a regular term of the Superior Court, made an order in the exercise of his discretion granting the parties time in which to file additional pleadings. Pursuant to this order the plaintiff filed his amended complaint. The order sustaining the demurrer to the former complaint could not therefore work an estoppel upon the plaintiff to proceed on the amended pleading. That the judge had the power to make the order is unquestionable. *Goins v. Sargent,* 196 N. C., 478; *Hines v. Lucas,* 195 N. C., 376; *Aldridge v. Insurance Co.,* 194 N. C., 683. Indeed, permission to file amended pleadings after a demurrer is sustained, if the judge thinks the ends of justice will be thereby promoted, is suggested as the proper practice in *Milliken v. Denny, supra.*

The order setting aside the judgment by default and inquiry is

Reversed.

CHARLIE RHODES v. THE AMERICAN UPHOLSTERY COMPANY.

(Filed 6 November, 1929.)

Appeal and Error J e—Where plaintiff could not recover on any aspect of case he will not be awarded a new trial.

Where the plaintiff cannot recover in his action under any aspect of the evidence, error which may have been committed upon certain phases of the case will not be regarded as reversible, and a new trial will not be granted.

APPEAL from *MacRae, Special Judge* and a jury, at April Special Civil Term, 1929, of DAVIDSON. No error.

This is an action for actionable negligence, brought by plaintiff against defendant claiming injury to his left eye. The defendant denied negligence and set up plea of contributory negligence and assumption of risk.

The usual issues were submitted to the jury and the answer to the first one: "Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" was No.

Walser & Walser for plaintiff.
McCrary & DeLapp for defendant.

PER CURIAM. If there is error in the trial of this action in the court below, we think it harmless. From the evidence appearing in the record, we do not think it sufficient to have been submitted to the jury to sustain a recovery for actionable negligence.

If error should be found and a new trial granted, it would not profit plaintiff. If a new trial was awarded no different result could follow. The entire testimony relevant to the issues was before the court. From this evidence it is apparent that in no aspect of it could plaintiff recover. In such cases our decisions are to the effect that a new trial will not be granted. *Bateman v. Lumber Co.*, 154 N. C., 248; *Booth v. Hairston*, 193 N. C., 278. For the reasons given, there is

No error.

JOHN W. MARSHALL ET AL. v. TOWN OF KERNERSVILLE.

(Filed 6 November, 1929.)

Appeal and Error J a—Where allegations of complaint are not supported by evidence, judgment dissolving restraining order will be affirmed.

Where a temporary restraining order has been granted against an assessment against property by a town for street improvements upon the grounds of insufficiency of petition, and that the assessments were confiscatory, the plaintiffs being some of those assessed who had not paid: *Held*, the refusal of the trial judge to continue the injunction to the hearing will be sustained on appeal in the absence of satisfactory evidence to support the determinative allegations of the complaint.

APPEAL by plaintiffs from *Clement, J.*, at Chambers, 28 March, 1929. From FORSYTH.

Civil action to restrain the defendant from enforcing liens for street assessments.

The street improvement work in question was commenced in October, 1924, and completed in February, 1926. The assessment roll was confirmed 10 March, 1926. Many assessments were paid as they became due, but others were not. Whereupon, in December, 1928, the defendant advertised the delinquent properties for sale. Plaintiffs instituted this action 5 January, 1929, to enjoin the sales, alleging that the petitions for said proposed improvements did not, in all cases, contain the requisite number of names and amount of feet frontage; that said petitions, therefore, were insufficient; that the assessments, judgments and liens

are confiscatory and void in that they attempt to lay a charge on private property without due process of law, etc.

It is further alleged, on information and belief, that there was lack of good faith, collusion and fraud on the part of the governing board of the defendant town in procuring the said petitions.

In the absence of satisfactory evidence to support the determinative allegations of the complaint, the temporary restraining order was dissolved and the action dismissed.

The plaintiffs appeal, assigning errors.

William Porter, J. E. Alexander and L. M. Butler for plaintiffs.
Morehead & Murdock for defendant.

PER CURIAM. No sufficient cause having been shown for disturbing the judgment, the same is

Affirmed.

GEORGE M. GLENN ET AL. V. E. E. CULBRETH ET AL.

(Filed 13 November, 1929.)

1. Appeal and Error J a—Where act has been done an appeal from order dissolving temporary order will not be decided.

Where a temporary order has been issued restraining the use of the registration for a primary election and upon a hearing the order has been dissolved upon proper finding of facts that the registration was regular, and the election has been held, an appeal from the order dissolving the temporary restraining order presents only moot questions, and will not be decided.

2. Elections I a—Action to try title to public office is by quo warranto and not mandamus.

Where the plaintiffs, residents of a city, institute an action praying that the use of the registration for a primary election be enjoined and that *mandamus* issue for a new registration, and a temporary restraining order issued therein has been dissolved, and the election has been held, an appeal from the dissolution of the temporary restraining order, if decided in favor of the appellants, would be in effect an action to try title to office, which cannot be done by *mandamus*, the proper remedy being *quo warranto*.

3. Elections D c—Voters registered by third persons or failing to take oath not necessarily disqualified.

Failure to administer an oath to voters applying for registration does not result in a forfeiture of their right to vote, nor does their registration by third persons necessarily work a disqualification.

4. Elections I d—Where it is not shown that result of election would be affected the judgment of the trial court will be upheld.

Where there is no allegation or finding of fact by the trial judge that irregularities complained of in the registration of voters would have affected the result of an election, an appeal from his order dissolving a temporary order restraining the use of the registration will not be disturbed on appeal.

5. Elections E c—Remedy for irregular registration was by challenge to voters and not mandamus for new registration in this case.

Where it is alleged that the registration of voters in a primary municipal election was irregular and fraudulent, and the plaintiffs seek *mandamus* to compel a proper registration, and the statute and the charter of the city under which the election is to be held provide for challenge to voters so registered: *Held*, *mandamus* being a proceeding in equity will not be issued, there being an adequate remedy at law by way of challenge provided by statute. C. S., 5972.

CIVIL ACTION, before *Midyette, J.*, at Chambers, in Raleigh, 12 April, 1929.

The plaintiffs, alleging that they were residents and voters of the city of Raleigh, instituted an action against the defendants, Commissioners of the City of Raleigh, and joined as defendants the registrars of said city. The plaintiffs alleged that a primary election was to be held in Raleigh on 22 April for the purpose of choosing commissioners for said city and a judge of the city court, said primary to be followed by the general election in the city, to be held on the first Monday of May, 1927.

The plaintiffs based their cause of action upon the following contentions:

(a) That the defendants, commissioners of the city of Raleigh, were candidates to succeed themselves and unlawfully attempted to select registrars favorable to their candidacy.

(b) That the defendants unlawfully and illegally printed certain blank cards containing space for the name of the voter and placed such cards in the hands of employees of the city to procure signatures to such cards which were then to be taken to the registrars and placed upon the registration books.

(c) That names of voters have been put upon the registration books unlawfully in all precincts.

(d) That the registrars were not sworn and qualified according to law.

(e) That the registrars have permitted third persons to place names on the registration books.

(f) That applicants for registration had not been sworn as required by law.

(g) That names of voters had been placed on the books by request over the telephone.

Upon such allegations plaintiffs prayed that the defendants and officers and employees of the city be restrained from using said registration and that a writ of mandamus issue.

A temporary injunction was issued and the cause was heard by Midyette, J., on 12 April.

The defendants filed answer, denying fraud or duress, and alleging that the primary was held in accordance with the charter of the city of Raleigh, same being chapter 59, Private Laws of 1913. Affidavits were filed by the parties, and after hearing the evidence the court rendered judgment, the pertinent portions of which are as follows: "This cause coming on to be heard before his Honor, G. E. Midyette, judge holding the courts of the Seventh Judicial District, by exchange, at Chambers in the city of Raleigh, N. C., on this 12 April, 1929, upon a hearing from the citation served upon the defendants in said cause, the same having been made returnable for 16 April, 1929, at 9:30 o'clock a.m.; but upon motion of the defendants the court, in its discretion, upon notice, having shortened the time for said hearing, and the cause having been reset for a hearing on 12 April, 1929, at 7:30 o'clock p.m., and the said hearing being heard upon the complaint, answer and affidavits filed herein, and upon the argument of counsel, and the plaintiffs by permission of the court, having subpœnaed each and every one of the defendant registrars then and there to appear and bring with them the registration books of the several precincts of the city of Raleigh in the hands of the several defendant registrars; and having heard the complaint, reply and the affidavits of the plaintiffs and the affidavits and answer of the defendants, and the court being of the opinion that the matters and things in controversy were largely ones of law, but found as a fact:

That the registration books for said primary election do not close until midnight 13 April, 1929, and that the registration books complained of are open for challenge against any voters whose names appear thereon that may not be properly or legally registered, and that such remedy is open to the complainants or any other interested persons; and it further appearing to the court that only one other day is now open for registration of voters, as provided in the charter of the city of Raleigh; and the court being of the opinion that it is not proper or necessary to continue the restraining order heretofore made against the defendants prohibiting them from the matters and things set out in the original order;

And it further appearing to the court, and it being found as a fact, that the defendant commissioners have regularly and properly called said election, and have forthwith duly appointed registrars and provided them with proper books for the registration of voters, and have properly advertised the said election and done all other things required

of them by law; and the court being of the opinion that having done these things that the prayer of the complaint asking for mandamus to compel them to order a new registration and other things contained therein, are not proper or necessary in view of what has already been done; and the court being of the further opinion that to now interfere with the registration and election about to be held would be against the public interest, and would work great confusion in holding the election; and the court further being of the opinion that the plaintiffs have an adequate remedy at law:

It is therefore ordered, adjudged and decreed that the restraining order and injunction issued in the cause be, and the same is hereby dissolved, and the court further refuses and declines to grant the prayer for a mandamus to compel the commissioners of the city of Raleigh to provide for a new registration of the voters of said city."

From the foregoing judgment the plaintiffs appeal.

W. F. Evans for plaintiffs.
Clifton Beckwith and William B. Jones for defendants.

BROGDEN, J. The law provided for the regular city election on the first Monday in May, 1927. It was conceded in the oral argument that the election was held and the defendants, commissioners, were elected. The injury complained of has thus become accomplished and completed. Hence, the appeal presents, in its final analysis, only a moot or abstract question. The uniform rule adopted by this Court is to the general effect that such questions will not be considered. *Wikel v. Board of Commissioners,* 120 N. C., 451, 27 S. E., 117; *Pickler v. Board of Education,* 149 N. C., 221, 62 S. E., 902; *Little v. Lenoir,* 151 N. C., 415, 66 S. E., 337; *Wallace v. Wilkesboro,* 151 N. C., 614, 66 S. E., 657; *Moore v. Monument Co.,* 166 N. C., 211, 81 S. E., 170. Furthermore, if the registration is declared to be void, such ruling, under the circumstances of the case, would, in effect, be equivalent to an action to try title to office. This cannot be done by mandamus. *Ellison v. Raleigh,* 89 N. C., 125; *Markham v. Simpson,* 175 N. C., 135, 95 S. E., 106; *Johnston v. Board of Elections,* 172 N. C., 162, 90 S. E., 143.

There is no allegation or finding of fact by the trial judge as to the number of qualified voters or as to the number placed upon the registration books by means of the methods complained of; nor is there allegation or finding that persons so registered were not qualified voters of the city of Raleigh, and that the irregularities complained of would have affected the result of the election. *Hill v. Skinner,* 169 N. C., 405, 86 S. E., 351. The fact that a person was registered by a third person with whom the registrar had left the book does not necessarily work a

disqualification (*Quinn v. Lattimore,* 120 N. C., 426, 26 S. E., 638); nor does a failure to administer an oath to voters applying for registration result in a forfeiture of the right to vote. This principle was declared in *Gibson v. Commissioners,* 163 N. C., 510, 79 S. E., 976, as follows: "A constitutional or statutory provision that no one shall be entitled to register without first taking an oath to support the Constitution of the State and that of the United States is directed to the registrars, and to them alone; and if they, through inadvertence, register a qualified voter, who is entitled to register and vote without administering the prescribed oath to him, he cannot be deprived of his right to vote through this negligence of the officers."

The trial judge, after hearing the matter upon its merits, found as a fact that the election was properly called, registrars duly appointed, proper books for the registration of voters provided, and that the officers have "done all other things required of them by law." There was evidence to support this finding.

Moreover, the plaintiff had an adequate remedy at law. The charter of the city of Raleigh, Article VII, provides that every person who shall vote in the city primary "shall be subject to the challenge made by any resident of the city of Raleigh under such rules as may be prescribed by the board of commissioners, and such challenge shall be passed upon by the judges of elections and registrars," etc. The general election law provides the same remedy in C. S., 5972.

Upon the whole record, we are of the opinion that the judgment rendered must be upheld.

Affirmed.

W. R. PIERCE, RECEIVER OF THE CITIZENS BANK OF SHALLOTTE, v. E. F. MALLARD AND WIFE, BESSIE S. MALLARD, A. W. MALLARD, C. L. WILLIAMS, RECEIVER OF COMMERCIAL NATIONAL BANK, W. E. FUSSELL, C. LEACH, MATTHEW COBB, C. G. BEST, TRUSTEE, AND F. R. BRASWELL.

(Filed 13 November, 1929.)

1. Attachment E b—Notice of attachment on realty should be noted on judgment docket and indexed, and filing lis pendens is unnecessary.

C. S., 500 and 807 are to be construed *in pari materia,* and where notice of levy of attachment on defendant's land in a county has been given under the provisions of C. S., 807, by certification of the levy to the clerk of the court for that county and his notation thereof on his judgment docket and indexing in the index to judgments the effect is to take the land in *custodia legis,* and is not an action affecting the title to lands

within the purview of C. S., 500, but from the day of such notice, unless the land is released, the attachment constitutes a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings relates back to the filing and indexing of the attachment, and where such notice under C. S., 807, has been given, the filing of *lis pendens* in the same county under the provisions of C. S., 500, is unnecessary.

2. Attachment C b—The trial court may allow minor amendments in attachment proceedings.

In attachment proceedings it is within the discretionary power of the judge of the Superior Court to allow amendments in regard to minor defects.

APPEAL by defendant, C. L. Williams, receiver, from *Daniels, J.*, at August Term, 1929, of DUPLIN. Affirmed.

A jury trial having been waived by the parties in the court below, the judge found the facts and set them forth in detail:

Material facts. The Citizens Bank of Shallotte brought a civil action against E. F. Mallard, its cashier, in Brunswick County, and in said action caused a warrant of attachment to issue to the sheriff of Duplin County, where Mallard owned real estate. This warrant of attachment was received by the sheriff of Duplin County on 4 August, 1921, and he made a levy by virtue of the same on 18 August, 1921, on the lands of E. F. Mallard, described in Finding of Fact, and returned said warrant of attachment with his said levy and return to the Superior Court of Brunswick County. That in addition to making the said return to the Superior Court of Brunswick County the sheriff of Duplin County duly certified a copy of his levy and return to the clerk of the Superior Court of Duplin County. The said certificate of return and levy so made by the sheriff of Duplin County was duly docketed and filed in the office of the clerk of the Superior Court of Duplin County on 18 August, 1921, and recorded in Judgment Docket No. 10, at page 181, and duly indexed on the index to judgments in said office on said date. No notice of *lis pendens* in "Record of *Lis Pendens*" in Duplin County was ever filed by the plaintiffs, the Citizens Bank of Shallotte, in its action against E. F. Mallard, and being the action in which the warrant of attachment was issued, nor was any *lis pendens* ever docketed or cross-indexed in said action on the *Lis Pendens* Docket in the clerk's office of Duplin County.

The American Bank and Trust Company recovered judgment against E. F. Mallard in the sum of three thousand and ninety-one dollars ($3,091) in the Superior Court of Duplin County on 19 January, 1922, and the said judgment was duly docketed and indexed on said date in the Superior Court of Duplin County. And since the rendition of said

judgment the defendant, C. L. Williams, as receiver, is now the owner of the said judgment. The Citizens Bank of Shallotte and W. F. Pierce, who was appointed receiver, were made parties to the action and recovered judgment against E. F. Mallard in the original action in which the warrant of attachment was issued at the October Term, 1923, of Brunswick Superior Court, a transcript of which judgment was duly docketed in the Superior Court of Duplin County on 15 October, 1923. The question is as to the priority of the liens of the respective judgments.

On the facts found the following judgment was rendered: "It is thereupon considered and adjudged, upon the foregoing findings of fact, that the lien of the judgment of W. F. Pierce, receiver of the Citizens Bank of Shallotte, against E. F. Mallard, for eighty-six thousand dollars, and interest, and costs, docketed on the Judgment Docket of the Superior Court of Duplin County, on 15 October, 1923, as hereinbefore set out, relates back to the date of the docketing of the return of the sheriff of Duplin County, on the warrant of attachment in the case of Citizens Bank of Shallotte *v.* E. F. Mallard, on the Judgment Docket of Duplin County, to wit, on 18 August, 1921, and that said judgment is a first lien on the tracts of land belonging to E. F. Mallard, set out and described in these findings of fact, and that the judgment of American Bank and Trust Company against E. F. Mallard, docketed on the Judgment Docket of the Superior Court of Duplin County, on 19 January, 1922, for the sum of three thousand ninety-one dollars, and interest on $3,000 from 19 January, 1922, and costs, and now owned by C. L. Williams, receiver of American National Bank, be and the same is hereby declared a second lien on the said lands of E. F. Mallard as hereinbefore set out, and subject to the lien of the judgment of the said W. F. Pierce, receiver, as aforesaid, and that the defendant, C. L. Williams, receiver, pay the costs of this action to be taxed by the clerk. F. A. Daniels, Judge."

To the judgment as signed C. L. Williams, receiver, excepted, assigned error and appealed to the Supreme Court.

McLean & Stacy and Gavin & Boney for W. F. Pierce, Receiver of the Citizens Bank of Shallotte.

J. O. Carr and Beasley & Stevens for C. L. Williams, Receiver of the Commercial National Bank.

CLARKSON, J. We think there was no substantial irregularity as would make the attachment void. It is well settled in this jurisdiction that for minor defects amendments can be made. *Askew v. Stevenson,* 61 N. C., 288; *Best v. Mortgage Co.,* 128 N. C., 351; *May v. Menzies,* 186 N. C., 144; *Thornburg v. Burton, ante,* 193; C. S., 547-9.

The main question involved in the controversy: Should the proceedings in attachment be docketed in the "Record of *Lis Pendens*" of Duplin County, C. S., 500, 501, 502, 503? We think not. It was docketed in the clerk's office of Duplin County in accordance with C. S., 807, in the judgment docket and indexed.

C. S., 500, says: "In an action affecting the title of real property, the plaintiff, at or any time after the time of filing the complaint, or when or any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, at or any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and the description of the property in that county affected thereby."

This section must be construed with C. S., 807, which is under Attachment, *in pari materia*. A warrant of attachment is not an action "affecting the title to real property." The warrant of attachment is not an action, but is ancillary and auxiliary to the action. Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. C. S., 802.

The part of C. S., 807, material to be considered in attachments, provides: "He shall levy on the real estate of the defendant as prescribed for executions; he shall make and return with the warrant an inventory of the property seized or levied on. . . . Where the sheriff or other officer levies an attachment upon real estate, he must certify the levy to the clerk of the Superior Court of the county where the land lies, with the names of the parties, and the clerk must note the same on his judgment docket and index it on the index to judgments, and the levy is a lien only from the date of entry by the clerk, except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made."

As said, the warrant of attachment is not an action affecting the title to the real property. The title of the owner of the land is not brought into dispute. The attachment merely seizes the property and holds it *custodia legis* until the final determination of the action or until the property is released pending the action when seized without proper cause. All the notice that any one is entitled to in cases where warrants of attachment are issued, is such as is contained in C. S., 807, *supra*.

The language with reference to warrant of attachment in C. S., 500, we must construe with C. S., 807. The latter requires the levy of a war-

rant of attachment on real estate to be certified to the clerk of the Superior Court of the county where the land lies, with names of parties, etc., the clerk notes same on the judgment docket. It is then indexed on the index to judgments and the levy then becomes a lien from the date of the entry by the clerk; except that if it is so docketed and indexed within five days after being made it is a lien from the time it was made. It will be noted that in the Consolidated Statutes, under Civil Procedure, Art. 34, Attachment, this provisional remedy of attachment is a complete and orderly system to attach property and hold it until the final determination of the action. A full and complete method is provided to give the public notice when a levy on real estate is made. We do not think that C. S., 500, *et seq.*, made it incumbent to file also a notice of *lis pendens* in a docket kept in the same office of the clerk of the Superior Court in another book called "Record of *Lis Pendens.*" This record of *lis pendens* is known as the Buncombe County Law, made Statewide, Public Laws 1919, ch. 19. We think the method provided under attachment, C. S., 807, is all that is required to give notice to the public in attachment proceedings.

It will be noted that section 500, in the first part, speaks of warrant of attachment. The latter part says "If it is intended to affect real estate, may file with the clerk of each county in which the property is situated," etc. In warrants of attachment we find under C. S., 807, how this notice must be filed and what the clerk shall do to create a lien on the property attached—it must be noted on the judgment docket and indexed. In construing the two sections together, it was never intended that notice should be given under C. S., 807 and then under C. S., 500, *et seq.*, in "Record of *Lis Pendens,*" both records kept in the clerk's office. C. S., 500, was intended to apply to actions affecting title to real property, and the Statewide Buncombe County Law applied to those actions and required them to be docketed and indexed in a book called "Records of *Lis Pendens.*"

In *Horney v. Price,* 189 N. C., at p. 824, we said: "This *lis pendens* statute applies to 'an action affecting the title to real property.'" At page 825: "Title is the means whereby the owner of lands has the just possession of his property. Co. Litt., 345; 2 Bl. Com., 195; Black's Law Dic., p. 1157." The judgment below is

Affirmed.

STATE v. ARCHIE ALLEN.

(Filed 13 November, 1929.)

1. Criminal Law G n—Sufficiency of circumstantial evidence to be submitted to the jury.

If in a criminal action there is any evidence tending to prove the fact in issue and which raises more than a suspicion or conjecture in regard to it, the same should be submitted to the jury, otherwise not.

2. Homicide G a—Proof of motive not essential to State's case.

Where the evidence of the State is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree, motive for the killing is not an essential element of the State's case without which a conviction may not be had.

3. Same—Evidence of defendant's guilt of murder held sufficient to be submitted to the jury.

Where the evidence in a trial for homicide tends to show that the prisoner and the deceased were seen talking together immediately before the latter was shot, and the deceased just after being shot said some one had shot him, but that he did not know who, and that the prisoner appeared in a neighboring house soon after the shooting, commented upon the fact that a man had been shot, and was anxious about having a pistol with him which he hid in consequence, and shells of the kind used in the pistol he had had and of the same size were found at the place of the killing, is upon the facts of this case held sufficient to be submitted to the jury and sustain a verdict of guilty of murder in the second degree.

4. Criminal Law G a—Where the defendant introduces no evidence the question of guilt is for the jury under the presumption of innocence.

A defendant in a criminal action may rely upon the presumption of his innocence, which remains with him throughout the trial and introduce no evidence in his own behalf, and though this may have its moral effect on the minds of the jury, it does not of itself as a matter of law create a presumption against him, and the question of his guilt is for the determination of the jury under the evidence, with the burden upon the State to prove him guilty beyond a reasonable doubt. C. S., 1709.

APPEAL by defendant from *Sinclair, J.*, at March Term, 1929, of DURHAM.

Criminal prosecution tried upon an indictment charging the defendant with the murder of one M. E. Rollins.

Verdict: Guilty of murder in the second degree.

Judgment: Imprisonment in the State's prison at hard labor for a period of 30 years.

Defendant appeals, assigning errors.

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

Victor S. Bryant for defendant.

STACY, C. J. There is evidence on behalf of the State tending to show that M. E. Rollins, a white man and agent of the Home Security Insurance Company, was shot in the chest with a 25-calibre bullet and killed on the night of 18 March, 1929, while standing near his automobile on Division Street in the city of Durham. Only one shot was heard. Two or three minutes prior to the shooting, which occurred about 8 o'clock, the defendant and the deceased were seen standing in the street near the automobile, talking in a friendly manner about insurance, with no one else around. Immediately after the shooting, the deceased ran into a nearby house and said to an occupant, Mary Hinson: "Get the doctor quick and call my wife. I am shot. A fellow out there at my car shot me." On being asked by Mary Hinson if he knew who shot him, the deceased replied: "It was a fellow at my car, but I don't know who it was." Shortly thereafter the defendant was seen at the home of Fannie Batts on Oak Street several blocks from the scene of the homicide. According to Vanda Moore, he bgan to pace the floor back and forth, and said: "I wonder is that man dead?" and in reply to an inquiry as to what man he had reference to and whether anybody had been shot, he said: "Yes, somebody shot him." On hearing Connie Stone say that a man had been "shot up there," the defendant remarked: "Damn, I got this pistol in pawn. I wish, G—d— it, I had never got it," to which the witness replied, "Yes, Archie, if they catch you with it they will say you shot him." The defendant then said: "Damn it; let me hide it," and he went around the house and came back brushing off his hands. The next day a 25-calibre pistol was found under the house, which resembled the one the defendant had the night before. It had a bullet lodged in the barrel. Before leaving Fannie Batts' house that night, the defendant, on being informed that Mr. Rollins was dead, said that he could not go home because some policemen were out there and he did not want them to take him up, as he was already on a scout, and added: "If they don't get me tonight they won't get me." On the day after the shooting, an empty shell was found near the place where the car was parked, and about six days later another empty shell was found 35 or 40 steps away. Both of these shells were of the kind used in a 25-calibre pistol.

Upon this, the evidence chiefly pertinent, the State asked that the case be submitted to the jury, which was done, and resulted in a conviction of murder in the second degree. The defendant appeals, assigning as error the refusal of the court to dismiss the action as in case of nonsuit on the ground that the evidence is not sufficient to warrant a conviction, and he relies upon the following authorities to support his position: *S. v. Montague*, 195 N. C., 20, 141 S. E., 285; *S. v. Melton*, 187 N. C., 481, 122 S. E., 17 (concurring opinion); *S. v. Oakley*, 176 N. C.,

755, 97 S. E., 616; *S. v. Brackville,* 106 N. C., 701, 11 S. E., 284; *S. v. Goodson,* 107 N. C., 798, 12 S. E., 329; *S. v. Wilcox,* 132 N. C., 1120, 44 S. E., 625; *S. v. Massey,* 86 N. C., 660; *S. v. Matthews,* 66 N. C., 106; *Rippey v. Miller,* 46 N. C., 479; 23 C. J., 49; 8 R. C. L., 225.

It is sometimes difficult to distinguish between evidence sufficient to carry a case to the jury, and a mere scintilla, which only raises a suspicion or possibility of the fact in issue. *S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804; *S. v. White,* 89 N. C., 462. And it will readily be conceded that this is one of the border-line cases. But a careful perusal of the record leaves us with the impression that the State's evidence is of sufficient probative value to warrant its submission to the jury. *S. v. McKinnon, ante,* 576; *S. v. Lawrence,* 196 N. C., 562, 146 S. E., 395; *S. v. McLeod,* 196 N. C., 542, 146 S. E., 409; *S. v. Bynum,* 175 N. C., 777, 95 S. E., 101.

The general rule of law is, that, if there be any evidence tending to prove the fact in issue, and not merely such as raises a suspicion or conjecture in regard to it, the case should be submitted to the jury; otherwise not. *Lewis v. Steamship Co.,* 132 N. C., 904, 44 S. E., 666; *S. v. Vinson,* 63 N. C., 335; *Matthis v. Matthis,* 48 N. C., 132. If the evidence warrant a reasonable inference of the fact in issue, its weight is for the jury. *S. v. Blackwelder,* 182 N. C., 899, 109 S. E., 644.

Speaking to the subject in *Campbell v. Everhart,* 139 N. C., 502, 52 S. E., 201, *Walker, J.,* delivering the opinion of the Court, very pertinently says: "The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury."

The defendant offered no evidence, but relied upon the legal presumption of innocence and the weakness of the State's case. This he had a right to do. C. S., 1799. The presumption of innocence which surrounds a defendant on his plea of "not guilty," goes with him throughout the trial and is not overcome by his failure to testify in his own behalf. He is not required to show his innocence, but the burden is on the State to prove his guilt beyond a reasonable doubt. *S. v. Singleton,* 183 N. C., 738, 110 S. E., 846. And while his absence from the witness stand or his failure to testify, may be a circumstance not without its moral effect

upon the jury, of which every lawyer appearing for a defendant is always conscious, yet this fact, as a matter of law, creates no presumption against him, and is not a proper subject for comment by the solicitor in arguing the case before the jury. *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720.

Nor is the failure of the State to show motive necessarily fatal to the case. *S. v. Alderman,* 182 N. C., 917, 110 S. E., 59. Its existence, if and when shown, may be helpful to the prosecution, but it is not an essential element of the crime. *S. v. Adams,* 138 N. C., 688, 50 S. E., 765.

Applying these principles to the evidence in the instant case, we conclude that the same was properly submitted to the jury. The verdict and judgment will be upheld.

No error.

L. O. OGBURN v. DR. L. S. BOOKER.

(Filed 13 November, 1929.)

Judgments L b—Judgment in action in which defenses should have been set up will bar subsequent action thereon.

A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, C. S., 1476, 1477, and in the Superior Court the defendant is required to set up his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action.

CIVIL ACTION, before *Sinclair, J.,* at April Term, 1929, of DURHAM.

Plaintiff alleged that during the summer and fall of 1922 the defendant owned a tract of land on the Chapel Hill road, and that the plaintiff offered to buy three acres of said land fronting said highway, and that the defendant refused to sell three acres, but agreed to sell seven or eight acres at $500 an acre; that plaintiff was desirous of purchasing said land for the purpose of erecting a home thereon. Plaintiff further alleged that the defendant authorized him to go ahead and begin the construction of his home, and thereupon the plaintiff cleared a part of the land, drilled a well and built a garage; that subsequently, the defendant informed plaintiff that he would not sell less than fifteen acres of land, and that if plaintiff would complete his house at a cost of not less than $3,000 and take fifteen acres of land for $500 per acre, no initial payment would be required. Thereafter, on 17 October, 1922, the defendant and his wife executed and delivered to the plaintiff a deed for

fifteen acres of land, and plaintiff executed and delivered to H. G. Hedrick, trustee for defendant, a deed of trust on the property described in the deed, which deed of trust secured the payment of the purchase-money notes. Thereupon the plaintiff began the work on his house and spent approximately $6,808.80.

Plaintiff further alleged that he did not have sufficient money to complete the house and offered to pay the defendant $1,000 if the defendant would release the front acre upon which the house was built, and that he secured a loan of $2,000 and offered the defendant $1,000 to release said front acre, but the defendant refused to do so. Plaintiff further alleged that when the purchase-money notes became due the defendant advertised the property and sold it on 7 December, 1923, at which sale the defendant became the purchaser of the property at the sum of $8,000.

Plaintiff further alleged that after the sale the defendant informed him that he must pay $50 per month "to keep up the taxes, insurance, interest," etc., but that if plaintiff would go ahead and make improvements on his home that he would hold the house for him and would not sell it to any one else. Plaintiff continued to occupy the house and pay the defendant the sum of $50 a month until about 23 March, 1925, but that the defendant "instead of helping the plaintiff to arrange to redeem his place . . . served notice upon the plaintiff to vacate the premises; that he brought suit to put the plaintiff out of his home."

Plaintiff further alleged "that on 20 April, 1925, the plaintiff was forced to vacate his home by order of court."

In consequence of the alleged wrongful conduct of defendant, plaintiff brought this suit on 25 October, 1926, to recover from the defendant the sum of $6,808.80 expended by plaintiff upon the house, and the further sum of $685 paid by plaintiff to defendant after the sale of the property.

The court entered judgment "from the pleadings filed in the cause that the defendant is entitled to a judgment against the plaintiff to the effect that the plaintiff take nothing by his suit, and that the defendant recover his costs in this behalf expended," etc.

From the foregoing judgment plaintiff appealed.

Bryant & Jones and Manning & Manning for plaintiff.
Long & Allen for defendant.

BROGDEN, J. The defendant contends that the judgment should be upheld upon the theory that it appears upon the face of the complaint that all oral negotiations between the parties prior to the execution and delivery of the deed and deed of trust were merged in those instruments. He further contends that the various oral agreements occurring after

the registration of the deed and deed of trust, involved a contract to convey land, and hence were unenforceable by reason of the fact that the defendant had pleaded the statute of frauds. The latter contention of the defendant, however, is not available for the reason that the answer of the defendant is not in the record, and there is nothing to indicate to this Court that the statute of fraud was so pleaded.

Nevertheless, the plaintiff expressly alleges that the defendant brought suit against him and that he "was forced to vacate his home by order of court." It does not appear whether the judgment of eviction was rendered by a court of a justice of the peace or by the Superior Court in an ordinary action of ejectment. It is clear, however, that if the plaintiff was evicted by order of the court that we must assume, nothing else appearing, that the court had jurisdiction of the subject-matter and of the parties. If the judgment of eviction was rendered in a summary proceeding in ejectment, this could only be done upon the theory of the relationship of landlord and tenant, and if the plaintiff had set up the equities alleged in the present suit, the jurisdiction of the justice of the peace would have been at an end. C. S., 1476 and 1477. *McLaurin v. McIntyre,* 167 N. C., 350, 83 S. E., 627. On the other hand, if the plaintiff was evicted in an ordinary suit of ejectment in the Superior Court, it was his duty to plead the equities alleged in the case at bar. In either event the plaintiff, by his own allegations, has unequivocally demonstrated that he has taken no steps to protect his rights, if any, according to the orderly processes of the law.

Affirmed.

J. N. COE & COMPANY, INC., v. FIRST REALTY AND LOAN COMPANY.

(Filed 13 November, 1929.)

1. **Arbitration and Award E a—In this case held: instruction that award should not be considered by jury was erroneous.**

   Where an award is set up in the defendant's answer in an action by the plaintiff to recover for materials furnished the defendant, and the award is attacked for being improperly, unlawfully and unfairly made, and the award was admitted in evidence without objection, a charge of the court to the jury that it could not consider the award is error to the defendant's prejudice, entitling him to a new trial.

2. **Trial E c—Conflicting instructions on a material phase of the case entitles party prejudiced thereby to a new trial.**

   Where the trial court gives conflicting instructions upon a material phase of the case it cannot be assumed that the jury followed the correct part of the charge in answering the issue, and a new trial will be awarded on appeal.

COE *v.* LOAN COMPANY.

APPEAL by defendant from *Moore, J.*, at March Term, 1929, of GUILFORD.

Civil action to recover for work and labor done and materials furnished in erecting buildings on lots in the city of Greensboro belonging to the defendant.

Upon denial of liability and plea of estoppel by arbitration and award, issues were submitted to the jury and answered as follows:

"1. Was the award set up in defendant's answer improperly, unlawfully and unfairly made? Answer: Yes.

2. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: Yes, $17,981.55, with interest until paid from 20 August, 1927.

3. Is the plaintiff indebted to the defendant, and if so, in what amount? Answer: Yes, $1,301.44, with interest from date of obligation until paid.

4. Did the plaintiff file its notice and claim of lien within six months from the furnishing of the last labor and material used in the construction of the buildings on the property referred to in the complaint, as therein alleged? Answer: Yes."

Judgment on the verdict, from which the defendant appeals, assigning errors.

A. C. Davis and Frazier & Frazier for plaintiff.

Hoyle & Harrison, J. S. Duncan, King, Sapp & King and Sidney S. Alderman for defendant.

STACY, C. J. The following excerpt, taken from the charge, constitutes one of the defendant's exceptive assignments of error:

"What that award is, as to the amount, gentlemen, is not before you, because it might be some evidence, or control or prejudice you in some way. As to the way they decided the matter isn't for you at all. You are to decide it under the instructions of the court, and from the evidence in the case."

The submission, which is the basis of every arbitration and award, being sufficient in the instant case, both in substance and in form, as well as the award made in pursuance thereof, and the latter having been offered in evidence without objection, we think it was error on the part of the trial court to withdraw the award from the consideration of the jury. *Mayberry v. Mayberry,* 121 N. C., 248, 28 S. E., 349; *Moore v. Gherkin,* 44 N. C., 73.

If an unquestioned arbitration and award be valid as an estoppel when properly pleaded and proved, it would seem to follow as a necessary corollary that it must be competent as evidence to establish such

defense. *Williams v. Mfg. Co.*, 154 N. C., 205, 70 S. E., 290, *S. c.*, 153 N. C., 7, 68 S. E., 902; *Geiger v. Caldwell*, 184 N. C., 387, 114 S. E., 497; *Hemphill v. Gaither*, 180 N. C., 604, 105 S. E., 183; 2 R. C. L., 388.

It is true that in other portions of the charge, the award is treated as properly being in evidence, but whether it was considered or discarded by the jury in answering the first issue, we are not able to say. Where there are conflicting instructions with respect to a material matter, a new trial will be granted, as the jury is not presumed to know which one of the two states the law correctly, and we cannot say that the erroneous instruction was not followed. *S. v. Falkner*, 182 N. C., 793, 108 S. E., 756; *Edwards v. R. R.*, 132 N. C., 99, 43 S. E., 585.

There are other exceptions appearing in the record, worthy of consideration, but as the questions presented thereby are not likely to arise on another hearing, we shall not consider them now.

New trial.

STATE v. C. A. STRAUGHN.

(Filed 13 November, 1929.)

1. Criminal Law L a—Appeal not prosecuted under Rules of Court will be docketed and dismissed on motion of Attorney-General.

An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the Rules of Court, but the record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea of "not guilty," the cause will be remanded to the Superior Court for trial according to law.

2. Criminal Law I a—Prisoner may not waive his right to trial by jury when he has entered plea of not guilty.

Where the defendant in a criminal prosecution for a misdemeanor under the "Bad Check Law" has entered a plea of "not guilty," he may not waive his constitutional right to a trial by jury without changing his plea.

MOTION by State to docket and dismiss appeal.

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

STACY, C. J. At the February Special Term, 1929, of Robeson Superior Court, Hon. Cameron F. McRae, Special Judge presiding, upon the call of the present case for trial, wherein the defendant is

charged with a violation of the "Bad Check Law," by consent of the solicitor and counsel representing the defendant, it was agreed that the court might "find the facts and the law," whereupon the court entered a finding "that the defendant is guilty," and rendered judgment that he "pay a fine of $50 and costs." The defendant gave notice of appeal to the Supreme Court, but has failed to prosecute same as required by the rules. *S. v. Taylor,* 194 N. C., 738, 140 S. E., 728.

The motion of the Attorney-General to docket the appeal must be allowed. *S. v. Clyburn,* 195 N. C., 618, 143 S. E., 129; *S. v. Thomas,* 195 N. C., 458, 142 S. E., 474; *S. v. Dalton,* 185 N. C., 606, 115 S. E., 881; *S. v. Ward,* 180 N. C., 693, 104 S. E., 531. But as it appears on the face of the record proper that the same error was committed in this case as in *S. v. Crawford, ante,* 513, the judgment will be stricken out and the cause remanded to the Superior Court for trial by a jury as the law provides; none has yet been had.

It has been held in a number of cases that when a defendant in a criminal prosecution, on trial in the Superior Court, enters a plea of "not guilty" to the charge preferred against him, he may not thereafter, without changing his plea, waive his constitutional right of trial by jury. *S. v. Hartsfield,* 188 N. C., 357, 124 S. E., 629. And this applies to misdemeanors as well as to the more serious offenses. *S. v. Pulliam,* 184 N. C., 681, 114 S. E., 394.

Of course, special verdicts are permissible in criminal cases, but when such procedure is had, all the essential facts must be found by a jury. *S. v. Allen,* 166 N. C., 265, 80 S. E., 1075. They may not be referred to the judge for decision even with the consent of the accused or his counsel. *S. v. Holt,* 90 N. C., 749.

Error.

J. H. COLE AND ATLANTIC BANK AND TRUST COMPANY, J. H. COLE, AUGUST KLIPSTEIN, JR., AND NELL FERGUSON, TRUSTEES, v. HARRIS MANGUM WAGNER AND HIS GUARDIAN, MRS. FRANCES C. WAGNER.

(Filed 13 November, 1929.)

1. Pleadings D a—Upon demurrer on grounds that cause of action is not stated pleadings will be liberally construed.

Where the defendant's motion for judgment upon the pleadings and that the action be dismissed is in the nature of a demurrer *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action, C. S., 511(6), the pleadings will be liberally construed with a view to substantial justice between the parties. C. S., 535.

2. Same—In this case held: cause of action was sufficiently alleged.

Where in an action by the trustees of a hospital against a minor and his guardian it is alleged that the hospital gave the infant medical attention necessary to save his life and usefulness after his injury in an accident, and that the guardian of the infant had recovered judgment for the negligent injury, and that hospital and medical attention was a substantial part of the consideration of the judgment recovered by the guardian of the infant: *Held*, the allegations are not so vague and uncertain as to fail to state a cause of action, but allege a cause of action upon *quantum meruit* and for money had and received, and the defendants should have asked, if they desired the complaint to be made more definite, for a bill of particulars, C. S., 534, or move that the plaintiff be required to amend. C. S., 537.

3. Pleadings D d—Demurrer on ground that cause of action is not stated may be taken at any time.

A motion which is in effect to the sufficiency of the complaint to allege a cause of action, or in the nature of a demurrer *ore tenus* may be taken at any time, or the Supreme Court may take knowledge thereof on appeal on its own motion.

4. Infants B a—In this case held: hospital might recover for services upon quantum meruit as necessaries.

A father who furnishes to his infant child a living under his own roof is not ordinarily liable to a stranger for furnishing his infant child such service as the parent may not reasonably consider necessary, yet where the child has met with a serious accident rendering it necessary for him to receive treatment at a hospital in order to save his life and usefulness, the hospital may recover upon a *quantum meruit*.

5. Same—In this case held: hospital could recover against minor's guardian for necessary medical attention.

Where in an action by the owners of a hospital to recover against a guardian of an infant it is alleged that the infant has recovered damages in an action against another for a negligent injury and that a part of the consideration recovered in the judgment was for hospital services rendered by the plaintiff in consequence of such injury: *Held*, the moneys recovered on account of the hospital treatment, etc., are necessaries and the plaintiff is entitled to recover from the guardian the amount so paid as moneys had and received by the infant to the use of the plaintiff as upon a *quantum meruit*.

6. Money Received A a—Where judgment recovered for a negligent injury includes hospital expenses, hospital may recover for money received.

Where an infant by his next friend has recovered judgment against another for a negligent personal injury, and included therein is the hospital expenses incident to the injury, and the judgment has been paid, the hospital may recover upon *quantum meruit* the amount of money so adjudicated for its services as for money had and received to its use.

7. Infants C a—Defense of infancy must be pleaded.

The defense of infancy of the defendant in a civil action must be set up in the answer, or it will be considered as waived.

8. Infants B a—Infant's contract is voidable and not void.

The contracts of an infant are voidable and not void.

9. Quasi Contracts B b—Question of reasonable worth of services rendered is for the jury.

Where in an action upon *quantum meruit* the defense is interposed by the infant defendant that the amount sought to be recovered as necessary hospital expenses was excessive and exorbitant; the question is for the jury, the trial court having the power to set aside the verdict if excessive.

APPEAL by plaintiffs from *Moore, J.*, at August Term, 1929, of GUILFORD. Reversed.

This is an action brought by plaintiffs against the defendants to recover the sum of $2,534.50 and interest from 13 March, 1928.

The plaintiffs are the owners of the "Wesley Long Hospital" in Greensboro, N. C. The defendant, Harris Mangum Wagner, is a minor about 12 years of age; his mother, the defendant, Mrs. Frances C. Wagner, was appointed guardian after the time her son received the attention hereinafter mentioned in the "Wesley Long Hospital."

Plaintiffs in their complaint allege: That about 27 August, 1926, Harris Mangum Wagner was seriously injured, and in order to save his life and usefulness that it became necessary that he receive hospital, medical and surgical attention, and he became an inmate of the said hospital and received such attention between said date above mentioned and 13 March, 1928, and the reasonable value of said attention was $2,534.50. An itemized statement showing what the amount was for is attached to the complaint. That at March Term, 1928, the said Harris Mangum Wagner recovered judgment in the Superior Court of Lee County in the sum of $4,500 as damages for the said injury for which the before-mentioned treatment was rendered. That said judgment has been paid to defendant guardian; that said hospital, medical and surgical treatment rendered by the plaintiffs was a material and substantial portion of the consideration for the rendition and payment of said judgment; that Frances C. Wagner is the duly qualified and acting guardian of Harris Mangum Wagner, and as such guardian has or is entitled to the $4,500 damages in payment of the judgment for the personal injury to the said Harris Mangum Wagner.

The defendants in their answer admit most of the material allegations of the complaint, but allege that when Harris Mangum Wagner was admitted to the hospital, he was living with his parents. That the son was treated at the hospital at the request of the company through whose negligence he was injured. Plea of infancy is set up, and, in regard to the bill rendered, says: "The defendant, Frances C. Wagner, . . .

does not consider the bills rendered in this case reasonable, but on the contrary they are exorbitant and excessive."

The court below found "at the time of the matters and things set out in the complaint (Harris Mangum Wagner) was then and now is living with his father, who was and now is supporting him." This was admitted by plaintiffs.

The defendant moved for judgment upon the pleadings and that the action be dismissed. The court below granted the motion, and the plaintiffs excepted, assigned error and appealed to the Supreme Court.

K. R. Hoyle and Hoyle & Harrison for plaintiffs.
King, Sapp & King and Gavin & Teague for defendants.

CLARKSON, J. The defendants' motion was in the nature of a demurrer *ore tenus* on the ground that "The complaint does not state facts sufficient to constitute a cause of action." C. S., 511 (6). The complaint must be liberally construed "with a view to substantial justice between the parties." C. S., 535. *Lee v. Produce Co., post,* 714.

"An objection that a complaint does not state a cause of action may be taken advantage of at any time. In such case the defendant may demur *ore tenus* or the Supreme Court of its own motion may take notice of the insufficiency. *Johnson v. Finch,* 93 N. C., 205; *Garrison v. Williams,* 150 N. C., 674; *McDonald v. MacArthur,* 154 N. C., 122." *Lassiter v. Adams,* 196 N. C., at p. 712.

We lay down certain principles of law and equity that are applicable to the facts set forth in the complaint and appear of record.

"As the general rule applicable to contracts is that the infant is not liable thereon, so the general rule in the law of torts is that he is liable." 14 R. C. L., part sec. 36, p. 259; *Smith v. Kron,* 96 N. C., 392; *Morris Plan Co. v. Palmer,* 185 N. C., 109; *Hight v. Harris,* 188 N. C., 328; *Collins v. Norfleet-Baggs, ante,* 659. To the general rule that an infant is not liable on contract is the well recognized exception that he is liable for necessaries. The serious question often arises, what are necessaries?

"Medical and dental services reasonably required by the infant are usually classed necessaries." 14 R. C. L., p. 256.

In *Freeman v. Bridger,* 49 N. C., at p. 2, *Pearson, J.,* speaking to the subject: "Lord Coke says, Co. Lit., 172a, 'It is agreed by all the books, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic and such *other* necessaries.' These last words embrace boarding; for shelter is as necessary as food and clothing. They have also been extended so as to embrace schooling and nursing (as well as physic)

while sick. In regard to the quality of the clothes and the kind of food, etc., a restriction is added, that it must appear that the articles were suitable to the infant's degree and estate." *Richardson v. Strong,* 35 N. C., 106; *Hyman v. Cain,* 48 N. C., 111; *Jordan v. Coffield,* 70 N. C., 110; *Turner v. Gaither,* 83 N. C., 357; 14 R. C. L., p. 256; Elliott on Contracts, Vol. 1, sec. 297-298.

It is also said in the *Freeman case, supra,* at p. 4: "While an infant lives with a parent, he cannot bind himself even for necessaries, unless it be proved that the parent was unable or unwilling to furnish the child with such clothes, etc., as the parent considers necessary, 'for no man shall take upon himself to dictate to a parent what clothing the child shall wear, at what time they shall be purchased, or of whom.' *Bainbridge v. Pickering,* 2 Blackstone's Rep., 1325. 'Guardians for infants are presumed to furnish all necessaries, and a stranger who furnishes board, or anything else, must, except under peculiar circumstances, take care to contract with the guardian.' *S. v. Cook,* 12 Ire. Rep., 67." See *Thayer v. Thayer,* 189 N. C., 502, 39 A. L. R., 428.

The next serious question is that ordinarily the father is liable for the necessaries of his infant child. In *Smith v. Young,* 19 N. C., at p. 27, it is said: "The law is, if an infant is living under the roof of his parent, who provides everything which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might, under other circumstances, be deemed necessaries. . . . But here the defendant did not live under the roof of his parent, but lived apart from him, laboring and receiving the profits of his labor to his own use. He was *pro tempore* acting as his own man, by the assent of his father; and the articles received by him being necessaries, should be paid for by him." As to the liability of lunatics on contracts, see *Wadford v. Gillette,* 193 N. C., 413; *Bank v. Duke,* 187 N. C., 386.

In 31 C. J., part sec. 174, at p. 1077, the law is stated: "As a rule the parent is liable for the support of his child, and the guardian for the support of his ward. Consequently, an infant who has a parent or guardian, or one who stands in *loco parentis,* who provides him with everything that appears to be necessary and proper, cannot bind himself to a stranger even for necessaries. Where the parent has the ability and is willing to support his minor child, board, lodging, etc., furnished to such infant by another without the parent's consent are not necessaries for which the infant is liable. But the mere fact that an infant has a father, mother, or guardian does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything toward his care or support."

The next serious question is when money is received that in equity and good conscience belongs to another.

In 41 C. J., p. 33, sec. 9, it is said: "The question, in an action for money had and received, is to which party does the money, in equity, justice, and law, belong? All plaintiff need show is that defendant holds money which, in equity and good conscience, belongs to him, but if he fails to show such superior right, that is that defendant does hold money which belongs to plaintiff, he cannot recover." Sec. 14: "Where one person has received money as an indemnity in which another has the right to share, the latter may maintain an action for money had and received for his portion." Sec. 18: "Although it is held that to support an action for money had and received there must be some privity between the parties in relation to the money sought to be recovered, the preponderance of authority is to the effect that no further privity is required than that which results from one person's having another's money, which he has no right conscientiously to keep, as in such cases the law implies a promise that he will pay it over." Sec. 34: "It is immaterial how the money may have come into defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity, and good conscience, he is not entitled to hold it against the true owner."

2 Elliott on Contracts, p. 623-4, sec. 1375, in part, thus states the principle: "The action can be maintained only to recover either money or the equivalent of money. In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff or to which he is in equity and good conscience entitled.

"The rule is quite elementary that, to enable a person to maintain an action for money had and received, it is necessary for him to establish that the persons sought to be charged have received money belonging to him or to which he is entitled. That is the fundamental fact upon which the right of action depends. *Trust Co. v. Gleason,* 77 N. Y., 400. The purpose of such action is not to recover damages, but to make the party disgorge; and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." Elliott, *supra,* note p. 1375; *Springfield First Nat. Bank v. Gratton,* 172 Ill., 625; *Porter v. Roseman,* 165 Ind., 255; *Bahnsen v. Clemmons,* 79 N. C., 556; *Houser v. McGinnas,* 108 N. C., 631.

The case of *Richardson v. Strong,* reported in the 35 N. C., 106, is an interesting one. The defendant became insane and so much so that he attempted to injure himself and destroy his property. His relatives and physician thought it necessary that he have a white man as a nurse and to guard him against violence. Plaintiff was requested by a member of the family to attend on him. He did so. The defendant recovered from his mental sickness and refused to pay plaintiff, who brought suit to

recover for his services. The defendant pleaded insanity, and that no promise could be implied. *Ruffin, C. J.*, speaking for the Court, said: "There is, therefore, no absurdity in the case of lunatics, more than in that of infants, in implying a request to one rendering necessary services, or supplying necessary articles, and implying, also, a promise to pay for them." The plaintiff was allowed to recover on a *quantum meruit*.

In the present action the complaint alleges that Harris Mangum Wagner was seriously injured, and in order to save his life and usefulness it became necessary that he receive hospital, medical and surgical attention and became an inmate in the "Wesley Long Hospital," and was treated there from 7 August, 1926, to 13 March, 1928. It appears that at the time he was seriously injured he was living with his father, who was and is now supporting him in the usual manner. From the facts alleged in the complaint, we do not think that the fact in regard to his father's usual support can absolve the infant from liability, under the facts and circumstances of this case. The infant was seriously injured, and by fair inference was immediately taken to the hospital and his life and usefulness was saved by hospital, medical and surgical attention. It was an emergency, and quick action had to be taken. During the period of treatment the father paid for no hospital, medical or surgical treatment for the infant. It seems that he was either unable, at least he did not provide for the infant. The circumstances were peculiar. The father did not provide this attention necessary to save his life and usefulness—the hospital did. The infant now has an estate, and it is unthinkable that the guardian of the infant should not pay the reasonable expense for saving the child's life and usefulness.

Again, it is alleged in the complaint that the defendant, Harris Mangum Wagner, for the serious injury, at March Term, 1928, recovered judgment for $4,500. That the hospital, medical and surgical treatment rendered by defendant was a material and substantial consideration of the judgment. The defendants contend that "This allegation is so indefinite, indirect and inconclusive as not to state a cause of action." The defendants could have asked for a bill of particulars, C. S., 534, or when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court, upon motion, may require the pleadings to be made definite and certain by amendment. C. S., 537. *Elizabeth City Water Works v. Elizabeth City*, 188 N. C., 278.

It is well settled in this jurisdiction that in an action for injuries, if the plaintiff "be entitled to recover at all, he is entitled to recover as damages one compensation—in a lump sum—for all injuries, past and prospective, in consequence of the defendant's wrongful and negligent

acts. *These are understood to embrace indemnity for actual nursing and medical expenses* and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money," etc. *Ledford v. Lumber Co.*, 183 N. C., at p. 616; *Shipp v. Stage Line*, 192 N. C., 475.

The money recovered by defendant guardian in the damage suit, which it is alleged was a material and substantial consideration of the judgment, was for necessary expenses of the defendant. To allow the defendant infant to recover upon this theory and then deny the plaintiff in the present action the right to recover on the same theory of necessary expenses, would be blowing hot and cold in the same breath.

In *Chandler v. Jones*, 172 N. C., 569, *Allen, J.*, says: "The contract of an infant is voidable and not void, and it may be either ratified or disaffirmed upon attaining majority at the election of the infant. If money is paid to an infant upon a contract and it is consumed or wasted, the infant may recover the full amount due under the contract." *Rawls v. Mayo*, 163 N. C., 177; *Hogan v. Utter*, 175 N. C., 332; *Gaskins v. Allen*, 137 N. C., 430; *Baggett v. Jackson*, 160 N. C., 31. See *Faircloth v. Johnson*, 189 N. C., at p. 431. The defense of infancy must be set up in the answer, and if not pleaded will be considered as waived. *Hicks v. Beam*, 112 N. C., 642.

In this case, plaintiff alleges in substance two causes of action—one on *quantum meruit*, and the other for the money had and received for his necessary expense. The amount of recovery is bottomed on *quantum meruit* or reasonable worth of services. In the answer it is alleged that the bills rendered are exorbitant and excessive. This is a question for the jury on the trial. The courts have always been careful to see that the rights of infants are protected. With the power of the lower court to set aside verdicts, we hardly think that the court below that will try this action, would allow an exorbitant and excessive verdict to stand if such a one was rendered by a jury. For the reasons given, the judgment below is

Reversed.

STATE OF NORTH CAROLINA ON THE RELATION OF THE CORPORATION COMMISSION v. SOUTHERN RAILWAY COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, AND NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 13 November, 1929.)

1. Corporation Commission C c—Order of Commission that railroads submit plans for new union station is appealable.

Where the Corporation Commission in proceedings before it to compel certain railroad companies to provide an adequate union passenger depot in a city has found upon evidence regularly taken in hearings before

it that the existing depot was inadequate and ordered the respondents to prepare and submit plans and specifications for a new depot, to which exceptions were duly and regularly filed and an appeal taken by the respondents, and the Commission orders the proceedings be certified and transferred to the Superior Court for trial, which has been done, all in conformity with the statute, C. S., 1097: *Held*, error for the judge presiding at the trial in the Superior Court to dismiss the appeal upon the ground that the order of the Commission was not appealable, and the proceedings remain in the Superior Court to be proceeded with upon the issues of fact raised for the determination of the jury.

2. Corporation Commission C a—Petitioners are not proper parties to move for dismissal of appeal from Commission.

The petitioners in proceedings before the Corporation Commission for the establishment of an adequate union passenger station are not proper parties to move in the Superior Court for the dismissal of the appeal of the respondents from an order of the Commission, but where such motion is made to appear to be with the assent and concurrence of the Commission the Supreme Court may decide the appeal from the order dismissing the action in the Superior Court.

APPEAL by respondents from order of *Harris, J.*, at June Term, 1929, of WAKE. Reversed.

The above-entitled proceeding was heard on a motion of the relator that the appeal of the respondents from an order made in the proceeding by the Corporation Commission of North Carolina with respect to the construction of a union passenger station in the city of Raleigh, N. C., be dismissed, for that said order was not final, but interlocutory in its nature, and for that the appeal from said order to the Superior Court of Wake County was, for that reason, premature.

From the order dismissing the appeal of the respondents in accordance with said motion, and remanding the proceeding to the Corporation Commission, respondents appealed to the Supreme Court.

Albert L. Cox and J. Melville Broughton for the relator.

S. R. Prince, John B. Hyde, Sidney S. Alderman and Smith & Joyner for Southern Railway Company.

Jas. F. Wright, Charles Abeles and Murray Allen for Seaboard Air Line Railway Company.

W. B. Rodman and R. N. Simms for Norfolk Southern Railroad Company.

CONNOR, J. This proceeding was begun by petition filed by the city of Raleigh and others on 15 November, 1926, with the Corporation Commission of North Carolina. Upon the allegations of the petition, the petitioners prayed that the Corporation Commission order the respondents to construct and equip a union passenger station in the city of Raleigh,

adequate for the security, convenience and accommodation of the traveling public. The respondents filed answers to the petition, in which each denied all the essential allegations therein, upon which the prayer for relief is founded. The respondents in their answers alleged that the union passenger station heretofore constructed, and now maintained and used by them in the city of Raleigh, is adequate in all essential respects. Each of the respondents alleged that the receipts from its passenger business at Raleigh are not sufficient to justify the order prayed for by the petitioners; that said receipts have greatly decreased within the past few years and that by reason of the use of automobiles on the hard-surfaced highways recently constructed in this State, such receipts will continue to decrease. Respondents further alleged that the Corporation Commission of North Carolina is without jurisdiction to make the order prayed for in the petition, for the reason that they are engaged in inter-state commerce, and that by the act of Congress jurisdiction of the matter involved in this proceeding is conferred exclusively upon the Inter-State Commerce Commission.

After a hearing at which both the petitioners and the respondents were represented by counsel, the Corporation Commission made an order dated 31 August, 1927. Upon the facts found by it, the Commission concluded that it had jurisdiction of the subject-matter of the petition, citing in support of its conclusion to that effect *R. R. Com. of California v. Southern Pacific Co. et al.*, 264 U. S., 331, 68 L. Ed., 713. The Commission also found with respect to the financial ability of respondents to construct an adequate union passenger station at Raleigh, N. C., that "the amount of expenditures required, allocated between the three participating carriers, would be relatively nominal." After setting out in full and in much detail the facts upon which it bases its order, the Commission concludes as follows:

"Upon consideration of all the facts involved, it is found that the union passenger station now in use in the city of Raleigh is inadequate to serve the needs and convenience of the traveling public, and that the carriers should proceed without delay to provide suitable plans to construct a modern union passenger station adequate in size, arrangement and equipment to meet the needs and convenience of the traveling public, either upon the site of the present depot, with such additional land as may be necessary or at the suggested site where the main tracks of these carriers converge at Boylan Avenue; and it is

"Ordered, That the Southern Railway Company, the Seaboard Air Line Railway Company and the Norfolk Southern Railroad Company file with the Corporation Commission within ninety days from this date plans for a new and adequate union passenger station to be erected in the city of Raleigh upon either of the sites indicated in the findings herein made."

Upon the filing of this order each of the respondents duly excepted to the same, and within the time prescribed by statute, filed its exceptions in detail to the findings and conclusions made by the Commission in support of its order. Each and all these exceptions were heard and considered by the Commission, and on 6 January, 1928, the Commission made an order as follows:

"Ordered that the exceptions filed by the respondent carriers in this proceeding be, and they are hereby, overruled, and that the order of the Commission of 31 August, 1927, be and it is hereby amended by extending the time fixed therein for the filing of plans and specifications for a new and adequate union passenger station in Raleigh to ninety days from the date of this order."

To this order, each of the respondents duly excepted, and gave notice of its appeal therefrom to the Superior Court of Wake County. Exceptions to the said order were duly filed by each of the respondents, who thereafter duly assigned error based upon their several exceptions. Thereupon, on 26 January, 1928, the following order was made by the Commission:

"It is now, therefore, ordered that . . . all papers and evidence considered by the Commission, together with the assignments of error filed by the appellants, be certified and transferred to the Superior Court of Wake County as provided by statute for the certifying and transferring of such records of appeal."

In accordance with the foregoing order, the record in this proceeding, duly certified, was docketed on the civil issue docket of the Superior Court of Wake County, for trial of the issues raised by respondents' exceptions to the order of the Corporation Commission. Since the docketing of said record, the proceeding has pended in the Superior Court of Wake County.

At April-May Term, 1928, of said court, the proceeding came on for trial, when an order was made by the judge presiding that the North Carolina Railroad Company be made a party to the proceeding. Thereupon, respondents moved that the proceeding be dismissed, contending that upon the finding by the judge that the North Carolina Railroad Company was a necessary party to the proceeding, the Superior Court was without jurisdiction, for that its jurisdiction of the proceeding was, by virtue of the statute, derivative, and that the orders of the Corporation Commission which had original jurisdiction, under the statute, of the proceeding, were void, in the absence of a necessary party. This motion was resisted by the Corporation Commission, and upon its denial, respondents appealed to the Supreme Court. This appeal was dismissed. We held that the North Carolina Railroad Company was not a necessary party to the proceeding for purposes of jurisdiction, either as a

respondent before the Corporation Commission, or as a defendant in the Superior Court, 196 N. C., 190, 145 S. E., 19. We said in the opinion upon that appeal: "The jurisdiction of the Superior Court of Wake County to proceed with the trial of the issues arising upon the record in this cause is not affected by the order that the North Carolina Company be made a party defendant in this proceeding."

It is now contended that the Superior Court of Wake County is without jurisdiction to try the issues raised upon the record, because the order made by the Corporation Commission in the proceeding is not appealable. The statute provides that "from all decisions or determinations made by the Corporation Commission any party affected thereby may appeal." C. S., 1097. The record in this proceeding shows, we think, that the Corporation Commission at the time its order of 31 August, 1927, was filed, interpreted said order as a decision or determination by it affecting the respondents and each of them. Upon the filing of the notice of appeal from said order, the Commission ordered that the record be certified and transferred to the Superior Court of Wake County as provided by statute. The interpretation of its order by the Corporation Commission as subject to appeal, is not conclusive, but in this case we concur with the Commission that its order made in this proceeding is appealable. There was error in the holding by the judge of the Superior Court to the contrary, and for this error the order dismissing the appeal must be reversed. The Superior Court of Wake County has jurisdiction of this proceeding and may proceed to the trial of the issues involved therein.

We have not overlooked the fact, as shown by the record, that the motion in the Superior Court to dismiss the appeal of the respondents from the order of the Corporation Commission, which is in writing, is entitled "City of Raleigh and others *v.* Seaboard Air Line Railway Co. *et al.*," and that the motion is made by the petitioners who filed the petition with the Corporation Commission and not by the Corporation Commission. We have assumed from the argument and briefs of counsel that the motion was made with the consent or approval of the Corporation Commission, as the relator in this proceeding. We have considered the appeal, and decided the question presented upon this assumption. Otherwise the appeal would have been dismissed for the reason that the petitioners are not parties to the proceeding, in the sense that they had a right to appeal from orders made in the proceeding, while same was pending before the Commission, or to appear in the proceeding after same had been transferred to and docketed in the Superior Court. *Corporation Commission v. R. R.*, 170 N. C., 560, 87 S. E., 785. We do not dismiss the appeal, but decide that the order was erroneously made. It is, therefore,

Reversed.

DRAPER BROWN v. W. U. LEWIS.

(Filed 13 November, 1929.)

1. Wills E b—Devise in this case held to be in fee simple.

Where two items of a will are apparently in conflict, one a devise to the testator's wife of the residue and remainder of the estate "all her heirs, executors, administrators and assigns," and the preceding item, "I want whatever part of my estate is left at the death of my wife, and after the younger children have been educated, equally divided among my living children at that time": *Held*, the wife takes an absolute fee-simple title to the lands thus devised, she being regarded as the primary object of the testator's bounty, and a devise being construed to be in fee simple unless a contrary intention is shown by the will or some part thereof. C. S., 4162.

2. Same—"All" may be construed "and"—Precatory Words.

Under a devise of the remainder of the testator's estate to his wife and "all" her heirs: *Held*, the word "all" may be construed "and," giving the estate to her "and her heirs," or a devise in fee simple; and construed in connection with another item of the will, "I want whatever part of my estate that is left at the death of my wife to be divided among my living children," the word "want," so used, is a precatory word not affecting the quality of the estate devised to the wife, and does not create a trust.

APPEAL by defendant from *Stack, J.*, at June Civil Term, 1929, of DURHAM. Affirmed.

The following judgment was rendered in the court below:

"This cause coming on to be heard before the undersigned on an Agreed Statement of Facts, both the plaintiff and the defendant being represented by counsel, and it appearing from the Agreed Statement of Facts that on or about 11 April, 1929, the plaintiff contracted and agreed to execute a warranty deed to the defendant, and the defendant agreed to pay three hundred dollars for lot No. 54, as shown on map recorded in Book 20, at page 431; that defendant paid five dollars at the time of the signing of the said contract; that on or about 17 April, 1929, the plaintiff tendered to the defendant a warranty deed for the said property and demanded payment of the balance of two hundred ninety-five dollars. It further appeared that the plaintiff purchased the lot from Sarah A. W. Fitzgerald, who claims title to it under Item No. 10 of R. B. Fitzgerald's will, which will is duly probated and recorded in Will Book 3, at page 74. Item No. 10 reads as follows:

'Item 10: I give, devise and bequest unto my beloved wife, Sarah A. W. Fitzgerald, all her heirs, executors, administrators and assigns, all of the remainder and residue of my estate, real and personal and mixed, wheresoever and in whatsoever condition it may be found.'

From the foregoing facts and from the language of Item 10 of the will of R. B. Fitzgerald, the undersigned finds as a matter of law that Sarah A. W. Fitzgerald takes a fee simple title to the property passing under Item No. 10 of the said will, and that the deed tendered to the defendant by the plaintiff conveyed a fee simple title.

It is therefore ordered and adjudged that the plaintiff recover of the defendant the sum of two hundred ninety-five dollars with interest on two hundred ninety-five dollars from 17 April, 1929, and the cost of this action to be taxed by the clerk."

E. C. Harris for plaintiff.
L. J. Phipps for defendant.

CLARKSON, J. Item No. 9 and the material part of Item No. 10 of the will of R. B. Fitzgerald is as follows:

"Item 9: I also want whatever part of my estate that is left at the death of my wife, and after the younger children have been educated, equally divided among my living children at that time.

Item 10: I give, devise and bequest unto my beloved wife, Sarah A. W. Fitzgerald, all her heirs, executors, administrators and assigns, all of the remainder and residue of my estate, real and personal and mixed, wheresoever and in whatever condition it may be found."

Sarah A. W. Fitzgerald conveyed to the plaintiff, Draper Brown, a piece of land in fee simple, known as lot No. 54, as shown on a certain map duly recorded. No question is made as to the description of the lot. The plaintiff, Draper Brown, in turn made a contract to convey the same lot by warranty deed to the defendant, W. U. Lewis, in fee simple for $300. The defendant, W. U. Lewis, refused to accept the warranty deed tendered by plaintiff in fee simple, on the ground that under the will of R. B. Fitzgerald his wife Sarah A. W. Fitzgerald had only a life estate and could not convey to Draper Brown a fee simple title, and he in turn could not convey a fee simple title to the defendant." We cannot so hold.

Sarah A. W. Fitzgerald was the wife of R. B. Fitzgerald, and naturally, and as shown by the language of the will, the principal object of his bounty. He had given to his children and other near kin certain property, and when he came to dispose of the residue of his property, in Item 10, says: "I give, devise and bequest unto my beloved wife, Sarah A. W. Fitzgerald *all* her heirs and executors, administrators and assigns." It can be readily seen that he intended to give her a fee simple title, and if he had used the word *and* instead of *all*, the usual language at common law before the statute, in denoting a fee simple, there would have been no question. He then continues "all of the remainder and

residue of my estate, real and personal, and mixed, wheresoever and in whatsoever condition it may be found." We think his intention was clear to devise a fee simple to his wife. The word *all* was a *casus*, and we think was intended to denote *and*. If he did not intend to devise a fee simple, why use the words "her heirs and executors, administrators and assigns." *Gordon v. Ehringhaus*, 190 N. C., at p. 150. Assigns means: "Those to whom property shall have been transferred. Now seldom used except in the phrase, in deeds, 'heirs, administrators and assigns.'" Black's Law Dic., p. 97.

"The use of the word 'assigns' makes it clear that the gift was absolute and not alternative. *(Kendall v. Clapp*, 163 Mass., 69) . . . In the *Keniston case (Keniston v. Adams*, 80 Me., 290), *Chief Justice Peters*, writing for the unanimous Court, said: 'The language here is to assigns as well as to heirs, and the power of assigning implies an absolute title.'" *In re Tamargo*, 220 N. Y., Reports, at p. 229.

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

"The rule is well settled that in a will no words are necessary to enlarge an estate devised or bequeathed into an absolute fee. On the contrary, restraining expressions must be used to confine the gift to the life of devisee or legatee. *Holt v. Holt*, 114 N. C., 241; *Jones v. Richmond*, 161 N. C., 553. In *Griffin v. Commander*, 163 N. C., 230, where the testator devised to his wife 'all the remainder of my estate, real and personal, with power to give and devise the same after her death to her beloved children and grandchildren,' it was held that she took in fee simple," *Springs v. Springs*, 182 N. C., at p. 488; *O'Quinn v. Crane*, 189 N. C., 97.

These words in Item 9, "I also want," etc., may be construed as merely expressing the wish of the testator without any intention on his part to affect the title to or estate in the land devised in fee simple in Item 10 to his wife, the primary object of his bounty. *Carter v. Strickland*, 165 N. C., 69; *Springs v. Springs, supra; Weaver v. Kirby*, 186 N. C., 387; *Hass v. Hass*, 195 N. C., 734.

The principle is thus stated, citing numerous authorities, in *Carter v. Strickland*, 165 N. C., at 71-2: "And it is now the prevailing doctrine, certainly so in this jurisdiction, that such words will be given their ordinary significance, and will not have the effect, as stated, unless from the terms and dispositions of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative and that the testator intended to create a trust."

In *Hardy v. Hardy,* 174 N. C., at p. 506-7, speaking to the subject: "Under the early English and American authorities, language in a will expressive of the wish or desire of the testator as to the disposition of his property was generally held to raise a trust, or to limit the estate devised, unless a contrary intent was manifest from a consideration of the whole will; but the tendency of modern authority is to reverse this rule, and to hold that precatory words 'are not to be regarded as imperative unless it is plain from the context that the testator so intended them.'"

Precatory words: Words of entreaty, request, desire, wish or recommendation, employed in wills, as distinguished from direct and imperative terms. 49 A. L. R., 18n, 76n.

In *Laws v. Christmas,* 178 N. C., 359, the words "I want," etc., were held, in construing the intent of the testator, to create a precatory trust, but this construction was in reference to the peculiar facts of that case. In the present action the conveyance of the property in Item 10 to testator's wife was absolute and in fee simple with no "strings" on the conveyance. This absolute fee simple title made by testator of the residue of his property to his beloved wife, so named, the primary object of his bounty, cannot be fettered by the language in Item 9 of the will. In fact, the last event referred to in Item 9 is uncertain as to any estate left at the death of Sarah A. W. Fitzgerald. This item also clearly implies a right given Sarah A. W. Fitzgerald to alienate the property. It implies that it may be necessary to do this so that the younger children have an education. *Maclin v. Smith,* 37 N. C., 376; *Wells v. Williams,* 187 N. C., 134; *Roane v. Robinson,* 189 N. C., at p. 631. See *Cagle v. Hampton,* 196 N. C., 470.

In our opinion the plaintiff acquired a title in fee simple to the lot in question under Item 10 of the will and is entitled to the specific performance of his contract with defendant. For the reasons given, the judgment is

Affirmed.

STATE v. DAVE HUNT.

(Filed 13 November, 1929.)

Indictment D a—In this case held: amendment did not effect substantial change in offense charged and was properly allowed.

Where the defendant indicted for driving an automobile while intoxicated on a public highway of the State appeals from a conviction in the recorder's court, an amendment allowed by the judge in the Superior Court to make the indictment conform to the statute "or other road over

which the public has a right to travel," and in accordance with the evidence: *Held*, the amendment did not effect a substantial change in the offense charged and was properly allowed by the judge in the exercise of his discretion.

APPEAL by defendant from *Harwood, Special Judge*, at January Term, 1929, of DAVIDSON. No error.

Defendant was arrested and tried in the recorder's court of the city of Thomasville on a warrant charging him with operating an automobile, while intoxicated, on a public highway of this State. He was convicted, and from the judgment of said court defendant appealed to the Superior Court of Davidson County.

At the trial in the Superior Court there was a verdict of guilty. From judgment on the verdict defendant appealed to the Supreme Court.

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

Walser & Walser for defendant.

PER CURIAM. At the call of this case for trial in the Superior Court, the Solicitor for the State moved that the warrant upon which defendant was tried and convicted in the recorder's court of the city of Thomasville be amended by inserting therein after the word "cartway," the words "or other road over which the public had a right to travel." The motion was allowed over the objection of defendant. Defendant's exception to the order of the court allowing the amendment is not sustained. The amendment was allowed in order that the warrant should conform to the statute. Chapter 230, Public Laws 1927. The crime charged in the warrant as amended is substantially the same as that charged in the warrant as originally issued. Defendant was not prejudiced by the amendment. The power of the Superior Court, in proper cases, to permit an amendment of the warrant upon which defendant was convicted in a recorder's court, where defendant has appealed to the Superior Court from the judgment upon such conviction, is well settled. *S. v. Walker*, 179 N. C., 730, 102 S. E., 404; *S. v. Price*, 175 N. C., 804, 95 S. E., 478; *S. v. Poythress*, 174 N. C., 809, 93 S. E., 919. The contention of the defendant that a new offense was charged in the warrant as amended cannot be sustained.

The evidence tended to show that the defendant, while intoxicated, was operating an automobile on a road which leads from a public highway to the place of the business of the lessee of the land over which the road is located. The public was invited to use this road and had a right to travel over the same. The evidence was submitted to the jury under instructions which are free from error. The judgment is affirmed.

No error.

STACY ADAMS COTTON, BY CORNELIUS C. COTTON, NEXT FRIEND AND FATHER, *v.* CAROLINA TRUCK TRANSPORTATION COMPANY AND GEORGE FOY.

(Filed 20 November, 1929.)

Master and Servant D b—Master is not liable for injuries to third person by servant acting outside scope of employment.

One injured while riding on the running board of a truck as an invitee of the driver, an employee of a transportation company, may not hold the transportation company liable under the doctrine of *respondeat superior* for an injury resulting from the negligence of the driver in the absence of allegations and evidence that the driver was acting within the scope of his employment in giving the invitation, or had authority expressed or implied to invite or permit persons to ride on the defendant's truck, or that the employer had knowledge or acquiesced in his so doing on former occasions, and where the evidence fails to disclose such authority a judgment as of nonsuit is proper.

APPEAL by defendant from *Daniels, J.*, at February Term, 1929, of CRAVEN.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff when he fell or was thrown from a truck.

The evidence for the plaintiff tends to show that on 23 October, 1926, George Foy, who prior and subsequent to that time worked for the corporate defendant as a truck driver, was operating a truck in the city of New Bern, through a section principally inhabited by the colored race. The truck in question was a Mack Truck, such as the corporate defendant uses, with the name "Carolina Truck Transportation Company" appearing on the side. One witness testified that it had the words "Carolina Instruction Company" painted on the side of the cab. On seeing the plaintiff, a colored boy eleven years of age, and his companion, James Wilson, the driver stopped and picked them up for a ride. Wilson got on the inside of the truck and the plaintiff stood on the outside, on the running board, next to the driver's seat.

It is further in evidence that George Foy had allowed the plaintiff to ride with him seven or eight times before, in the same neighborhood, and on the same truck which he was driving that day. As the truck turned the corner of Biddle and Rose streets, two unimproved streets, narrow and sandy, at a rapid rate of speed, the plaintiff's foot slipped, and not being able to hold on with his hands, or regain his footing, because of the speed of the truck, he fell to the ground and was run over by the rear wheel of the truck, sustaining serious and permanent injuries. The plaintiff testified: "The car was going fast when he turned the corner; it turned to the right; I was on the left-hand side, and as the car turned the corner I was flung out. I held up my hand

trying to get back up there. I couldn't hold myself up with this one hand, so I fell off. The reason I fell off was because the car was going too fast."

The evidence for the corporate defendant tends to show that it is engaged in freight transportation by automobile trucks between certain towns, and that none of its trucks or drivers has any business for the defendant in that section of the city where the plaintiff was injured; that George Foy worked for the Carolina Truck Transportation Company, both before and after the accident, but that for several days before and several days after the plaintiff was injured, the said Foy was not in the employ of the Carolina Truck Transportation Company, and that none of its trucks was in the vicinity of the accident at the time it occurred.

George Foy testified that he was not in the employ of the Carolina Truck Transportation Company at the time of the plaintiff's injury, and that the truck he was driving belonged to a man in Goldsboro who was looking for cotton hands; that he was accompanying his driver in that section of the city where he thought such hands might be found; and that the Carolina Truck Transportation Company had nothing whatever to do with the truck which injured the plaintiff or with its driver.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff. From the judgment rendered thereon the defendant appeals, assigning errors.

Ernest M. Green and R. O'Hara for plaintiff.
Moore & Dunn for defendant.

STACY, C. J., after stating the case: It is questionable as to whether the evidence is sufficient to show that the truck which injured the plaintiff belonged to the defendant, Carolina Truck Transportation Company, and that the driver of the truck was about the business of said defendant at the time of the injury; but, however this may be, and conceding for the moment that such inferences are permissible, still we think the plaintiff has failed to make out a case of liability against the corporate defendant, in that, no evidence has been offered to show that the driver was acting within the scope of his employment in taking the boys on the truck for a ride. *Dover v. Manufacturing Co.*, 157 N. C., 324, 72 S. E., 1067. If the defendant Foy had invited the plaintiff to ride with him on other occasions, there is no evidence that the corporate defendant knew it. In this respect *Fry v. Utilities Co.*, 183 N. C., 281, 111 S. E., 354, is distinguishable.

It is neither alleged, nor shown by the evidence, that George Foy, when driving for the defendant company, had any authority, express or

implied, to invite or to permit boys to ride on the defendant's truck. Without such authority, express or implied, the invitation of the driver, even if given, was apparently beyond the scope of his employment, and it is well settled that the master is not liable for the acts of his servant which transcend the legitimate sphere of his employment and are not done in furtherance of the master's business. *Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852; *Bilyeu v. Beck,* 178 N. C., 481, 100 S. E., 891; *Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096; *Daniel v. R. R.,* 136 N. C., 517, 48 S. E., 816.

Speaking to the subject in *Sawyer v. R. R.,* 142 N. C., 1, 54 S. E., 793, the following was quoted with approval from Wood on Master and Servant, sec. 279, p. 535:

"The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that, under the employment the master can be said to have *authorized* the act; for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because not having been done under authority from him, express or implied, it can in no sense be said to be his act, and the maxim previously referred to *(respondeat superior)* does not apply. The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it."

And, again, the same author, in section 307, says:

"The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may fairly be said to have been authorized by him. By 'authorized' is not meant authority expressly conferred, but whether the act was such as was incident to the performance of the duties entrusted to him by the master, even though in opposition to his express and positive orders."

To like effect is the following from *Marlowe v. Bland,* 154 N. C., 140, 69 S. E., 752: "An act is within the scope of the servant's employment, where necessary to accomplish the purpose of his employment, and intended for that purpose, although in excess of the powers actually conferred on the servant by the master. The purpose of the act rather than its method of performance is the test of the scope of employment. But the act cannot be said to be within the scope of the employment merely because the injuries complained of would not have been committed without the facilities afforded by the servant's relations to his master, nor because the servant supposed that he possessed authority to do the act in

question." See, also, *Elmore v. R. R.*, 189 N. C., 658, 127 S. E., 710, and cases there cited.

Nothing was said in *Misenheimer v. Hayman*, 195 N. C., 613, 143 S. E., 1, or *Hayes v. Creamery Co.*, 195 N. C., 113, 141 S. E., 340, both strongly relied upon by plaintiff, which, when properly applied, militates against our present position or is in conflict with any of the cases above cited. In the first, it is expressly stated that to hold the master liable for the tort of the servant, the plaintiff must show "that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business," citing as authority for the position: *Freeman v. Dalton*, 183 N. C., 538, 111 S. E., 863, and *Clark v. Sweaney*, 176 N. C., 529, 97 S. E., 474. In the second, the whole question was whether the prohibitory rule of the master had been so persistently and openly violated as to amount to its abrogation. If so, the master was deemed to have had knowledge of its violation and to have acquiesced in its abrogation, thus impliedly authorizing the acts of the servant. *Fry v. Utilities Co., supra.*

On the record, we think the action against the Carolina Truck Transportation Company should be dismissed as in case of nonsuit.

Reversed.

DAVID G. DAVIS v. Z. M. L. JEFFREYS, J. T. JEFFREYS AND R. A. JEFFREYS, TRADING AS JEFFREYS' SONS.

(Filed 20 November, 1929.)

1. Negligence C a—Contributory negligence which is proximate cause of injury bars plaintiff's right of recovery.

In an action to recover damages for an injury alleged to have been negligently caused by the defendant, plaintiff's contributory negligence that will bar his recovery is that which, concurring and coöperating with the negligence of the defendant, becomes the real, efficient and proximate cause of the injury, or that cause without which the injury would not have occurred, and it is not necessary that the plaintiff's negligence be the sole proximate cause.

2. Highways B g—In this case held: plaintiff's evidence disclosed contributory negligence barring his recovery.

Where the action for damages arising from the defendant's truck and trailer being nearly across a public road near the corporate limits of a town at night without lights, etc., in violation of C. S., 2615, and the plaintiff's own evidence shows that his collision therewith was caused by his excessive speed in driving his motorcycle through rain and partial sleet, and that otherwise he could have passed in safety: *Held*, notwithstanding the defendant's negligence, the plaintiff's own evidence disclosed contributory negligence barring his recovery, and defendant's motion as of nonsuit was properly granted.

3. Negligence D c—Where plaintiff's own evidence discloses contributory negligence barring recovery nonsuit is proper.

Where the plaintiff's own evidence shows that his contributory negligence in a personal injury action bars his recovery a judgment of nonsuit is properly rendered.

APPEAL by plaintiff from *Daniels, J.*, at June Term, 1929, of CARTERET.

Civil action to recover damages for an alleged negligent injury suffered by plaintiff when he ran his motorcycle into the defendant's truck, which was standing on a public highway about 9 o'clock at night, without any lights.

The evidence tends to show that on the night of 2 May, 1928, about 9 p.m., the defendants' truck and trailer, while being loaded from a freight car, was standing partly across the highway near or within the corporate limits of Morehead City, but there was room for cars or motor vehicles to pass on the pavement or hard surface. The plaintiff testified that he was driving his motorcycle from Beautfort to Morehead City; that his lights were in good condition; that they would show a distance of 150 yards down the highway; that he was running about 30 or 35 miles an hour; that he could bring his motorcycle to a full stop within 100 feet, if proceeding at 25 miles an hour, or within 150 feet, if proceeding at 40 miles an hour; that he did not see the truck in time to avoid running into it; that it was a dark night, with a dense atmosphere, probably drizzling rain a little.

When the plaintiff was about 300 feet from the truck, a Mr. Crump (presumably defendant's agent) tried to stop the plaintiff by waving his hands and calling to him, but plaintiff testified: "I did not stop as soon as I saw the man waving his hands because I did not want to stop in the dark to pick people up. I didn't know him, but slowed down and threw the motor out of gear. I put my foot on the brake of the motorcycle and slid right on it. I couldn't stop, it was so close to the object I saw in front of me. It looked like a mountain when I first saw it, and when I got a little closer I saw it was a truck. It did not have any lights on it, and I slid right on it."

R. A. Cherry, witness for plaintiff, testified that he was traveling on the highway at about 20 miles an hour and that the plaintiff passed him, two or three blocks from the scene of the accident, going "about three times as fast as I was" *(i. e.,* 60 miles an hour).

The plaintiff's motorcycle bounded back about "half the distance of this court room" (40 feet) after striking the truck, and he was seriously injured. His motorcycle was demolished.

From a judgment of nonsuit entered on motion of the defendant at the close of plaintiff's evidence, the plaintiff appeals, assigning error.

C. R. Wheatley and Luther Hamilton for plaintiff.
Kenneth C. Royall and J. F. Duncan for defendants.

STACY, C. J., after stating the case: Conceding that the defendants were negligent in allowing their truck and trailer to stand partly across the highway in the night time, without lights, in violation of C. S., 2615, still we think the evidence discloses a clear case of contributory negligence on the part of the plaintiff which bars a recovery. *Hughes v. Luther,* 189 N. C., 841, 128 S. E., 145.

Contributory negligence, such as will defeat a recovery in an action like the present, is the negligent act of the plaintiff, which concurring and coöperating with the negligent act of the defendants, thereby becomes the real, efficient, and proximate cause of the injury, or the cause without which the injury would not have occurred. *Bailey v. R. R.,* 196 N. C., 515, 146 S. E., 135; *Elder v. R. R.,* 194 N. C., 617, 140 S. E., 298; *Weston v. R. R.,* 194 N. C., 210. And it is sufficient to defeat a recovery, in a case like the one at bar, if the plaintiff's negligence is one of the proximate causes of the injury; it need not be the sole proximate cause. *Construction Co. v. R. R.,* 184 N. C., 179, 113 S. E., 672. The expression "contributory negligence" implies *ex vi termini* that the negligence of the defendant is one of the causes of the injury. *Fulcher v. Lumber Co.,* 191 N. C., 408, 132 S. E., 9.

A motorcycle running, on a dark rainy night, fast enough to be demolished and thrown back a distance of 40 feet on striking a truck standing in the road, was necessarily being driven at a reckless rate of speed under the circumstances disclosed by the record.

A judgment of nonsuit is properly entered when the contributory negligence of the plaintiff is established by his own evidence, as he thus proves himself out of court. *Holton v. R. R.,* 188 N. C., 277, 124 S. E., 307; *Wright v. R. R.,* 155 N. C., 325, 71 S. E., 306.

Affirmed.

ED. HUGH LEE, ADMINISTRATOR OF ED. HUGH LEE, JR., v. CAVENESS PRODUCE COMPANY.

(Filed 20 November, 1929.)

1. Pleadings D a—Where pleadings liberally construed allege cause of action demurrer thereto will be overruled.

Upon a demurrer the pleadings are liberally construed in the light most favorable to the pleader, and where there are conflicting allegations, and one of them is sufficient to allege a cause of action, the demurrer thereto will not be sustained. C. S., 535.

2. Highways B h—In this case held: allegations of complaint were sufficient to state cause of action for actionable negligence.

Allegations in the complaint liberally construed that the defendant's driver of its truck, acting within the scope of his employment and in furtherance of his master's business, stopped the truck he was driving on a dangerous place on the highway on the top of a hill near a curve in the road, at night, that he turned off the rear light of the truck and turned it on again when he heard an automobile approaching, and that the plaintiff's intestate was guiding a car being towed by the car heard by the driver of the truck, and that the light on the truck was turned on too late for the intestate to see the danger and guide his car in safety behind the lead car: *Held*, the allegations of actionable negligence against the defendant are sufficient as against a demurrer.

APPEAL by defendant from *Harris, J.*, at Second June Term, 1929, of WAKE.

Civil action to recover damages for an alleged wrongful death caused by a collision between the car in which plaintiff's intestate was riding and the defendant's truck.

The material allegations of the complaint, so far as essential to a proper understanding of the legal question involved, may be abridged and stated as follows:

1. That plaintiff is the duly appointed administrator of the estate of Ed. Hugh Lee, Jr., deceased; and that the defendant is a corporation engaged in transporting by trucks goods, wares and merchandise over the highways of the State.

2. That on the night of 6 December, 1928, plaintiff's intestate and a colored man by the name of Joe Williams, went out in a Buick roadster to tow in a Dodge sedan automobile belonging to plaintiff's intestate.

"That they arrived at Auburn about 4:30 a.m., and secured the said Dodge car to the rear of said Buick roadster by a towing chain, leaving an interval between the two cars of about 12 feet; that the said Williams then got into the Buick car and plaintiff's intestate got into the Dodge car which was to be towed, and said parties proceeded with said cars on highway No. 10 in the direction of Smithfield, N. C.; that the said Williams, while driving in a careful and prudent manner on a stretch of road which was practically straight, at a speed somewhere around 25 miles an hour, when in about 4 miles of Smithfield, suddenly saw the red rear light of defendant's truck flash into view; that at this time the car driven by said Williams was within 50 to 75 yards of the said light; that the said Williams could not instantly tell whether said truck was moving or not, but he immediately began to reduce his speed as much as was practical, taking into consideration that he was towing another car, and proceeded to turn to the left in order to avoid said light.

"That when within 25 or 35 yards of said red light the bulk of the truck suddenly came into view, extending 7 or 8 feet in the air above said red light and projecting over the hard surface road to the extent of something like 4½ feet; that the said Williams thereupon continued to turn to the left and passed the end of said truck, projecting into the road, by a margin of 2 or 2½ feet.

"That plaintiff's intestate, who could not see the light of the truck, the same being hidden by the Buick car, was unable to follow directly in the path of the car driven by Williams by reason of the fact that he did not have sufficient time to make the turn in the same manner and to the same degree as was done by the said Williams; that the car being guided by plaintiff's intestate crashed into the rear of defendant's said truck, and plaintiff's intestate was instantly killed."

3. "That the point at which the agent and servant of defendant company had stopped his truck is on a slight curve and something like 200 yards on the Raleigh side from where the said highway No. 10 makes an abrupt turn to the left and curves over a steep hill; that the said Williams was aware of the fact that he was approaching a dangerous curve on a hill and, not knowing exactly how close he was to said curve, was well over on the right side of the road at the time when he first saw the red light of defendant's truck, knowing that a towed car might be difficult to manage if he met a car speeding towards him and coming over said hill and around said curve."

4. "That defendant's truck was loaded with produce belonging to defendant, which defendant's servant was conveying to certain points in Eastern North Carolina; that said driver had stopped the truck at a point he knew to be dangerously close to an abrupt curve coming over a steep hill a short distance in front of him allowing the rear of said truck to project upon the hard surface a distance of more than 4½ feet, and had cut out the lights on said truck and only turned the same on when he heard the approach of the car driven by the said Williams and not before said car had arrived within a distance of 50 to 75 yards from where he had parked said truck."

5. "That plaintiff's intestate met his death, as hereinbefore set forth, by reason of the careless, negligent and wanton conduct of defendant's said agent and servant, in that:

"(a) He parked said truck in such a manner that the rear of the same protruded over the hard surface road for a distance of more than 4½ feet, occupying at the time of the death of plaintiff's intestate, more than half of the right-hand side of said road.

"(b) After parking said truck, as hereinbefore described, he cut off his lights and failed to turn the same on until the car driven by Williams was within 50 to 75 yards of said truck, thus rendering it impos-

sible for the said Williams and plaintiff's intestate to avoid the collision between the car being towed and the said truck.

"(c) Defendant's said servant parked his truck at a dangerous point in the road by reason of a sharp curve coming over a steep hill a short distance in front of him, well knowing that the position in which he had parked his truck added greatly to the risk of a collision between his said truck and a towed car going in the same direction his truck was headed."

6. That plaintiff has been damaged in the sum of $50,000.

A demurrer was interposed on the ground that the complaint does not state facts sufficient to constitute a cause of action, or that upon the facts stated in the complaint, the death of plaintiff's intestate as a matter of law, was the direct and proximate result of the negligence of Joe Williams, agent and servant at the time of plaintiff's intestate.

From a judgment overruling the demurrer, the defendant appeals, assigning error.

Pou & Pou and Jno. W. Hinsdale for plaintiff.
Clyde A. Douglass for defendant.

STACY, C. J. The plaintiff alleges, as we understand his complaint, that the defendant's truck was parked on the side of the road, partly on the hard surface, in the night time, without any lights burning, in violation of C. S., 2615, and that this condition continued—the lights not being turned on by the defendant's servant in charge of the truck—until it was too late for Williams, in the exercise of reasonable care, to pass in safety with both the lead car, which he was driving, and the car that was being towed, in which plaintiff's intestate was riding. Thus, it is alleged, in effect, that the plaintiff's intestate was killed by the negligence of the driver of defendant's truck while acting in the scope of his employment and in furtherance of the defendant's business. The complaint, therefore, is good as against a demurrer. *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1.

We have not overlooked the allegation set out in paragraph 2 above, and stressfully urged as fatal by the defendant, to the effect that plaintiff's intestate could not see the light of the truck because of the Buick car, and was unable to follow directly in the path of the car driven by Williams, by reason of the fact that he did not have sufficient time to make the turn in the same manner and to the same degree as was done by the said Williams. But this allegation, taken in connection with others appearing in the complaint, we apprehend, may be interpreted in a light favorable to the plaintiff, even if it also be susceptible to a contrary interpretation. Nor have we failed to observe that in one place plaintiff alleges the truck was "stopped on a slight curve," while in

another he says that Williams was driving "on a stretch of road which was practically straight."

When a case is presented on demurrer, we are required by the statute, C. S., 535, to construe the complaint liberally, "with a view to substantial justice between the parties," and in enforcing this provision, we have adopted the rule "that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader." *Dixon v. Green,* 178 N. C., 205, 100 S. E., 262.

The demurrer interposed by the defendant was properly overruled. *S. v. Bank,* 193 N. C., 524, 137 S. E., 593.

Affirmed.

A. S. HERMAN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 20 November, 1929.)

1. Negligence B c—Where intervening negligence of third person is sole proximate cause of injury defendant is not liable.

Where a passenger in an automobile is injured in a collision of an automobile and a train at a grade crossing, and sues the railroad company for damages resulting therefrom, and his own evidence tends only to show that the accident resulted from the negligent driving of the automobile by another, and that this negligence of the driver was the sole proximate cause of the injury, or that cause which acting in unbroken sequence produced the injury, and without which it would not have occurred, and that the negligence of the railroad company, if any, would not have caused injury except for the intervening negligence of the driver: *Held,* the railroad company is not liable in damages to the plaintiff, and a judgment as of nonsuit was properly entered.

2. Railroads D b—Where negligence of third person is the sole proximate cause of accident at crossing railroad is not liable.

Where the collision between an automobile and a train at a grade crossing is caused solely by the negligence of the driver of the automobile, an occupant therein may not recover damages for his injuries sustained therein from the railroad company.

APPEAL by plaintiff from *Cranmer, J.,* at April Term, 1929, of CUMBERLAND.

HERMAN *v.* R. R.

Civil action to recover damages for an alleged negligent injury caused by a collision between an automobile in which plaintiff was riding and one of the defendant's trains.

The evidence discloses that the automobile in which plaintiff was riding when it collided with the defendant's locomotive at a highway crossing in the village of Raynham, Robeson County, was running about 30 or 35 miles an hour; it skidded approximately 90 feet, presumably due to the driver's effort to stop, before striking the rear driving wheel just under the fireman's seat. "I saw the car hit and rear up like a bucking horse," said one of the plaintiff's witnesses. The train was approaching, slowing down for the station stop, at a rate of from 10 to 12 or 15 miles an hour.

Judgment of nonsuit was entered at the close of plaintiff's evidence on the theory that the sole proximate cause of plaintiff's injury was the negligence of the driver of the car in which plaintiff was riding. Plaintiff appeals, assigning error.

S. Burnell Bragg and Dye & Clark for plaintiff.
Rose & Lyon for defendant.

STACY, C. J. We fail to discern from the record any evidence of negligence on the part of the railroad company which contributed to the plaintiff's injury. Even if the engineer or fireman did fail to ring the bell or sound the whistle, of which there is only negative testimony with positive evidence to the contrary, still the defendant had a right to operate the train over its track, and the negligence of the driver of the automobile is so palpable and gross, as shown by plaintiff's own witnesses, as to render his negligence the sole proximate cause of the injury. *Construction Co. v. R. R.*, 184 N. C., 179, 113 S. E., 672.

Upon all the evidence, we think it is manifest that the alleged negligence of the defendant, Atlantic Coast Line Railroad Company, was not in law a proximate cause of plaintiff's injury.

Speaking to the subject in his valuable work on Negligence (138), Mr. Wharton very pertinently says: "Suppose that, if it had not been for the intervention of a responsible third party, the defendant's negligence would have produced no damage to the plaintiff: is the defendant liable to plaintiff? This question must be answered in the negative, for the general reason that causal connection between the negligence and damage is broken by the interposition of defendant's responsible human action. I am negligent on a particular subject-matter. Another person, moving independently, comes in and, either negligently or maliciously, so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor and insulates my negli-

gence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable."

The same rule announced by *Mr. Justice Strong* in *R. R. v. Kellogg,* 94 U. S., 469, regarded as sound in principle and workable in practice, has been quoted with approval in a number of our decisions. He says: "The question always is, was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, or wrongful act, and that it ought to have been foreseen in the light of attending circumstances."

Where the plaintiff's evidence shows that his injury was due to the negligence of a third person, and not to that of the defendant, it is proper to nonsuit the action, for he thus fails to make out a case against the defendant. Such was the holding of the trial court, and the judgment is affirmed. *Ballinger v. Thomas,* 195 N. C., 517, 142 S. E., 761.

Affirmed.

FANNIE MARTIN, ADMINISTRATRIX, v. GREENSBORO-FAYETTEVILLE BUS LINE.

(Filed 20 November, 1929.)

Master and Servant D b—In this case held: servant was not acting within scope of employment or about master's business and master was not liable for injuries to third person.

In order to hold a master responsible for the negligence of the servant in causing an injury to a third person, it is essential that the latter should be acting in the scope of his employment and in the furtherance of the master's business, and in an action against an auto-bus line for damages resulting from the negligence of its driver in running over and killing plaintiff's intestate, a motion as of nonsuit should be entered if the plaintiff's own evidence tends only to show that a bus of the defendant was at the time of the injury being driven by an employee of the garage in which the defendant stored its buses who was returning the bus to the garage after the driver thereof had ridden home in it contrary to the express orders of the defendant and without his knowledge or acquiescence.

MARTIN *v.* BUS LINE.

APPEAL by plaintiff from *Sink, Special Judge,* at May Term, 1929, of DURHAM.

Civil action to recover damages for an alleged wrongful death occasioned by defendant's bus striking plaintiff's intestate on Main Street in the city of Durham, knocking him down and inflicting injuries from which he died.

The evidence discloses that on 10 October, 1926, Lester Griffin, driver of one of defendant's Greensboro-Fayetteville buses, arrived in Durham at 6:45 p.m., about an hour late, due to heavy traffic on the road; that, after unloading his passengers, he carried the bus to King's garage, where the defendant stores its buses for the night, and asked that one of the tires, which had been punctured, be patched, so that he could leave next morning on schedule time; that Mr. King replied he was too busy to repair the tire—his full force not working on Sunday—and suggested that the bus be taken to Harris' garage for the needed repairs, which was done; that Griffin's wife and child met him at Harris' garage and rode back with him after the repairs had been made; that upon arriving at the storage garage, about 8 p.m., Griffin asked King, who had charge of storing the bus for the night, if he could send him and his family home, as he was about half sick and was not feeling well; that King replied he had no available car, but that he might go in the bus, taking Clarence Bullock, an employee of the garage and a good driver, to bring it back; that in consequence of this suggestion, Bullock got in the bus and rode with Griffin and his family to Griffin's home, when and where the bus was turned over to Bullock by Griffin, and that on his way back to King's garage, Bullock ran into and killed plaintiff's intestate.

The evidence further discloses that Griffin, the regular driver of the bus, was under positive instructions from the defendant not to use the bus after reaching Durham, but to store the same for the night in King's storage garage, and Mr. King was to wire the defendant's manager in Greensboro whenever the bus arrived at his garage later than 6:30 p.m., so that the delay might be investigated; and that the use of the bus from the time it reached the storage garage until its scheduled departure on the following morning was unauthorized, and without the knowledge, consent or acquiescence of the defendant or any of its agents.

From a judgment dismissing the action as in case of nonsuit, the plaintiff appeals, assigning error.

Bryant & Jones for plaintiff.
John W. Hester for defendant.

STACY, C. J., after stating the case: When it is sought to hold one responsible for the neglect or tort of another, under the doctrine of

respondeat superior, at least three things must be made to appear, yea four, and, upon denial of liability, the plaintiff must offer "some evidence which reasonably tends to prove every fact essential to his success" (*S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804). These are:

1. That the plaintiff was injured by the negligence of the alleged wrongdoer. *Hurt v. Power Co.,* 194 N. C., 696, 140 S. E., 730.

2. That the relation of master and servant, employer and employee, or principal and agent, existed between the one sought to be charged and the alleged *tort-feasor. Linville v. Nissen,* 162 N. C., 95, 77 S. E., 1096.

3. That the neglect or wrong of the servant, employee, or agent, was done in the course of his employment or in the scope of his authority. *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Fleming v. Knitting Mills,* 161 N. C., 436, 77 S. E., 309.

4. That the servant, employee or agent, was engaged in the work of the master, employer, or principal, and was about the business of his superior, at the time of the injury. *Gurley v. Power Co.,* 172 N. C., 690, 90 S. E., 943.

It is elementary law that the master is responsible for the negligence of his servant which results in injury to a third person when the servant is acting within the scope of his employment and about the master's business. *Roberts v. R. R.,* 143 N. C., 176, 55 S. E., 509; 8 L. R. A. (N. S.), 798, 10 Ann. Cas., 375. It is equally elementary that the master is not responsible if the negligence of the servant which caused the injury occurred while the servant was engaged in some private matter of his own or outside the legitimate scope of his employment. *Bucken v. R. R.,* 157 N. C., 443, 73 S. E., 137; *Doran v. Thomsen,* 76 N. J. L., 754.

It is further held that the owner of an automobile is not liable for injuries caused by it, merely because of ownership. *Linville v. Nissen, supra.* And it is well settled by numerous decisions, here and elsewhere, that "the doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of such neglect or wrong, at the time and in respect to the very transaction out of which the injury arose." *Wyllie v. Palmer,* 137 N. Y., 248; *Doran v. Thomsen, supra; Wilkie v. Stancil,* 196 N. C., 794, 147 S. E., 296; *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852.

In the instant case it could hardly be said that Bullock was the servant of the defendant in bringing the bus back to the storage garage, or that Griffin was acting within the scope of his employment and about the defendant's business, when he took the bus to drive himself and family home. *Cotton v. Transportation Co., ante,* 709. It is univer-

sally held that "the master is not responsible if the wrong done by the servant is done without his authority and not for the purpose of executing his orders or doing his work. So that, if the servant, wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another, not within the scope of his employment, the master is not liable." *Howe v. Newmarch,* 94 Mass., 49.

Speaking to the subject in *Dover v. Manufacturing Co.,* 157 N. C., 324, 72 S. E., 1067, *Brown, J.,* delivering the opinion of the Court, said: "This doctrine of *respondeat superior,* as it is now established, is a just but a hard rule. The master exercises care in the selection of his servant and retains in his service only such servants as are prudent and trustworthy; the servant in the prosecution of the master's business must of necessity pass beyond his sight and out of his control; and yet the law makes the master liable for the conduct of the servant. The application of this principle without working the greatest injustice to every employer of a servant is made possible only by the limitation established by the courts, that when the servant does an act which is not within the scope of his employment the master is not liable. 'Beyond the scope of his employment the servant is as much a stranger to the master as any third person, and his act in that case cannot be regarded as the act of the master. The rule as it is now established by the later judicial declarations should be strictly held within its defined limits. It is a rule capable of great abuse and much hardship and the courts should guard against its extension or misapplication.' *Holler v. Ross,* 68 N. J. Law, 324."

The decisions in *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1, and *Freeman v. Dalton,* 183 N. C., 538, 111 S. E., 863, both strongly relied upon by plaintiff, are not in conflict with our present position or with any of the cases above cited. In the first, it is expressly stated that to hold the master liable for the tort of the servant, the plaintiff must show "that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business," citing in support of the position: *Freeman v. Dalton, supra,* and *Clark v. Sweaney,* 176 N. C., 529, 97 S. E., 474. In the second, the only question presented and decided was that the trial court erred in instructing the jury, "if the plaintiff has satisfied you by the greater weight of the evidence that he was injured by the defendant's automobile, then the burden would be on the defendant to show by the greater weight of the evidence that although he was the owner of the automobile, it was not being used in his business." This was the extent of the decision in *Freeman's case,* and while some expressions in the opinion, not necessary to the decision, may be out of line with the holdings in other cases, *e. g., Wilkie*

v. Stancil, 196 N. C., 794, 147 S. E., 296, *Tyson v. Frutchey,* 194 N. C., 750, 140 S. E., 718, *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852, *Reich v. Cone,* 180 N. C., 267, 104 S. E., 530, and *Bilyeu v. Beck,* 178 N. C., 481, 100 S. E., 891, it should be remembered, as pointed out by *Marshall, C. J.,* in *U. S. v. Burr,* 4 Cranch, 470, that "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."

Applying these principles to the facts before us, it would seem that the plaintiff ought not to recover of the defendant.

Affirmed.

ADAMS, J., concurring: I concur in the opinion written by the *Chief Justice,* and take occasion to stress the statement that in *Misenheimer v. Hayman,* 195 N. C., 613, the Court did not hold that the owner of a motor car is liable for injuries caused by it, merely because of his ownership. In that case there was no controversy as to the negligent operation of the truck. The questions were (1) whether the defendant was the owner of the truck; (2) whether at the time of the injury the truck was driven by the defendant's employee; and (3) if it was, whether the employee was then engaged in the prosecution of the defendant's business? The court concluded, on the defendant's motion for nonsuit, that the evidence, while not complete in all respects, was not so meager as to require dismissal of the action as a matter of law.

WILLIAM JEFFREY v. OSAGE MANUFACTURING COMPANY.

(Filed 20 November, 1929.)

Master and Servant D b—In this case held: plaintiff established prima facie case that servant was acting in furtherance of master's business.

Where the plaintiff's evidence in his action against the owner of an auto-truck for damages resulting from the negligence of the defendant's driver tends to show that a truck was found on the highway on a business day during business hours and was operated by the regular employee of the defendant, whose regular business or employment was the duty of driving and operating the said truck: *Held,* the evidence is sufficient to furnish a basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business, and makes out a prima facie case, and upon contradictory evidence, the question is for the jury.

CIVIL ACTION, before *Stack, J.,* at January Term, 1929, of GASTON.

The plaintiff was a resident of Cambridge, Mass., and had been spending some time in Florida. He left Florida and returning to New York as a passenger and guest of John Warner, who lived in Watertown, Mass.

The evidence tended to show that plaintiff left Asheville about 8:30 on the morning of 22 March, 1928. When the car reached a point on highway No. 20 between Kings Mountain and Bessemer City, going east toward Gastonia, it collided with a truck owned by the defendant and operated at the time by a colored driver named William Shifty. There was sufficient evidence of negligence to be submitted to the jury. The defendant admitted the ownership of the truck; that the driver, Shifty, was in its regular employment, and that said Shifty was the regular driver of said truck and had been in the employment of the defendant for four or five years.

The evidence further tended to show that Shifty's mother lived some distance from the defendant's plant on the road between Gastonia and Bessemer City, and that on the day of the injury Shifty, in company with two other negro employees of the defendant, took the truck at the dinner hour to visit Shifty's mother, who was sick. The collision occurred at a point near the home of the driver's mother. The defendant offered evidence to the effect that the driver, Shifty, had taken the truck at the dinner hour without the knowledge or consent of defendant and contrary to the express orders and instructions given him by the officers of defendant to the effect that the driver should not use the truck for any purpose without orders from his superiors. This evidence came from several witnesses for the defendant and was uncontradicted.

There was evidence that Shifty was the only person who ever drove the truck, and that on previous occasions he had driven the truck on the road between Gastonia and Bessemer City.

Issues of negligence and damages were submitted to the jury and answered in favor of plaintiff.

The verdict awarded damages in the sum of $7,200. From judgment upon the verdict the defendant appealed.

Ernest R. Warren, John G. Carpenter and Ryburn & Hoey for plaintiff.

J. Lawrence Jones and S. J. Durham for defendant.

BROGDEN, J. What must a plaintiff prove, in order to make out a prima facie case, for personal injury inflicted by a truck?

Our decisions are to the effect that a prima facie showing takes the case to the jury, and it is therefore a question for the jury to determine

whether or not the necessary facts have been established. This rule of law was tersely expressed in *Speas v. Bank,* 188 N. C., 524, as follows: "A prima facie case, or prima facie evidence, does not change the burden of proof. It only stands until its weight is met by evidence to the contrary. The opposing party, however, is not required as a matter of law to offer evidence in reply. He only takes the risk of an adverse verdict if he fail to do so. The case is carried to the jury on a prima facie showing, and it is for them to say whether or not the crucial and necessary facts have been established."

Our decisions are also to the effect that a plaintiff, in order to recover for personal injury inflicted by an automobile or truck, must offer evidence tending to prove the following:

1. That the truck or automobile inflicting the injury was at the time operated in a negligent manner, or that the driver thereof was guilty of negligence which was the proximate cause of the injury.

2. Where the driver or operator of the conveyance at the time of the injury was other than the owner, the plaintiff must offer evidence tending to show the ownership of the vehicle if such owner is sought to be charged with the negligence of the driver or operator.

3. That if the injury was caused by the negligence of an agent, evidence must be offered tending to establish the agency.

4. That the agent or employee at the time of the injury, was acting within the scope of his employment as contemplated and defined by law. *Grier v. Grier,* 192 N. C., 760, 135 S. E., 852; *Misenheimer v. Hayman,* 195 N. C., 613, 143 S. E., 1; *Ferguson v. Spinning Co.,* 196 N. C., 614, 146 S. E., 597; *Wilkie v. Stancil,* 196 N. C., 794, 146 S. E., 81; *Martin v. Bus Line, ante,* 720; *Cotton v. Transportation Co., ante,* 709.

In the case at bar there was ample evidence of negligence and the defendant admitted ownership of the truck, and further admitted that the driver was a regular employee and had previously been the regular driver of the truck in the furtherance of the business of said defendant. However, the defendant offered strong evidence to the effect that at the time of the injury the driver was not engaged in its business, but had taken said truck, a substantial distance from the mill, at the dinner hour to visit his mother, and that this was done without the knowledge, consent or approval of the defendant and contrary to its express and repeated instructions. This evidence was not contradicted, and upon such showing the defendant earnestly contends that the plaintiff ought not to recover, because there was no evidence tending to prove that the driver at the time of the injury was acting within the scope of his employment and in furtherance of the master's business. In other words, this phase of the case is reduced to a single proposition, to wit: "Must a plaintiff offer evidence that the driver of the truck was acting within

the scope of his employment, or may the jury infer such fact, when it is either admitted, or there is evidence tending to show, the ownership of the truck, and that the driver was in the regular employment of such owner as the habitual operator of said vehicle.

This question has been the subject of extended debate by the courts of this country. There is a sharp division in the judicial reasoning upon the proposition and the result achieved by various courts are utterly divergent and irreconcilable, unless resort, perhaps, be made to microscopic distinctions. The general aspect of the question is stated in Huddy on Automobiles 7th edition, section 795, p. 873, as follows: "In a majority of the jurisdictions passing upon the question, it is held that evidence of defendant's ownership of a motor vehicle, coupled with proof that the driver is in his regular employment or is a member of his family raises a presumption that at the time he is acting for the owner and within the scope of the owner's business. . . . In a minority of jurisdictions, however, it is held that such evidence does not present a prima facie case of liability, but that the plaintiff must show affirmatively that at the particular occasion under consideration the driver was acting for his master and within the scope of his master's business."

The Supreme Judicial Court of Massachusetts has considered the question in various aspects. Upon the particular question involved, the Court came to this conclusion in *Persino v. De Stefano,* 137 N. E., 664: "If the servant was not then engaged in the course of his employment, but was acting for a purpose of his own, the master would not be liable. If the defendant was the owner of the truck, and the driver was in his general employment, those facts would not be sufficient to show that he (the driver) was acting within the scope of his employment at the time of the accident." *Washburn v. Owens Co.,* 147 N. E., 546. The Supreme Court of Maryland in the case of *Pollock v. Watts,* 121 N. E., 238, held that the presumption that the driver is agent of the owner is rebuttable, and if rebutted by uncontradicted testimony, then the case ought not to go to the jury. The Supreme Court of Michigan considered the proposition in *Union Trust Co. v. American Commercial Car Co.,* 189 N. W., 23. The Court, quoting with approval, said: "It is now quite generally held by the courts that a rebuttable or prima facie presumption has no weight as evidence. It serves to establish a prima facie case, but if challenged by rebutting evidence, the presumption cannot be weighed against the evidence. Supporting evidence must be introduced, and it then becomes a question of weighing the actual evidence introduced, without giving any evidential force to the presumption itself." *Curry v. Kelley,* 195 N. W., 617; *Der O'Hannessian v. Elliott,* 135 N. E., 518.

The Supreme Court of Pennsylvania adopts a contrary view. In *Holzheimer et ux. v. Lit Bros.*, 105 Atlantic, 73, the Court declared: "There was evidence, however, that the truck bore the name of defendant company. This was sufficient to establish, not only a prima facie case that the defendants were the owners of the truck, but also whether it was then in charge of their servant or employee. This was presumptive evidence, and, as has been frequently ruled, was quite sufficient to carry the case to the jury. As a presumption it was of course rebuttable, but this does not mean that it had any less presumptive force than it would have had had it rested on direct evidence," etc. Again in *Thatcher v. Pierce*, 125 Atlantic, 302, the same Court said: "Where a truck or car is used for business purposes and is identified as the property of the owner, a presumption arises that the truck was engaged in the master's business." The Pennsylvania Court makes a distinction between trucks and pleasure vehicles. This distinction was sharply drawn in the case of *Laubach v. Colley*, 129 Atlantic, 88. The Court said: "A distinction has been drawn between cars employed for business and pleasure purposes. In the case of the former, the operation is presumed to be in the master's service, and the burden rests on him to show the contrary to be true." *Hartig v. American Ice Co.*, 137 Atlantic, 867.

In North Carolina the decisions are not in full accord, but the general principle is that mere ownership plus negligence is not sufficient to constitute a prima facie case. Indeed, in *Misenheimer v. Hayman*, 195 N. C., 613, 143 S. E., 1, this Court held that the plaintiff must show "that the driver of the truck was acting within the scope of his authority and in furtherance of his employer's business." The case, however, does not undertake to decide how this must be shown.

Summarizing the plaintiff's evidence as disclosed in the present record, we have substantially the following fact situation: A truck, which is in itself, a business vehicle or devoted exclusively to business purposes, is found on the highway on a business day during business hours, operated by the regular employee of the defendant, and one whose regular business or employment was the duty of driving and operating said vehicle.

We are of the opinion, and so hold, that these facts furnish a sound and reasonable basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business. Therefore, it necessarily follows that the plaintiff by such showing, made out a prima facie case. It was the function of the jury to determine the weight and credibility of the evidence offered by the parties.

No error.

STATE v. STANCIL PHIFER.

(Filed 20 November, 1929.)

Criminal Law I e—In this case held: prosecution overstepped bounds in argument to jury and defendant is entitled to a new trial.

Where in the prosecution for murder for the reckless driving of an automobile the counsel for the private prosecution in his argument to the jury appeals for a conviction because others had been killed by drunken drivers on the same highway and no one had been punished for it, and upon objection by the defense on the ground that the argument was not sustained by the evidence, the trial court remarked that he could not regulate argument of counsel unless beyond bounds, and instructed the counsel to continue: *Held*, the counsel for the prosecution went outside the record and overstepped the bounds, and the defendant is entitled to a new trial.

APPEAL by defendant from *Stack, J.*, at May Term, 1929, of MECKLENBURG.

Criminal prosecution tried upon an indictment charging the defendant with the murder of Estelle Godfrey.

On the night of 24 November, 1928, near Matthews, N. C., there was a collision between defendant's automobile and another car in which the deceased was an occupant. The driver of each machine claimed that the other was responsible for the collision, and there is evidence that the defendant was drinking at the time.

The attorney for the private prosecution, in his argument to the jury, used the following language:

"Gentlemen of the jury, drunken men are driving their cars all over the highways of North Carolina, and are running over people and killing them, and have no regard for human life. I argue to you that drunken drivers on our highways must be stopped. I contend to you, gentlemen of the jury, that this man has operated his automobile in a drunken condition, and I appeal to you to put a stop to transporting whiskey when operating automobiles on the highways. Drunken drivers of automobiles have killed others on this same highway and have not been punished for it."

Counsel for the defendant immediately objected and asked that the jury be instructed not to consider the argument that others had been killed on this same highway by drunken drivers, as there was no evidence to support such an argument, but the court simply replied: "I cannot tell a lawyer what to say and what not to say, unless he goes beyond bounds. Proceed with the argument and argue the evidence in the case before the jury." Exception by defendant.

Verdict: Guilty of manslaughter.

Judgment: Imprisonment in the State's prison for a term of not less than five nor more than seven years at hard labor.

The defendant appeals, assigning errors.

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

Jake F. Newell and Stewart, MacRae & Bobbitt for defendant.

STACY, C. J., after stating the case: It is conceded by the Attorney-General that counsel for the private prosecution went outside the record and overstepped the bounds in appealing to the jury to convict the defendant because others had been killed by drunken drivers on this same highway and no one had been punished for it. *S. v. Evans,* 183 N. C., 758, 111 S. E., 345.

In *Washington v. State,* 87 Ga., 133, 13 S. E., 131, the Supreme Court of Georgia held that, on the trial of an indictment for arson, it was error to allow the solicitor-general, over objection of defendant's counsel, to state, in his concluding argument, that frequent burnings had occurred throughout the country, and to urge the jury, in consequence thereof, strictly to enforce the law in the case then on trial.

To like effect is the holding of the Supreme Court of Indiana in *Ferguson v. State,* 49 Ind., 33: "On the trial of an indictment for murder, it is error for counsel for the State, in argument to the jury, to comment on the frequent occurrence of murders in the community and for the formation of vigilance committees and mobs, and to state that the same are caused by laxity in the administration of the law, and that they should make an example of the defendant, and for the court, upon objection by the defendant to such language, to remark to the jury that such matters are proper to be commented upon."

The State ought not to rely upon a sacrificial altar for the observance or enforcement of its laws. *S. v. Green, ante,* 624; *S. v. Tucker,* 190 N. C., 708, 130 S. E., 720. And herein lies a distinction or bit of philosophy sometimes overlooked. Law observance and law enforcement are two different things. The one belongs to the kingdom of right living, the other to the field of retributive justice. It was said in Blackstone's time, that, from a comprehensive viewpoint, human punishments are rather calculated to prevent future crimes, by amendment, disability or example, than to expiate past offenses. "They tend to the amendment of the offender, or to deprive him of the power to do future mischief, or to deter others by his example." *S. v. Swindell,* 189 N. C., 151, 126 S. E., 417. By amendment or disability, yes, for they come within the purview of law enforcement, but why by example? Does the deterrence theory belong exclusively to the law of crimes? Whose duty is it to

preach the gospel of fair dealing and to hold high the banner of righteousness? Does not a punitory judgment which is in excess of amendment, disability or expiation, and to the extent that it is rendered alone for example's sake, or solely as a warning to others, partake of atonement for society's neglect? Does nature exact such punishments for the violation of her laws? Is the good life no more than a refuge? But these are only meditative reflections, binding on no one, and of little value perhaps.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

STATE OF NORTH CAROLINA ON RELATION OF D. L. BOULDIN v. W. A. DAVIS.

(Filed 20 November, 1929.)

1. Elections I a—It is not necessary that relator in action to try title to office be candidate for office contested.

It is not required that a resident taxpayer and qualified voter of a municipality be a competitor of the present incumbent in an election to the municipal office in order for him to be a relator with the approval of the Attorney-General of the State in proceedings in the nature of *quo warranto*. C. S., 869, 870, 871.

2. Same—Superior Court has original jurisdiction of action in nature of quo warranto to try title to office.

The jurisdiction of the courts to entertain action in the nature of *quo warranto* existed at common law and does not exclusively rest by statute, and where a municipality is authorized by certain provisions in its charter to determine the result of an election held for the election of its own officers, recount of the votes, etc., it does not oust the jurisdiction of the Superior Court to entertain original jurisdiction of the proceedings in the nature of *quo warranto* to try the disputed title to the office of one of its officials. C. S., 869. The provisions of the Federal and State Constitutions having reference respectively to the rights of Congress and the State Legislature to determine the rights of contestants to seats in the respective bodies have no application.

3. Same—In this case held: charter of city did not prescribe that action to try title to office be first brought before commissioners.

In this case *held:* that a provision in the charter of a municipal corporation giving to the city commissioners the authority and right to determine the question of a contested election of one of its officers did not attempt to deprive the Superior Court of its jurisdiction, or make it derivative or subordinate to the action of the municipal authorities, but at most to provide a cumulative remedy. As to whether the Legislature may by statute deprive the courts of their original jurisdiction in proceedings in the nature of *quo warranto* to determine title to office, *quære?*

BOULDIN *v.* DAVIS.

APPEAL by defendant from *Shaw, J.*, 21 September, 1929. From GUILFORD. Affirmed.

The relator alleges that he is a resident, taxpayer, and qualified voter in Ward No. 2, in the city of High Point; that the defendant is a resident and citizen of High Point; that the Attorney-General has granted the relator leave to bring this action; that an election of councilmen was held in the city on 7 May, 1929, the two candidates in Ward No. 2 being the defendant and T. C. Johnson; that although Johnson received a majority of the votes cast in the election, the registrar and judges of election declared the defendant elected to the office; and that the defendant has unlawfully assumed to qualify and has usurped the office and is unlawfully receiving the fees and emoluments.

The defendant demurred *ore tenus* to the complaint on the following grounds: 1. The charter of the city (sec. 31, subsec. 5) is a public act and the courts must take judicial notice of its provisions, among which is this: "It (the city council) shall be the judge of the qualification and election of its members, and shall have authority to recount the votes for any of its members and to correct the result which may have been declared in the event notice of a contest shall be duly given." 2. The city council is a *quasi*-judicial body, having sole jurisdiction of this inquiry, or, in any event, primary jurisdiction, and that the Superior Court has no jurisdiction until the plaintiff has prosecuted his cause before the city council. 3. That the complaint fails to state a cause of action in that it does not allege that the plaintiff prosecuted his cause before the city council before instituting this action.

The demurrer was overruled and the defendant excepted and appealed.

King, Sapp & King, Shuping & Hampson and Hoyle & Harrison for plaintiff.

T. J. Gold, Z. I. Walser, Clifford Frazier and Sidney S. Alderman for defendant.

ADAMS, J. The relator does not allege that he is entitled to the office or to any of its emoluments; but this allegation is not essential to the maintenance of the action. A civil action in the nature of *quo warranto* may be brought by the Attorney-General in the name of the State upon his own information or upon the complaint of a private party. C. S., 869, 870. A relator need not be a contestant for the office, but he must be a citizen and taxpayer within the jurisdiction over which an incumbent of the contested office exercises the functions prescribed by law. *Foard v. Hall,* 111 N. C., 369; *Hines v. Vann,* 118 N. C., 3; *Houghtalling v. Taylor,* 122 N. C., 141; *Jones v. Riggs,* 154 N. C., 281; *Midgett v. Gray,* 158 N. C., 133.

The charter of the city of High Point provides, not only that the city council shall be the judge of the qualification and election of its members, but that the charter shall be deemed a public act, judicial notice of which shall be taken in all courts without the necessity of pleading the act or reading it in evidence.

This is a proceeding in the nature of *quo warranto,* instituted in the Superior Court without reference to the prosecution of any asserted remedy before the city council or any allegation of an application to the city council to adjudge the election. The appellant contends that by virtue of the charter the trial court was affected with judicial notice of these facts, and that the right of the city council to judge of the election and qualification of its members excludes or ousts the jurisdiction of the Superior Court.

On this point we are referred by the appellant to *Britt v. Board of Canvassers,* 172 N. C., 797, and to *Alexander v. Pharr,* 179 N. C., 699, in the first of which it was held that Article I, sec. 5, of the Constitution of the United States withdraws from the courts and vests in Congress the power to judge of the election and qualification of its own members, and in the second of which it was held that similar power is conferred upon the General Assembly of North Carolina. Constitution, Art. II, sec. 22. Just as Congress is one of the coördinate branches of the Federal Government, the General Assembly is one of the coördinate branches of the State Government. The doctrine upon which rests the separation of executive, legislative and judicial powers is thus expressed in *Kilbourn v. Thompson,* 103 U. S., 168, 190, 26 Law Ed., 377, 387: "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether State or National, are divided into the three grand departments of the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

This doctrine has no application to the point in question. But the appellant contends that there is no common-law jurisdiction in any courts under the Code of Civil Procedure to try title to an office and that the existing remedy is purely statutory, *quo warranto* and information in the nature of *quo warranto* having been abolished. C. S.,

869. The writ of *quo warranto* was a common-law process. It was an original writ in the nature of a writ of right prosecuted at the suit of the king against one who usurped or claimed franchises or liberties to inquire of what right he claimed them. It fell into disuse and was supplied or superseded by an information in the nature of *quo warranto* which in its origin was "a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise as to oust him, or seize it for the crown." 3 Bl., 263. It was subsequently applied to the purposes of trying the civil right, and was a "part of that mass of remedies for wrongs which was brought over to this country by the early English settlers. 22 R. C. L., 656; 32 Cyc., 1412; *Ames v. Kansas*, 111 U. S., 449, 461, 28 Law Ed., 482, 487; *Brocks v. State*, 51 L. R. A. (N. S.), 1126; *S. v. Hardie*, 23 N. C., 42; *Brown v. Turner*, 70 N. C., 93; *S. v. Norman*, 82 N. C., 687.

There can be no doubt that the Superior Court has jurisdiction of actions to try the title to an office. 1 Rev. Sts., ch. 97; Rev. Code, ch. 95; Battle's Rev., 234; Code, secs. 603, 616; Revisal 1905, secs. 826, 833; C. S., sec. 869, *et seq.* It was said in *Saunders v. Gatling*, 81 N. C., 298, that although the proceeding by information in the nature of *quo warranto* has been abolished, the remedy to be pursued when the controversy involves the validity of an election to public office is by a civil action in the nature of a writ of *quo warranto*—from which the conclusion may be drawn that the statutory change relates more directly to the form than to the substance of the action. It is not necessary to decide, and we express no opinion on the question, whether under our Constitution an amendment to the charter of a municipal corporation can deprive the Superior Court of its jurisdiction in actions of this character. *Rhyne v. Lipscombe*, 122 N. C., 650. In other jurisdictions there is an apparent conflict of authority. 20 C. J., 215, sec. 273(2); 9 R. C. L., 1160, sec. 150; *Love v. Cosgrave*, 26 L. R. A. (N. S.) (Neb.), 207, and annotation. Many of the cases are cited in the well considered briefs of counsel, but an effort to differentiate or to reconcile them would be a superserviceable task. We believe the better rule to be the one given by two of the leading textwriters on Municipal Corporations. Dillon says: "It is not unusual for charters to contain provisions to the effect that the common council or governing body of the municipality 'shall be the judge of the qualifications' or 'of the qualifications and election of its own members,' and of those of the other officers of the corporation. What effect do such provisions have upon the jurisdiction of the Superior Courts? The answer must depend upon the language in which these provisions are couched, viewed in the light of the general laws of the State on the subjects of contested elections and *quo warranto*. The principle is, that the jurisdiction of the court

remains unless it appears with unequivocal certainty that the legislature intended to take it away. Language like that quoted above will not ordinarily have this effect, but will be construed to afford a cumulative or primary tribunal only, not an exclusive one." The same principle is maintained by McQuillin: "Thus a charter provision that the council 'shall judge of the qualifications, election and return of the members thereof,' it has been held, does not make the council the final judge, and, hence, the courts may determine the right to the office of councilman on an information in the nature of *quo warranto*. The jurisdiction of the court remains unless it clearly appears that the intention was to take it away." 2 Municipal Corporations (2 ed.), sec. 491. We find in the charter no "clear intent" to deprive the Superior Court of its jurisdiction in the premises. Conceding, without deciding, the power of the Legislature to confer exclusive jurisdiction upon the city, we conclude that the amendment construed most favorably for the appellant is cumulative only, and that the Superior Court had jurisdiction to proceed to judgment. See *S. v. Carter,* 194 N. C., 293; *Harkrader v. Lawrence,* 190 N. C., 441. We are likewise of opinion that the city council has no primary jurisdiction and that the jurisdiction of the Superior Court is not merely supervisory of matters growing out of the council's departure from or transgression of the powers alleged to have been conferred. The original jurisdiction of the Superior Court has not been taken away, and its exercise cannot be subordinated to the action of the city council. The judgment overruling the demurrer is

Affirmed.

TALLASSEE POWER COMPANY v. MARY B. PEACOCK ET AL.

(Filed 20 November, 1929.)

1. Appeal and Error A c—Upon overruling demurrer appeal lies exclusively to Supreme Court.

Where a demurrer to a complaint in a civil suit on the ground of its insufficiency to state a cause of action has been overruled, the procedure for the defendant is to except and duly appeal to the Supreme Court, and where he has appealed, but has failed to prosecute it, he may not plead and again demur before another judge of the Superior Court at a subsequent term of court, the action of the former judge in refusing the motion being conclusive. C. S., 601.

2. Pleadings D d—Upon overruling of demurrer defendant cannot demur again before another judge of Superior Court.

Demurring *ore tenus* to the sufficiency of the complaint to state a cause of action after a former judge has refused the motion is in effect appealing

from one Superior Court judge to another upon matters of law or legal inference which is the sole province of the Supreme Court under the provisions of our State Constitution, Art. IV, sec. 8.

3. Same—Demurrer on ground that cause of action is not stated may be made at any time.

Demurrer to the sufficiency of the complaint to state a cause of action may be made at any time, though answer has been filed in the Superior Court or in the Supreme Court, or the Supreme Court on appeal may take cognizance thereof *ex mero motu*. C. S., 518.

APPEAL by plaintiff from *Moore, J.*, at July Term, 1929, of DAVIDSON. Reversed.

Action for the specific performance of a contract to convey land.

From judgment sustaining defendant's demurrer *ore tenus* to the complaint, and dismissing the action, plaintiff appealed to the Supreme Court.

Raper & Raper and R. L. Smith & Sons for plaintiff.
Spruill & Olive for defendants.

CONNOR, J. This action was begun in the Superior Court of Davidson County on 8 December, 1927. On 9 December, 1927, plaintiff filed its duly verified complaint. On 4 January, 1928, defendants demurred in writing to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action. This demurrer was overruled by Stack, J., at May Term, 1928, and defendants were allowed sixty days within which to answer the complaint. Defendants excepted to the order overruling the demurrer and gave notice of their appeal to the Supreme Court. The appeal was not perfected. The order of Judge Stack has not been reversed on appeal by this Court and is, therefore, conclusive in the Superior Court of the question presented by the demurrer, in writing, to wit: Whether the facts stated in the complaint are sufficient to constitute a cause of action upon which plaintiff is entitled to the relief prayed for. C. S., 601.

On 9 June, 1928, defendants filed an answer to the complaint in which they denied the material allegations thereof. On 18 March, 1929, by leave of court obtained at February Term, 1929, defendants filed an amended answer, in which after again denying the material allegations of the complaint, they alleged matters in further defense of plaintiff's recovery in this action. Plaintiff filed a reply to the amended answer, in which it denied the allegations of the answer.

The action came on for trial on the issues raised by the pleadings at July Term, 1929, before *Moore, J.*, and a jury. After the jury had been empaneled and after the pleadings had been read, defendants demurred

ore tenus to the complaint, and moved that the action be dismissed, on the ground that the facts stated in the complaint are not sufficient to constitute a cause of action. The demurrer *ore tenus* was sustained and the motion that the action be dismissed was allowed. Plaintiff excepted to the judgment, sustaining the demurrer *ore tenus,* and dismissing the action, and appealed to this Court, contending that there was error in the judgment.

Ordinarily, an objection that the complaint filed in a civil action does not state a cause of action may be taken advantage of at any time. The objection may be made in writing before answer filed, or it may be made orally after answer filed. The right to demur to the complaint on that ground, or on the ground that it appears upon the face of the complaint that the court is without jurisdiction of the cause of action alleged in the complaint, is not waived by the filing of an answer. C. S., 518. In either case, notwithstanding answer filed, the defendant may demur *ore tenus* in the Superior or in the Supreme Court. The Supreme Court of its own motion may take notice of the insufficiency of the complaint, or of the lack of jurisdiction, and dismiss the action upon either ground. *Lassiter v. Adams,* 196 N. C., 711, 146 S. E., 808; *McDonald v. MacArthur,* 154 N. C., 122, 69 S. E., 684; *Garrison v. Williams,* 150 N. C., 674, 64 S. E., 783.

Where, however, as in the instant case, before answer filed defendant demurred in writing to the complaint on the ground that the facts stated therein are not sufficient to constitute a cause of action and the demurrer on this ground is heard by a judge of the Superior Court, and not sustained by him, and thereafter the defendant filed an answer to the complaint, the defendant may not present the same question for decision to another judge of the Superior Court, presiding at a subsequent term of the court, by a demurrer *ore tenus.* The order of the judge overruling the written demurrer is appealable. *Shelby v. R. R.,* 147 N. C., 537, 61 S. E., 377. The appeal therefrom must, however, be taken to the Supreme Court which alone has jurisdiction to review the decision of the judge of the Superior Court. *Dockery v. Fairbanks,* 172 N. C., 529, 90 S. E., 501. It is well settled that "no appeal lies from one Superior Court judge to another." *May v. Lumber Co.,* 119 N. C., 96, 25 S. E., 721. It was error for Judge Moore, presiding at a subsequent term of the court to hear and determine defendants' demurrer *ore tenus,* where the same question thereby presented had been decided by Judge Stack at a former term of the court. Defendants' demurrer *ore tenus* in this case was in effect an appeal from Judge Stack to Judge Moore, both of whom are judges of the Superior Court. The latter was without power to review the decision of the former. The power to review the decision of a judge of the Superior Court, upon a matter of law or legal

inference, on appeal, is vested by the Constitution of this State exclusively in the Supreme Court. Const. of N. C., Art. IV, sec. 8.

Upon consideration of the allegations of the complaint, we are of opinion that the facts alleged therein are sufficient to constitute a cause of action, and that in any event it was error to sustain the demurrer *ore tenus* and to dismiss the action. The judgment is

Reversed.

R. B. BROWN, TRADING AS SALEM STEEL COMPANY, v. MRS. MINNIE K. BROADHURST AND A. F. NANCE.

(Filed 20 November, 1929.)

1. Jury C a—In this case held: defendant had preserved right to trial by jury and refusal of jury trial was reversible error.

In an action to enforce a lien for material furnished the contractor and used in the construction of the owner's building when the defendant owner excepts to the order of reference and preserves her right to trial by jury throughout, and tenders exceptions to the referee's findings with demand in apt time for a trial of the facts by jury: *Held*, error for the trial court to confirm the referee's report and deny defendant's right to a trial by jury.

2. Contracts F c—Instruction in effect placing burden of proving breach of contract on both parties is reversible error.

Where in the action by a material furnisher to enforce a statutory lien against the owner of a building the question is involved as to whether the defendant had breached her contract with her contractor, the submission of two issues to the jury, one as to the owner's breach and the other as to the contractor's breach of the same contract, under instructions placing the burden of proving one of these issues on the defendant and the other on the plaintiff, is reversible error, the effect being to put the issue as to defendant's breach upon both parties at the same time. As to the question of waiver of the defendant's breach *quære?* but not decided.

APPEAL by defendant, Mrs. Minnie K. Broadhurst, from *Shaw* and *Moore, JJ.*, at April and August Terms, 1929. From GUILFORD.

Civil action to recover for materials furnished by plaintiff and used by A. F. Nance, contractor, in the construction of a building for Mrs. Minnie K. Broadhurst, owner, on a lot in the city of High Point, and to enforce a lien upon said property.

Upon denial of liability, and issues joined, the jury, at the April Term, 1929, Superior Court of Guilford County, Hon. Thomas J. Shaw, judge presiding, returned the following verdict:

"1. Did the plaintiff give to the defendant, Minnie K. Broadhurst, owner of the lands described in the complaint, notice of his alleged

claim against the defendant, A. F. Nance, contractor, as alleged in the complaint and as prescribed by statute? Answer: Yes.

2. If so, did the defendant make payment to the contractor after receiving said notice, and if so, in what amount? Answer: $1,147.60.

3. Did the defendant, Nance, breach the contract, as alleged in the pleadings? Answer: No.

3½. If so, what amount, if any, did Mrs. Broadhurst expend to complete the said building in accordance with the contract with the defendant, Nance? Answer: .....

4. Did the defendant, Mrs. Broadhurst, breach the contract, as alleged in the pleadings? Answer: Yes.

5. What amount, if any, is the defendant, Nance, indebted to the plaintiff? Answer: $1,208, with interest from 28 February, 1928."

The answer of the jury to the second issue was set aside, and a reference ordered to state an account between the owner and the contractor. The owner objected and demanded a jury trial as to said accounting, and at the same time preserved her exceptions to the validity of the trial on the other issues, upon which judgment was entered in favor of the plaintiff.

Upon exceptions duly filed to the report of the referee, issues tendered, and a jury trial again demanded, the matter came on for hearing before Hon. Walter E. Moore, judge presiding, at the August Term, 1929, Superior Court of Guilford County. The request for a jury trial was denied, all exceptions to the report of the referee were overruled, and from the judgment confirming said report, as well as from the judgment entered at the April Term, the defendant, Mrs. Minnie K. Broadhurst, appeals, assigning errors.

Archie Elledge and Frazier & Frazier for plaintiff.
D. H. Parsons for defendant Broadhurst.

STACY, C. J., after stating the case: We think it was error for the trial court to confirm the report of the referee at the August Term, without first submitting an appropriate issue to the jury, as the defendant had duly preserved her right to have the controverted matter determined in this way. The appealing defendant objected and excepted to the order of reference at the time it was made, and, on the coming in of the report, she filed exceptions thereto in apt time, properly tendered an appropriate issue and demanded a jury trial on the issue tendered and raised by the pleadings. This preserved her right to have the matter submitted to a jury. *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419; *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16; *Driller Co. v. Worth,* 117 N. C., 515, 23 S. E., 427.

We are also of opinion that error was committed on the trial at the April Term. The third and fourth issues, above set out, refer to the same contract—the building contract between the owner and the contractor. The burden of proof with respect to the third issue was placed upon the defendant, Mrs. Broadhurst, while the plaintiff was given the laboring oar on the fourth issue. Thus, it would seem that the burden of proof, with respect to the alleged breach of the building contract, was put upon both parties at the same time. This was error. *Power Co. v. Taylor,* 194 N. C., 231, 139 S. E., 381; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398.

Furthermore, it may be doubted as to whether the record contains evidence sufficient to support a finding that the contract was breached by Mrs. Broadhurst. True, she stopped the laborers and declined to pay a bill of $98 on the morning of 11 February, 1928, but this was adjusted later in the day through the efforts of the bondsman, with the understanding that the work would continue, and on the following Monday a check for $220 was given to the contractor to cover a draft for materials. As to whether this amounted to a waiver of any prior deviation from the contract, does not seem to have been submitted to the jury, and we are content to place our present decision on the error in the charge relative to the burden of proof.

New trial.

O. W. HOLMES v. CITY OF FAYETTEVILLE.

(Filed 20 November, 1929.)

1. Municipal Corporations B a—General powers of municipal corporations.

The powers of a municipal corporation are those granted in express words or necessarily implied thereby, incident or essential to the declared objects and purposes of the corporation as ascertained from the interpretation of its charter, and special and general statutes and the organic law.

2. Municipal Corporation B d—In this case held: city had authority to furnish electric current to those within three mile zone.

Where a city has its own poles and electric wires for the supplying of electric current supplied under contract with a private corporation to supply it, with the statutory authority to furnish for profit individuals, corporations, etc., within the limits of the city and a territory extending three miles in all directions therefrom, it is not inhibited by the State or Federal Constitutions from supplying such current to another corporation for the purpose of furnishing electricity to consumers within the city limits of its extended territory when such service does not affect the service rendered in this respect to its own citizens, and tends to diminish

and not to increase the rate of taxation of its citizens, and this is not objectionable on the ground that it does not contribute to the fulfillment of its municipal functions as an agency of the State Government for local purposes.

3. Same—Legislature may grant city power to sell electricity within three mile zone.

A municipality has the power to purchase electricity for its own use and the use of its citizens, and where it is authorized by general and special statutes to purchase current from a power company and to resell and distribute it at a profit to its citizens and to those within a three-mile zone therefrom, the grant of power to do so is effective in law under the authority of the Legislature to grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established unless prohibited by the organic law. Article VIII, section 4; C. S., 2807, 2808, as amended; Private Laws 1929, ch. 190.

4. Taxation A a—Where expansion of city's power lines is to be paid for out of profits therefrom submission to voters is unnecessary.

Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of our State Constitution, Art. VII, sec. 7, nor is it in violation of the Fourteenth Amendment to the Federal Constitution.

5. Statutes A e—Where authority is given city by special and general statute Art. VIII, sec. 1 does not apply.

The provisions of Article VIII, section 1, of our State Constitution, prohibiting the Legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the Legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined.

THIS was a motion to continue to the hearing an order restraining the defendant from paying out any of its funds for the purpose of erecting and maintaining an electric transmission line beyond its corporate limits and furnishing an electric current to persons, firms and corporations outside the corporate limits, heard by *Cranmer, J.*, at Chambers, on 26 March, 1929. The temporary restraining order was dissolved and the plaintiff excepted and appealed upon error assigned.

In 1905 the General Assembly amended the charter of the defendant by creating a "Public Works Commission," to consist of three members, who should have charge, control, supervision, and management of all the defendant's public utilities, including waterworks, sewerage, electric

light plant, etc., and who should have power and authority to make necessary contracts for the construction, repair, alteration, enlargement, and proper management of any of said public utilities, and to fix rates for their use. Private Laws, 1905, ch. 311. In 1925 this act and other acts were amended and the corporate powers of the defendant were enlarged. Private Laws 1925, ch. 28. By these amendments the defendant was authorized and empowered to purchase, conduct, own, lease, and acquire utilities and to provide for all things in the nature of public works, and to acquire, establish, and operate waterworks, electric lighting systems, etc. Section 3 of Article 2, says that all ordinances enacted in the exercise of the police power for sanitary purposes or the protection of the defendant's property shall, unless otherwise provided by the aldermen, apply with equal force to the territory outside the city limits within one mile in all directions from the corporate boundaries. Article 3 provides for acquiring by purchase or condemnation rights of way, easements, and privileges for water, sewer, and electric light systems either within or outside the city, and section 7 of Article 7, for the supervision of electric light, water, and sewerage plants. On 16 March, 1929, section 3, Article 2, of the act of 1925, *supra,* was amended by adding thereto the following: "Sec. 4. That said city of Fayetteville be, and it is hereby authorized and empowered, in its discretion, to extend, construct, maintain, and operate its water, sewerage, and electric light lines and systems for a distance of not exceeding three miles in all directions beyond the corporate limits of said city as the same now exist or may hereafter be established; and to make reasonable charges for the use of such utilities." All laws in conflict with the act were repealed. Private Laws 1929, ch. 190.

"The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens," etc. C. S., 2807. This statute was amended in 1929 by inserting after the word "citizen" the following: "And to any person, firm, or corporation desiring the same outside the corporate limits, where the service is available." Public Laws 1929, ch. 285. This act amends C. S., 2808, by adding the following: *"Provided, however,* that for service supplied outside the corporate limits of the city, the governing body, board, or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits, with the same exemption from liability by the city or town as is contained in section two thousand eight hundred seven."

Brooks, Parker, Smith & Wharton and C. Murchison Walker for plaintiff.

Robinson, Downing & Downing and Nimocks & Nimocks for defendant.

ADAMS, J. The defendant has no plant of its own for producing and furnishing electricity as a public utility, but it owns and maintains a system of poles, wires, and appliances for transmitting and delivering electricity to persons, firms, and corporations within the city. Some years ago it made a contract with the Carolina Power and Light Company, which is now in effect, for the purchase of an electric current for the use of the city and for resale or redistribution within the corporate limits and within adjacent territory distant not more than three miles from the corporate boundaries. The contract is to continue ten years from 10 September, 1924. The company is to supply all the electric power requirements of the city not to exceed certain electrical horsepower. The city shall not sell or permit others to use power supplied under the contract except when expressly provided for in the rate classification under which the service is furnished, and the company shall have the right to serve only such power customers within the area as shall require an installation aggregating not less than twenty-five horsepower.

After the creation of the Public Works Commission, the city extended its light and water systems beyond the corporate limits, thereby supplying a Normal School, a Women's Home, and various individuals outside the city with light and water, and at the commencement of this action was engaged in constructing lines for selling electricity to persons and corporations outside the city limits, but within the three-mile zone. It intends, unless restrained, to complete this work. For more than ten years it has owned and operated transmission lines beyond the corporate boundaries, by which, it is alleged, electricity has been sold and is now sold to nonresidents at a profit.

Some time ago the plaintiff put up poles and lines outside and within less than three miles of the city boundaries, and the city furnished meters and electricity to persons using these lines under an agreement with the plaintiff; and it is now the purpose of the city to abide by its agreement if the plaintiff's lines are maintained in such way as to enable the defendant to provide reasonable service to its customers.

The plaintiff recently conveyed his transmission lines to the Holmes Electric Company, Inc., and this company soon after the conveyance applied to the Carolina Power and Light Company for the purchase of an electric current for resale or redistribution to persons and corporations within and beyond the three-mile limit. The plaintiff's application was rejected by the Power and Light Company and its subsequent effort to secure from the Superior Court a writ of mandamus to compel an acceptance of its application was denied. *Holmes Electric Co., Inc., v. Carolina Power and Light Co., post,* 766.

The relief sought by plaintiff in this action is a perpetual injunction to restrain the defendant from using its funds to erect and maintain a line for transmitting an electric current to persons, firms, or corporations outside the boundaries of the city. In dissolving the restraining order the judge determined the action upon its merits and rendered a final judgment. *Lutterloh v. Fayetteville,* 149 N. C., 65. This judgment the plaintiff assails on the ground that the defendant has no legal right to engage in a private enterprise beyond its corporate limits and because the act of 1929 purporting to grant the power was enacted in violation of the State and Federal Constitutions.

The plaintiff specifically rests his right to relief on two propositions, the first of which is this: A municipality which is not engaged in the manufacture of electricity, but is supplied an electric current from an electric power company, cannot engage in the business of selling such electric current to inhabitants outside the boundaries, where its activities outside its corporate limits in no way contribute to a fulfilment of its municipal functions or duties to the citizens within its boundaries.

The powers of a municipal corporation are those granted in express words, those necessarily or fairly implied in, or incident to, the powers expressly granted, and those essential to the declared objects and purposes of the corporation. 1 Dillon (5 ed.), sec. 237. The sources of its powers are its charter, special acts, general statutes, and the organic law. 1 McQuillin (2 ed.), 363.

The dual capacity or twofold character possessed by municipal corporations is governmental, public, or political, and proprietary, private, or *quasi*-private. In its governmental capacity a city or town acts as an agency of the State for the better government of those who reside within the corporate limits, and in its private or *quasi*-private capacity it exercises powers and privileges for its own benefit. *Scales v. Winston-Salem,* 189 N. C., 469. "In its proprietary or private character the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the State at large, but for the private advantage of the compact community which is incorporated as a distinct legal personality or corporate individual; and as to such powers, and to the property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the Legislature over it or the rights represented by it, are omnipotent." 1 Dillon (5 ed.), sec. 109, quoted in *Asbury v. Albemarle,* 162 N. C., 247, 253.

The general rule is that a municipal corporation has no extra-territorial powers; but the rule is not without exceptions. The Legislature has undoubted authority to confer upon cities and towns jurisdiction for

sanitary and police purposes in territory contiguous to the corporation. *S. v. Rice,* 158 N. C., 635; *C. P. & P. Co. v. Chicago,* 88 Ill., 221. If a municipality owns and operates a water or lighting plant and has an excess of water or electricity beyond the requirements of the public, which is available for disposal, it may make a sale of such excess to outside consumers as an incident to the proper exercise of its legitimate powers. 3 Dillon (5 ed.), sec. 1300; *Dyer v. City of New Port* (Ky.), 94 S. W., 25; *Muir v. Murray City* (Utah), 186 Pac., 433; *Sibley v. Electric Co.* (Iowa), 187 N. W., 560. The excess may be sold although the city, instead of owning the plant, gets its supply by contract. *Riverside Ry. Co. v. Riverside,* 118 Fed., 736.

In the case before us the record does not disclose the exercise of the police power or the sale of a surplus current. The direct question is whether the defendant is authorized to sell electricity to persons and corporations outside its limits when the electric current is furnished by the Power and Light Company in pursuance of the contract between these parties.

We think there can be no question as to the defendant's right to purchase electricity for its own use and for the use of its inhabitants. Private Laws 1925, ch. 28, Art. 2, sec. 1; Pond on Public Utilities, sec. 54. It is equally clear that without legislative authority the defendant would not be permitted to extend its lines beyond the corporate limits for the purpose of selling electricity to nonresidents of the city. *City of Paris v. Sturgeon,* 110 S. W. (Tex.), 459; *City of Sweetwater v. Hamner,* 259 S. W. (Tex.), 191; *Mayor, etc., v. Dunlap,* 94 S. E. (Ga.), 247; *Mulville v. San Diego,* 192 Pac. (Cal.), 702. This situation presents the two questions whether such legislative authority has been granted and if it has whether the grant is effective in law. The answer to the first is not in doubt. The recent amendment to the defendant's charter provides: "Sec. 4. That said city of Fayetteville be, and it is hereby authorized and empowered, in its discretion, to extend, construct, maintain and operate its water, sewerage, and electric light lines and systems for a distance of not exceeding three miles in all directions beyond the corporate limits of said city as the same now exist or may hereafter be established; and to make reasonable charges for the use of such utilities." Private Laws 1929, ch. 190. At the same session of the General Assembly, C. S., 2807, was amended by authorizing a city to furnish water and lights, not only to its citizens, but "to any person, firm or corporation desiring the same outside the corporate limits where the service is available." Public Laws 1929, ch. 285. Section 2 of this chapter adds to C. S., 2808, the following: "*Provided, however,* that for service supplied outside the corporate limits of the city, the governing

body, board or body having such waterworks or lighting system in charge, may fix a different rate from that charged within the corporate limits, with the same exemption from liability by the city or town as is contained in section two thousand eight hundred and seven."

Now, as to the second question. The Constitution requires the Legislature to provide by general laws for the organization of cities, towns, and incorporated villages. Art. VIII, sec. 4. In *Perry v. Commissioners,* 148 N. C., 521, it is suggested that by inadvertence this section was given an improper placing in Article VIII instead of Article VII; but without regard to its place in the Constitution the section contains, not only a grant of power to the Legislature, but the imposition of a duty to provide by general laws for the organization of municipal corporations. It has often been said that such corporations are mere instrumentalities of the State for the more convenient administration of local government. They are creatures of the Legislature, public in their nature, subject to its control, and have only such powers as it may confer. These powers may be changed, modified, diminished, or enlarged, and, subject to constitutional limitations, conferred at the legislative will. There is no contract between the State and the public that a municipal charter shall not at all times be subject to the direction and control of the body by which it is granted. *Wood v. Oxford,* 97 N. C., 228; *Lilly v. Taylor,* 88 N. C., 490; *Wharton v. Greensboro,* 146 N. C., 356; *Lutterloh v. Fayetteville, supra; Cabe v. Board of Aldermen,* 185 N. C., 158; *Martin v. Greensboro,* 193 N. C., 573.

The Constitution prohibits a city from contracting any debt, pledging its faith, loaning its credit, or levying any tax, except for necessary expenses, unless by the vote of a majority of the qualified voters. Article VII, section 7. The voters have not given their approval to the proposed enterprise; but the city does not purpose to disregard either of these constitutional inhibitions. It intends to use only such available funds as it has, and such as it will receive as the profits of the business. This course was pursued in the erection of a building in the city of Durham and was approved by this Court; but the auditorium was in the city and was intended for a public purpose. *Adams v. Durham,* 189 N. C., 232. In *Briggs v. City of Raleigh,* 195 N. C., 223, it was held that a State fair is a public undertaking and that a donation out of the funds of the city, approved by a majority of the qualified voters, could lawfully be made for retaining the fair outside the corporate limits, but within the vicinity of the city.

Neither of these cases is decisive of the present appeal. The defendant contends that as the Constitution confers upon the General Assembly power to provide by general laws for the organization of cities, towns,

and villages, the legislative branch of the government may grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established, unless prohibited by the organic law. The controlling principle is that the exercise of powers for the private advantage of a city is subject to the same rules that govern individuals and private corporations, and that the courts will not interfere with the power to contract, especially when expressly conferred, unless it contravenes some fundamental principle or conflicts in some way with the organic law. 43 C. J., 235, sec. 233; *Henderson v. Young,* 83 S. W. (Ky.), 583; *Coldwater v. Tucker,* 24 A. R. (Mich.), 601; *Pittsburgh v. Bruce,* 27 At. (Penn.), 854. The contract between the defendant and the Power and Light Company, is limited in point of duration; and under its terms light can be furnished only by the defendant to those within the three-mile zone.

The appellant's second proposition is this: The Legislature of North Carolina cannot, by special act, constitutionally confer upon the city of Fayetteville the power to extend its electric power lines beyond its corporate limits and to furnish electricity to inhabitants beyond the territory embraced in these boundaries.

It is contended that the act amending the charter of the defendant is in violation of Article VIII, section 1, of the Constitution: "No corporation shall be created nor shall its charter be extended, altered, or amended by special act, except corporations for charitable, educational, penal, or reformatory purposes that are to be and remain under the patronage and control of the State; but the General Assembly shall provide by general laws for the chartering and organization of all corporations and for amending, extending, and forfeiture of all charters, except those above permitted by special act. All such general laws and special acts may be altered from time to time or repealed, and the General Assembly may at any time by special act repeal the charter of any corporation."

It has been held that this section applies only to private or business corporations and not to those of a public or *quasi*-public nature, such as cities, towns, and counties. *Kornegay v. Goldsboro,* 180 N. C., 441. A municipality furnishing water or light renders service for a public purpose, and the fact that the water or service is furnished for individual consumption or the use of the inhabitants does not detract from the public service. Private purposes may be served incidentally, but this does not destroy the public character of the corporation or municipality. 3 Dillon (5 ed.), sec. 1300. Even if the amendment be construed as a private act the appellant's objection would not be fatal to the defendant's position for the reason that the Legislature has enacted general statutes, applicable to all cities and towns, which in effect confer the same powers given by the amendment to the charter.

In our opinion neither the amendment to the charter of the city nor the statutes amending the general laws to which we have referred are in conflict with the Fourteenth Amendment of the Federal Constitution, upon the facts appearing in the record, in that, by means of levying a tax, the taxpayer's money and property will be taken from him and applied to purposes outside the city limits. The theory on which the defendant's action is based is not that of taxing the inhabitants of the city for extra-territorial purposes, but the maintenance of its lines beyond the corporate limits out of the profits arising from the business within the three-mile limit. If the defendant should attempt to pledge the faith of the city or to contract a debt or to levy a tax for an enterprise conducted within the designated territory, the taxpayer would have ample remedy; but so long as the defendant's action is not in breach of any constitutional provision we do not perceive why it may not be justified by legislative sanction. The judgment is

Affirmed.

CITY OF GREENSBORO v. J. C. BISHOP ET AL.

(Filed 20 November, 1929.)

1. **Eminent Domain C d—On appeal it must be shown that levy of assessments was fraudulent, arbitrary or confiscatory.**

   Where assessments for special benefits against property abutting a street sought to be improved have been levied by the commissioners and regularly confirmed by the municipal governing body in accordance with statutory provisions, the action of the commissioners is ordinarily conclusive, and the owner of the property so assessed is not entitled to have an issue submitted to a jury to fix the amount of such assessment to be charged against his property in the absence of an allegation of bad faith, or arbitrary conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or gross injustice, or that the assessments were confiscatory, and his appeal without such allegations or evidence supporting them will be dismissed.

2. **Eminent Domain C b—Cross-examination of assessor as to amount allowed other adjacent owners held competent.**

   Where on appeal from the levy of assessments for street improvements involving also the issue of compensation for land taken in condemnation proceedings, it is competent for the owner of the land, for the purpose of impeachment, to cross-examine the city's witness, an appraiser in the proceedings, as to the amount allowed other adjacent owners in the same proceedings when a sufficient similarity as to the comparative value of the lands taken is shown.

GREENSBORO *v.* BISHOP.

APPEAL by city of Greensboro, plaintiff, petitioner, and J. C. Bishop, defendant, respondent, from *Shaw, J.*, April Term, 1929, of GUILFORD. *Both appeals affirmed.*

Robert Moseley and Andrew Joyner, Jr., for plaintiff, petitioner.
A. C. Davis and Frazier & Frazier for defendant, respondent.

CLARKSON, J. This was a special proceeding brought by the city of Greensboro, plaintiff, petitioner, against J. C. Bishop, defendant, respondent, and others, to condemn certain land and create a special assessment district area to pay the cost of improvement on Bishop Street in the corporate limits of the city of Greensboro. Bishop Street extends one city block eastwardly from Elm Street to Church Street, and is one city block north from O. Henry Hotel. Bishop Street, at the time of filing the petition by interested property owners to improve same, was 18 feet wide between curbs, with sidewalks six feet wide on either side of the street. The petition provided that Bishop Street be widened to 34 feet between curbs with sidewalks 8 feet wide on either side of the street. The entire width of Bishop Street to be increased from 30 to 50 feet. To do this, it was necessary to widen Bishop Street: (1) to condemn certain lands of the defendant, respondent, J. C. Bishop; (2) to create a special assessment district to pay the cost of such improvements. See chapter 220, Public Laws of N. C., 1923; C. S., 2792 (Sup., 1924) (a) to (p) inclusive, "An act to incorporate the City of Greensboro," etc.; chapter 37, Private Laws of N. C., session 1923; chapter 107, Public Laws, Extra Session, 1924; chapter 217, Private Laws 1927.

It seems that the law in regard to the special proceeding in the present action was carefully complied with, in fact the regularity of the proceedings by defendant, respondent, Bishop, was admitted.

We will consider first defendant respondent's, J. C. Bishop's, appeal to the Supreme Court. He was assessed for special benefits alleged to have resulted to his property in the area of the special assessment district according to the benefits accruing from such improvement.

The question involved: May a dissatisfied property owner, upon appeal to the Superior Court from a benefit assessment charged against his property by the commissioners and regularly confirmed by a municipal governing body in a proceeding brought under the provisions of C. S., 2792(a), *et seq., supra,* in the absence of an allegation of *mala fides* or arbitrary conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or gross injustice, have an issue submitted permitting the jury to fix the amount of such benefit assessment, if any, to be charged against his property? We think not.

The statutes applicable: C. S., 2792(i), in part: "If any party to the proceedings shall be dissatisfied with the report of the commissioners, or the assessment levied by the said governing body, he may file exceptions thereto with the clerk of the Superior Court within ten days after the filing of said report with said clerk, or in the event the appeal be from the levying of the assessment by said governing body, within ten days after the confirmation of such assessment roll by such governing body, and the issues of fact and law raised before the clerk in the said proceedings and upon the said exceptions shall be transferred to the Superior Court for trial in like manner as provided in the case of other special proceedings pending before the clerk," etc. C. S., 2792(h); C. S., 2714.

The city of Greensboro, plaintiff, petitioner, does not deny that defendant, J. C. Bishop, respondent, had a right to appeal, but that Bishop's exceptions do not set forth sufficient grounds—in that the exceptions do not contain an allegation of *mala fides* or arbitrary conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or such gross injustice to the effect that the assessment was so excessive as to result in the confiscation of defendant respondent's property. It appears that the sole complaint of defendant, respondent, is based upon the contention that the assessment for benefits was excessive and his dissatisfaction with same.

When the matter came on for hearing on appeal in the Superior Court the plaintiff, petitioner, city of Greensboro, moved the court to overrule the exceptions of defendant, propounder, J. C. Bishop, and confirm the report of the city council on the ground that the exceptions did not set forth allegations sufficient to raise issues of fact to be submitted to the jury. The court below overruled the exceptions and confirmed the judgment of the city council, and in this we think there was no error.

It is contended by defendant, petitioner, that the language of the statutes allowing appeals referred to, *supra*, used the expressions: C. S., 2792(i) "dissatisfied with a report of the commissioners," etc. C. S., 2714, "If a person assessed is dissatisfied with the amount of the charge," etc. C. S., 2792(h), "If a person assessed is dissatisfied with the amount of the charge," etc. That these sections allow an appeal in all cases where there is dissatisfaction as to the amount of the benefits assessed by the person whose land is charged. We cannot so hold. The defendant, propounder, was given notice and a hearing as to benefits assessed under the statute 2792(g): "At the time appointed for the purpose, or to some other time to which it may adjourn, the governing body, or a committee thereof, must hear the allegations and objections of all persons interested who appear and make proof

in relation thereto. The governing body may thereupon correct such assessment roll and either confirm the same or may set it aside and provide for a new appraisal of benefits in such proceeding pending before the clerk of the Superior Court."

In accordance with the statute, upon objection by defendant, propounder, after due consideration of the merits of same, the city council declined to overrule the report of the commissioners and passed the following resolution: "That the city council is of the opinion, and now finds as a fact, that each tract of land referred to in the commissioners' report of benefits is actually benefited by the improvement described in this proceeding, in the amount shown by said report and the said assessment roll."

The Legislature has fixed this method of procedure, giving notice and a hearing, and it has been repeatedly held that the decision of the body is ordinarily conclusive and the power is based on the right to tax and not eminent domain.

In *Kinston v. Wooten,* 150 N. C., at p. 299, it is said: "From this it would seem to follow that the right of imposing such burdens, unlike the power of general taxation, is not unlimited and without restraint, but may be in certain cases subjected to judicial scrutiny and control." At page 302: "It will thus be seen 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 stay the action of the officials on any other principle."

In *Atlanta v. Hamlein,* 96 Ga., 383, the following from that decision is approved in *Tarboro v. Staton,* 156 N. C., at p. 508: "It is inconsistent with the proper exercise of the taxing power, and would tend to manifest embarrassment of the public in the prosecution of these public improvements, if, upon every assessment, the lot owner were entitled to have the question judicially determined whether or not he was benefited by the proposed improvement. As to whether he was benefited or not is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but, as we have before stated, it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportioned to the value of the estate sought to be improved as

that the levy of the assessment amounts to a virtual confiscation of the lot owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements."

In *Felmet v. Canton,* 177 N. C., at p. 54, citing a wealth of authorities, speaking to the subject: "The right of municipalities to make these assessments for public-local purposes, when acting under legislative authority properly conferred, has been very broadly upheld in this State, extending to any of the recognized methods of procedure and apportionment and including both the front-foot rule as well as the creation of local assessment districts. Being, as it is, referred to the power of taxation, it is very largely a matter of legislative discretion, usually held to be conclusive as to the necessity for the improvement, and in respect to the method of apportionment as well as the amount it only becomes a judicial question in cases of palpable and gross abuse."

In *Anderson v. Albemarle,* 182 N. C., at p. 435: "The question of benefit is one of fact, and the governing board of a municipality, under legislative authority, is vested with the power to determine what lands will be benefited by the improvements, and their determination is conclusive upon the owner of the ground charged with the costs of the improvements except in rare cases." *Gunter v. Sanford,* 186 N. C., 456.

In *Durham v. Proctor,* 191 N. C., at p. 121, it is said: "The municipal authorities were fully empowered to establish the assessment district, and to assess the burdens in proportion to the benefits. . . . 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.*"

In *Butters v. Oakland,* 263 U. S., at pp. 164-5, it is said: "Ample provision is made for a hearing, and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or fraudulently."

The principle cited in the above authorities has long been the law in this jurisdiction and the statutes allowing appeals for dissatisfaction with the amounts charged as special benefits have been in force, but the appeal applies only in such cases as where the exception charges *mala fides* or arbitrary conduct or wilful misconduct of the governing body, or abuse of discretion, or such gross injustice as to make the assessment of benefits confiscatory. None of these allegations were made by defendant, respondent, in his exceptions on appeal. The court below overruled the exceptions because the allegations were not made, therefore there were no issues to be submitted to the jury, and confirmed the judgment of the city council. In this we think there was no error.

The judgment of the court below on defendant, respondent Bishop's appeal is

Affirmed.

We will now consider plaintiff, petitioner, the city of Greensboro's appeal, to the Supreme Court:

J. C. Bishop, defendant respondent, owned a strip of land, approximately 20 feet wide, necessary to widen Bishop Street. The proceeding in which the land was condemned and the damages therefor fixed was brought under the provisions of chapter 220, Public Laws 1923 (C. S., 2792 a to p inclusive), as amended.

From the report of the commissioners awarding damages, duly confirmed in accordance with the statute, the defendant respondent, J. C. Bishop, gave the proper notice and appealed to the Superior Court on the ground that the award of damages was inadequate and setting forth the reasons.

The issue submitted to the jury in the Superior Court and their answer thereto was as follows: "What damages, if any, have resulted to the defendant's property by reason of the widening of Bishop Street and the taking of the strip of land approximately 20 feet wide? Answer: $4,576.65."

The court below rendered judgment, in part, as follows: "It is further ordered, adjudged and decreed, that the defendant, J. C. Bishop, recover of and from the city of Greensboro the sum of $4,576.65, and that the cost of this proceeding be taxed by the clerk against the city of Greensboro." Plaintiff, petitioner, city of Greensboro, moved to set aside the verdict and for a new trial. Motion overruled. Exception by the city of Greensboro. Judgment was signed as above set forth.

The plaintiff, petitioner, city of Greensboro, assigned as error: "The action of the court in permitting the witness, J. R. Cutchin, to testify as to the damage fixed by the commissioners for a lot other than the plaintiff's lot."

J. R. Cutchin was one of the three appraisers or commissioners appointed to assess the cost against the plaintiff, petitioner, city of Greensboro, for taking the strip of land 20 feet wide necessary for improving Bishop Street in the area designated. Upon appeal by defendant, respondent, J. C. Bishop, to the Superior Court on the ground of inadequacy of the damage, the Commissioner Cutchin was a witness in behalf of the city of Greensboro. The city of Greensboro contends that the question involved: Upon the hearing in the Superior Court of an appeal as to damage to A.'s land resulting from the condemnation of a part thereof, is it competent to impeach a witness, who has testified as to the amount of such damages, by showing that, as appraiser in the condemnation proceeding, he estimated the damages to B.'s land, part of which was condemned in the same proceeding, to be a larger amount than the damage to A.'s land, without first showing that both tracts were similarly situated and of similar character?

J. C. Bishop contends: That the questions were asked on cross-examination and that the court limited the evidence as follows: The court: "Gentlemen, this evidence about that corner lot is only admissible as tending to impeach the witness, not to show the damage to this lot, but simply as tending to impeach the witness." The respondent, Bishop, insisted throughout the trial that he had been allowed an inadequate sum for the strip of land condemned and taken for street purposes by the city of Greensboro, and appealed for that reason. He insisted that no uniform rule had been adopted and that the appraiser Cutchin, along with the other appraisers, had allowed a much higher rate for the property located at the corner of Bishop and Church streets than should have been allowed, and that much less had been allowed him than ought to have been allowed him.

In *Ayden v. Lancaster, ante,* 556, the subject of proximity and similarity of land to determine value standard was discussed. We repeat what Dean Wigmore said, speaking to the subject (Wigmore on Evidence, Vol. 1, 2nd ed., p. 1136, part section 718): "Hence, the question arises how far an acquaintance with value standards in one place will suffice when the value in question is of a thing in another place. The witness' competency must here depend upon whether the conditions of value in the two places are sufficiently similar to render his knowledge of values in one place adequate for estimating them in the other. The application of this principle must depend on the circumstances of each case, and no further detailed rules can be laid down." *Ayden v. Lancaster, supra,* at pp. 561-2.

In this character of evidence (value standards) no iron-clad rule can be laid down. The relevancy is largely with the court below, the probative force is for the jury. In the present case, the evidence adduced was on cross-examination and allowed for the purpose of impeachment.

Ruffin, J., in *S. v. Morris,* 84 N. C., at p. 763, speaking of cross-examination, says: "All trials proceed upon the idea that some confidence is due to human testimony, and this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this, because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth, and trials are appreciated in proportion as they furnish the opportunities for such critical examinations." *Milling Co. v. Highway Commission,* 190 N. C., 692.

It must be borne in mind that the witness, Cutchin, was one of the commissioners who signed the report and made the appraisal as to the value of Bishop's land taken by the city of Greensboro. When he as one of the commissioners appointed to appraise the land, he was then

acting in the capacity of an impartial arbiter. He also was one of the appraisers of the Masonic lot. When he became a witness for the city of Greensboro he was subject to cross-examination as any other witness for the purpose of impeachment and to show bias. The Masonic lot was in the proximity, not exactly similar, but the difference testified to so that the jury had all the facts before them. If error, we cannot on the record hold it prejudicial or reversible.

We do not think the evidence in the present case, which was brought out on cross-examination, militates against the principle in the cases cited by plaintiff, petitioner, city of Greensboro. *Warren v. Makely,* 85 N. C., 12; *Bruner v. Threadgill,* 88 N. C., 361; *Belding v. Archer,* 131 N. C., 287; *Brown v. Power Co.,* 140 N. C., 333.

The judgment of the court below on plaintiff, petitioner, city of Greensboro's appeal, is

Affirmed.

CORA BOHANNON, BY HER NEXT FRIEND, MRS. A. E. BOHANNON, v. LEONARD-FITZPATRICK-MUELLER STORES COMPANY, INC.

(Filed 20 November, 1929.)

Negligence A c—Construction and condition of steps held not to constitute negligence in this case.

The owner of a store for the sale of merchandise is not an insurer of the safety of its customers or invitees therein, but is liable only for injuries resulting from failure to exercise reasonable care to provide for their safety while on the premises; and where there is evidence tending only to show that the plaintiff was injured while coming down the stairs of the store by a fall caused by her heel catching in a piece of metal strip two inches wide lying one-sixteenth of an inch above the wooden tread of the step, the tread being nine inches and the rise of the step eight inches, and the width of the stair being four feet, with a hand-railing on each side: *Held,* the injury could not have been reasonably anticipated, but resulted from an accident, and defendant's motion as of nonsuit should have been granted.

CLARKSON, J., dissenting opinion; STACY, C. J., concurring in dissent.

APPEAL by defendant from *McElroy, J.,* at September Term, 1929, of FORSYTH. Reversed.

Action to recover damages for personal injuries alleged to have been caused by the negligence of defendant.

The negligence alleged in the complaint is the maintenance of a stairway in a building occupied by the defendant, for the use of the public, with steps which plaintiff alleges were negligently constructed.

On 1 March, 1929, defendant, a corporation engaged in the retail mercantile business, under a lease from the owner was in possession of a building in the city of Winston-Salem, N. C. It occupied said building and operated therein a store for the sale of dry goods. On the second floor of said building there was a "Beauty Parlor." The only means of access to said "Beauty Parlor" from the first or ground floor of said building was a stairway. By the terms of its lease, defendant had undertaken to maintain the said stairway in a safe condition for use by the patrons and customers of the "Beauty Parlor."

The steps of said stairway are constructed of wood. Each step has a tread of nine inches, and a rise of eight inches. Across the front of each step is a metal strip two inches wide. The surface of each of these metal strips as it lies upon the step is one-sixteenth of an inch higher than the surface of the step. Each of the metal strips extends over the next lower step in the stairway about an inch and three-fourths, and is curved back to the riser of said step. The purpose of the metal strips is to protect the edge of each step from wear, and thereby to provide for the safety of persons who use the stairway. The stairway is inside the building, and is about four feet wide. There is a hand-rail on each side of the stairway. From the first floor to the platform, which is between the first and second floors, there are eight or nine steps; from the platform to the "Beauty Parlor," which is in a balcony on the second floor, there are four steps.

On 1 March, 1929, the plaintiff was an employee of defendant. She had been in charge of the hosiery department, located on the first floor of the building, for five months. She had no duties as an employee of defendant which required her to ascend the stairway or to go to the second floor of the building. During the lunch hour of said day, while she was released from her duties as an employee, plaintiff ascended the stairway and went to the "Beauty Parlor" on the second floor as its patron or customer. After she had been served in the "Beauty Parlor," and while she was descending the stairway to the first floor, she fell and was injured. She testified as follows:

"On 1 March I was a customer of the "Beauty Parlor." After the work for which I had gone up there had been finished, I started to go down the steps. About five steps from the bottom of the stairway I fell. What caused me to fall was that the steel piece on the edge of the step caught in the heel of my left shoe. The steel piece was a fraction higher than the other part of the step—the wood part—and that caught the heel of my shoe, as I was coming down the stairway. I was holding to the banisters on either side of the steps. I was coming down carefully, as I knew that others had fallen on the stairway. As I stepped on this step, and was making another step, my heel caught on the steel piece which

comes up a fraction above the wood, throwing me around. This was the cause of my injuries. I did not fall clean to the bottom of the stairway. I got up and sat on the step. Then everything went black to me. One of the employees in the store came and helped me to the back of the store."

All the evidence offered at the trial was to the effect that the metal strips on the steps in the stairway were about one-sixteenth of an inch higher than the wood, and that the tread of each step, including both the wood and the metal strip, is nine inches. One of plaintiff's witnesses, a carpenter of forty years experience, testified as follows:

"I was in that store a couple of times while they were building those steps, and I saw the steps three or four days ago. I didn't examine them very much, but had occasion to go up and down the stairway once or twice. To the best of my knowledge the steps in the stairway have a tread of about nine inches, and a rise of about eight inches. I judge that the metal strip is about two inches wide. That is the way they usually put them on. I never noticed whether the edge of the metal strip on each step was higher than the step back of it."

This action was begun and tried in the Forsyth County Court before Efird, J., and a jury. The issues submitted to the jury at the trial were answered 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 her own negligence, contribute to the injury as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $1,000."

From judgment on the verdict, defendant appealed to the Superior Court of Forsyth County, assigning errors based on exceptions duly taken during the trial.

Upon the hearing of said appeal, in the Superior Court, defendant's exceptions were not sustained. The judgment of the County Court was affirmed.

From the judgment of the Superior Court, affirming the judgment of the County Court, defendant appealed to the Supreme Court.

W. L. Morris for plaintiff.
Ratcliff, Hudson & Ferrell for defendant.

CONNOR, J. The defendant on its appeal to this Court contends that there was error in the judgment of the Superior Court of Forsyth County, and that for this error the said judgment should be reversed. On its appeal from the judgment of the County Court to the Superior

Court of Forsyth County, defendant assigned as error the refusal of the County Court to allow its motion for judgment as of nonsuit, at the close of all the evidence, and in accordance with said motion to dismiss the action. This assignment of error was not sustained by the Superior Court. The judgment of the County Court was affirmed. The defendant excepted to the judgment of the Superior Court and appealed therefrom to this Court.

The defendant's contention that the evidence offered at the trial in the Forsyth County Court, viewed in the light most favorable to plaintiff, is not sufficient to sustain plaintiff's allegation that the injuries for which she seeks to recover damages by this action, were caused by the negligence of defendant, is thus presented to this Court. It is conceded that there was evidence tending to show that plaintiff's fall on the stairway in the building occupied by defendant was caused, as she testified, by the catching of the heel of her shoe by the metal strip on the edge of a step in said stairway, and that her injuries were caused by this fall. It is admitted that upon the facts of this case, defendant is liable to plaintiff for the damages which resulted from her injuries, if the said injuries were caused by the negligence of defendant in failing to maintain the steps of the stairway in a reasonably safe condition for use by patrons and customers of the "Beauty Parlor," located on the second floor of the building occupied by the defendant, under a lease from the owner. The question to be decided, therefore, is whether the defendant was negligent in maintaining the stairway with steps constructed as all the evidence tends to show the steps in the stairway were constructed by the owner of the building. The negligence alleged in the complaint is the maintenance by defendant of the stairway for use by the public, with steps which were negligently constructed, in that metal strips, two inches wide, are laid upon the steps, with the result that the surface of the said strips is higher than the surface of the remainder of the steps. All the evidence tends to show that the surface of the metal strips is one-sixteenth of an inch higher than the surface of the remainder of the steps.

With respect to the construction of the steps in the stairway, it should be noted that the tread of each step is nine inches, including the metal strip, thus leaving the distance from the edge of the step to the back of the step, or to the rise of the next step above, seven inches; also, that hand-rails were placed on each side of the stairway, which does not exceed four feet in width. The stairway is inside the building, and was constructed for use only by persons who have occasion to go from the first to the second floor, and from the second to the first floor of the building. Plaintiff contends that the construction of the steps in the stairway is negligent. She alleges that defendant was negligent in maintaining the

stairway with the negligently constructed steps for use by patrons and customers of the "Beauty Parlor," in that defendant by the exercise of reasonable care could have foreseen that the edge of the metal strip on each of the steps, being higher than the remainder of the step, would probably catch the heel of the shoe of a person descending the stairway from the second floor, and cause such person to fall and be injured.

Plaintiff had been employed by defendant for five months prior to the day on which she was injured. During this time she worked only on the first floor. She had no duties by reason of her employment by defendant which required her to go up the stairway to the second floor of the building. She had, however, gone up to the "Beauty Parlor" twice during this time using the stairway for that purpose. She testified that she knew that others had fallen on the stairway. She did not testify, however, that any person other than herself had ever fallen on the stairway because the heel of the shoe of such person had been caught by the metal strip on any of the steps in the stairway, nor did she testify that defendant knew that any person had fallen on said stairway prior to the date on which she fell. There was no evidence tending to show that any person other than the plaintiff, while ascending the stairway, had fallen because his or her heel had been caught by one of the metal strips.

The liability of the owner or occupant of a building used as a store for the sale of merchandise to a customer or other invitee for damages resulting from injuries sustained while such customer or other invitee was in the building, and caused by some condition therein, is founded upon the principles on which the law of negligence is predicated. *Leavister v. Piano* Co., 185 N. C., 152, 116 S. E., 405. The owner or occupant of the building is not an insurer of the safety of his customer or other invitee, while in the building. *Mullen v. Sensenbrenner* (Mo.), 260 S. E., 982, 33 A. L. R., 176. He is liable only when the injuries resulting in damages were caused by his failure to exercise reasonable care to provide for the safety of his customers or other invitees. These principles apply in the instant case, and in accordance therewith we are of opinion that the evidence offered at the trial in the Forsyth County Court fails to show that defendant was negligent in maintaining the stairway with steps constructed by the owner of the building, on which metal strips were placed so that the surface of the strip on each step was one-sixteenth of an inch higher than the surface of the step between the edge of the metal strip and the back of the step. Plaintiff's fall while descending the stairway, caused by catching the heel of her shoe on the metal strip was not caused by the negligence of defendant. The fall was an accident, for which defendant is not liable. *Pendergrast v. Traction Co.*, 163 N. C., 553, 79 S. E., 984; *Chapman v. Clothier,* 274 Pa., 394, 118 Atl., 356.

The judgment of the Superior Court of Forsyth County is reversed. The action is remanded to said court with direction that judgment be entered in accordance with the decision of this Court.

Reversed.

CLARKSON, J., dissenting: Defendant corporation had a retail mercantile business on the first floor, and in connection with same had also a "Beauty Parlor" on the second floor. The steps going up to the "Beauty Parlor" were of wood. Each step had a tread of nine inches and a rise of eight inches. Across the front of each step was a metal strip two inches wide. The surface of each of these metal strips as they lay upon the step was one-sixteenth of an inch higher than the surface of the step. The purpose of the metal strip was to protect the edge of each step from wear.

Cora Bohannon, a young girl, had gone up the steps to the "Beauty Parlor," and on coming down the steps the steel piece on the edge of the step caught in the heel of her left shoe. She was coming down the steps carefully, as she knew others had fallen on the stairway. She testified, "My heel caught on the steel piece which comes up a fraction above the wood." She sustained injuries and the jury found, under a charge free from error, that defendant was guilty of negligence, that she was not guilty of contributory negligence, and awarded her damages for her injuries.

I think there was sufficient evidence to have been submitted to the jury. In order that the defendant may be liable for negligence, it is not necessary that it could have contemplated, or even been able to anticipate the particular consequence which ensued or the precise injury sustained by plaintiff. It is sufficient if by the exercise of reasonable care the defendant might have foreseen that some injury would result from its act or omission or that consequences of a generally injurious nature might have been expected. It is said also that it is not required that the particular injury should be foreseen; it is sufficient if it could be reasonably anticipated that injury or harm might follow the wrongful act. *Hall v. Rinehart,* 192 N. C., 706.

Perhaps the blade of an ordinary knife is less than a sixteenth of an inch, yet it will cut. We have here on this record a piece of steel tacked on wooden steps, leaving a sharp edge, admittedly one-sixteenth of an inch above the floor, like a knife blade. The heel of the young girl's shoe caught on this sharp blade and she was thrown and seriously injured. I think it is a question of due care for the jury to determine under proper instructions, and not for this Court.

I can see no accident in the matter. It was a known cause, and from the known cause defendant could reasonably anticipate that injury might

follow. Then, again, from frequent use the steel piece becomes loose and more liable to have the shoe heel caught in it and the person thrown. All this was a matter involving due care for the jury and not a Court to decide. In this cause a learned and experienced judge in the court below thought the evidence sufficient to go to a jury and twelve jurors—selected under the law as men of intelligence and moral character—found the defendant guilty of negligence and the young girl free from blame.

The jury system is a coördinate and right arm of the court, to ascertain facts, and one of the few agencies left to pass on the rights of the average man. Defendant owed plaintiff the duty as an invitee to see that the sharp, knife-like steel was tacked down to the floor in such a manner that the steel piece or blade would not catch a shoe heel and throw a person. The steel tacked down would be firm and would naturally throw a person if the shoe heel caught. At least, all this is a question of due care for the jury and not this Court.

STACY, C. J., concurs in dissent.

T. E. CHEEK AND HIS WIFE, ELIZABETH TAYLOR CHEEK, v. J. M. N. GREGORY ET AL.

(Filed 20 November, 1929.)

1. **Will E a—In absence of residuary clause property not devised descends to heirs at law.**

   In the absence of a general residuary clause in a will, realty owned by the testator at his death and not devised in the will descends to his heirs at law as in case of intestacy.

2. **Will E b—In this case held: "Balance" referred to personalty only and as to certain realty testator died intestate.**

   Where a testator in disposing of his property by will devises certain of his lands to his widow for life and by various other items certain other lands to his mother, brother and sisters, and then by a subsequent item "after the foregoing I want my personal property and all my moneys on hand" equally divided between his wife and son, followed by another item "if there is over ten thousand dollars each for him and his mother besides real estate and property named, the balance I wish to go to my brother and sisters and their children": *Held*, the word "balance" thus used refers only to the personal property, and there being no residuary clause after the life estate devised, the lands thus devised go to the son as the sole heir at law of the testator, as to this property the testator having died intestate.

3. Appeal and Error J c—Refusal to strike out paragraph of reply which does not affect the cause of action will not be held for error.

The refusal of the trial court to strike out a certain paragraph of the reply contradictory to one in the complaint will not be held for reversible error on appeal when the allegations thereof do not affect the result of the trial in the lower court.

BROGDEN, J., did not sit.

APPEAL by defendants from *Devin, J.*, at September Term, 1929, of DURHAM. Affirmed.

Action for specific performance of a contract for the purchase of land described therein, and for judgment that the defendants, who claim an interest in said land, have no right, title or estate in or to the same.

There was a judgment by default, for want of an answer, against certain of the defendants named therein, adjudging that said defendants have no right, title, or estate in or to said land, and that as against said defendants, plaintiffs are the owners and are seized in fee of said land. There was no exception to this judgment.

As to the other defendants, the action was heard upon the pleadings and admissions made in open court. Judgment was rendered that the answering defendants, who claim as heirs at law of the brother and sisters of J. W. Cheek, and their children, have no right, title or estate in or to the land described in the contract, and that plaintiffs are the owners and are seized in fee simple of said land; and that plaintiffs are entitled to the specific performance of the contract for the purchase of said land by the other answering defendants.

In accordance with said judgment, there was a decree that the defendants, the Georgia Industrial Realty Company, as assignee of J. M. N. Gregory, and the Southern Railway Company, as beneficiary under said contract, specifically perform the same, by paying to the plaintiffs the sum of $90,000, upon the delivery to said defendants by the plaintiffs of their deed attached to the complaint as Exhibit B, conveying to said defendants the land described in the contract.

From said judgment and decree defendants appealed to the Supreme Court.

Manning & Manning for plaintiffs.

F. C. Owen, W. S. Lockhart and McLendon & Hedrick for defendants.

CONNOR, J. At the hearing of this action in the Superior Court, it was agreed by counsel for both plaintiffs and defendants, that the controversy presented for decision by this action involves only the construction of a provision of the last will and testament of J. W. Cheek, deceased. It is conceded that plaintiffs are entitled to a decree for the

specific performance of the contract alleged in the complaint, if the plaintiff, T. E. Cheek, is the owner, and is seized in fee of that part of the land described in the contract, which was owned by J. W. Cheek, at his death, and also that he is such owner and is so seized, if the defendants, other than the purchaser under the contract, have no right, title or estate in or to the land described therein. These defendants contend that as heirs at law of the brother and sisters of J. W. Cheek, deceased, and their children, by virtue of a provision in his last will and testament, they are the owners in fee, and entitled to the possession of said land as tenants in common.

J. W. Cheek died in September, 1875. He left surviving him his wife, Rebecca N. Cheek, and his only son and heir at law, the plaintiff, Thomas Edgar Cheek, who was then nine years of age. His mother, one brother and four sisters also survived him. One of these sisters, Amanda Cheek, was unmarried. His sister, Mrs. Nancy Malone, was dead, having left surviving her three children, William A. Malone, Charles Malone, and Callie Watts. These children of his deceased sister were living at the death of the said J. W. Cheek.

At his death the said J. W. Cheek owned considerable property, both real and personal. He was a resident of Orange County, North Carolina, and had been engaged in the mercantile business. He owned that portion of the land described in the contract, the title to which is involved in this action. This land was situate in that part of Orange County which is now included in Durham County.

A short time before his death, to wit, on 12 April, 1875, the said J. W. Cheek executed his last will and testament, which was duly probated and recorded in the office of the clerk of the Superior Court of Orange County, on 20 September, 1875. This last will and testament, a certified copy of which is attached to the complaint in this action as Exhibit D, is as follows:

"Knowing the uncertainty of life and the certainty of death, I make and publish this my last will and testament.

1st. I give to my wife, Rebecca N. Cheek to have during her natural life the following property, to wit: the house and lot where I now live extending to the plank fence next to where my mother and Sister Amanda live; the house and lot where Col. Dalby lives, with two acres land to go with it, and my half interest in the E. J. Parrish lot and one I bought joining it, also the Frank Barbee land and the land where Ben Carroll lives.

2nd. I give to my son Thomas Edgar Cheek my store houses and lot, except that his mother shall have the rents derived from the old store house during the time she is my widow. I also give to Thomas Edgar

the house and lot where P. T. Conrad lives and the James Tillett place, and the land I bought of L. Morris. I also give him my interest in Tobacco Factory lot and Cotton Gin lot, also a vacant lot bought of W. J. Green on Main Street.

3rd. I give to my mother and sister Amanda the use of the house and lot in which they live during their lives, unless Amanda gets married, and then it goes to Edgar.

4th. I give to brother Newton and to each one of my sisters One Thousand Dollars each, and to Wm. A. Malone, Charles Malone and Callie Watts, five hundred dollars each, in cash.

5th. If there is a new Brick Church built by members of Rose of Sharon Church during next three years, I give five hundred dollars to aid in building it.

6th. If my store is in operating at my death and J. L. Markham still with me, I wish him to have at least six months to sell goods and wind up, and if found necessary extend time to twelve months.

7th. I give Thomas Edgar a good bed & furniture, the best bureau and my double case gold watch.

8th. After the foregoing I want my personal property and all moneys on hand divided equally between Thomas Edgar and his mother, except that she shall have all the house hold & kitchen furniture, except what I named for him, and he to have one thousand dollars in Raleigh National Bank.

9th. If there is over ten thousand dollars each for him and his mother including what they may get on my life policy in cash, besides real estate and property named, the balance I wish to go to my brother and sisters and their children.

10th. I wish J. M. Cheek to be allowed to redeem land of his I bought, and if there is a street run from about J. A. McMannen's stables across along back of Hughes & Co. Factory lot, then I desire a line to extend from lower or N. West corner of Simeon Barbee's line straight toward the back line of said land and to extend in other direction to Hughes & Co. line and McMannen, then to have South of said street, I named if run and West of the line joining with West line of Sim Barbee, and I give him any debt he may owe me and the balance of the land named may be divided between Edgar and his mother.

11th. I appoint my wife, Rebecca H. Cheek and Fred C. Geer, my executors to carry out this my last will and testament.

In witness I set my hand & Seal this 12th day of April 1875.

(s) J. W. CHEEK (Seal).

May 20th 1875.

Witness:

J. L. MARKHAM.

. . . . . .

Codicil—I do not wish J. A. McMannen to have the portion of land I name for him upon any condition but that a street is run where I name. Signed 12th April 1875.

(s) J. W. CHEEK (Seal)

May 20th 1875
Witness:
J. L. MARKHAM."

After the death of the said J. W. Cheek his widow, Rebecca N. Cheek, intermarried with A. D. Markham, and thereafter died in 1918; his mother died on 22 September, 1875, and his sister, Amanda Cheek, remained unmarried until her death in 1928. Since the death of his mother, the plaintiff, T. E. Cheek, has been, and is now in the possession of the lands devised to his mother, for her life, by Item 1 of the last will and testament of the said J. W. Cheek. Since the death of his aunt, Amanda Cheek, the plaintiff has been in possession of the land devised to her and the mother of J. W. Cheek, for their lives, by Item No. 3 of said last will and testament. The plaintiff claims the said lands as the sole heir at law of his father, J. W. Cheek, contending that as to the reversionary interest in these lands, the said J. W. Cheek died intestate. The defendants claim the said lands, as heirs at law of the brother and sisters of J. W. Cheek, and their children, contending that said lands, upon the death of the widow and sister of J. W. Cheek, went to the brother and sisters of J. W. Cheek, and their children, under the provisions of Item 9 of his last will and testament.

With respect to these conflicting contentions, Judge Devin was of opinion that "construing the entire will, and particularly paragraphs 8 and 9, it is apparent that the testator did not intend the word 'balance' as used in Item 9 of said will to refer to or pass anything but the balance of his personal property, and that Item 9, although separately numbered, was intended by the testator as and was in effect a proviso or limitation upon the disposition of all his personal property disposed of by Item 8, and that said word 'balance' so used in Item 9 was not intended by the testator to and did not pass any of the real estate or interest in real estate to the brother and sisters of said testator and their children."

In this opinion we concur. There is no error in the judgment "that the defendants, heirs at law of the brother and sisters of J. W. Cheek and their children, have no right, title or interest in the land covered by the deed of plaintiffs tendered to the defendants, the Georgia Industrial Realty Company, for the benefit of the Southern Railway Company." It follows from this decision that the judgment and decree in accordance therewith should be affirmed.

The exception to the refusal of the court to strike out paragraph one of the reply cannot be sustained. In both their complaint and in their reply to the answer of the defendants, plaintiffs allege that J. W. Cheek died intestate as to the reversion in the lands devised in Item 1 of his will to his wife for her life, and in Item 3 of said will to his mother and sister, Amanda Cheek, for their lives. The allegation in the complaint that neither the widow of the testator nor the plaintiff, T. E. Cheek, received the sum of $10,000 from his personal estate was not material to their recovery. The admission in their reply that said sums were received by the said widow and by the plaintiff, does not affect the cause of action upon which plaintiffs rely for their recovery in this action. This cause of action is based upon the allegation that the reversionary interest in the lands devised to his wife, for her life, by Item 1, and to his mother and unmarried sister, for their lives, by Item 3, of the last will and testament of J. W. Cheek, were not devised by the testator, and therefore, descended to the plaintiff, T. E. Cheek, as his sole heir at law. It is well settled, of course, that in the absence of a general residuary clause in a will, land owned by the testator at his death, and not devised by his will, descends to his heirs at law, as in case of intestacy. *Reid v. Neal,* 182 N. C., 192, 108 S. E., 769.

There is nothing in the language used by the testator in Item 9 of this will, which requires or justifies a construction of said item by which it must be held that the testator intended to deprive his only son—an infant, nine years of age—of the lands devised to his wife for her life, or to his mother and sister, for their lives, at their death, and to give said lands to his brother and sisters and their children. We find no error in the judgment or in the decree.

Affirmed.

BROGDEN, J., not sitting.

HOLMES ELECTRIC COMPANY, INC., v. CAROLINA POWER AND LIGHT COMPANY.

(Filed 20 November, 1929.)

1. Jury C b—Right to trial by jury in mandamus proceedings is waived by failure to make motion therefor in apt time.

The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Article IV, sec. 13, but the manner of such waiver is governed by statute, C. S., 568, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time

for the preservation of its right to trial by jury, C. S., 868, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived.

2. Electricity B a—In this case mandamus to compel power company to sell current to plaintiff for resale at retail was properly denied.

Where an electric power company has not held itself out or furnished other distributing lines electricity for redistribution or resale to the latter's customers, it may not be compelled to do so by mandamus, as it has the right to restrict its services to the consumers of electricity alone when not discriminatory against distributors. *Southern Power cases*, 179 N. C., 18, 330; 180 N. C., 335, cited and distinguished.

CIVIL ACTION, before *Cranmer, J.*, 27 March, 1929, at Chambers, CUMBERLAND County.

The plaintiff alleged that it is a public-service corporation and had constructed and maintained a system of poles and wires and other necessary things to transmit, deliver and sell electric current to persons, firms and corporations living or having places of business outside of the corporate limits of the city of Fayetteville in Cumberland County, and running in every direction therefrom a distance of approximately nine miles, except the territory embraced within the corporate limits of the town of Hope Mills. On 7 February, 1929, the plaintiff made application to defendant to be allowed "to purchase from said defendant primary electric current in the approximate amount of 20,000 K. W. H. per month, such electric current to be supplied by the defendant and taken by the plaintiff at or near a substation built and maintained for the delivery of current by the defendant, near the Victory Mills, near said city of Fayetteville," etc. Plaintiff was desirous of purchasing current for the purpose of resale or redistribution to other parties within the area described.

The defendant refused to furnish electric current for redistribution upon the ground that such resale of current would constitute the plaintiff a competitor of the defendant or of the city of Fayetteville with which the defendant had a contract for the sale of electric current for use and redistribution by said city, and further, that to furnish current to the plaintiff under the circumstances would constitute a breach of the contract existing between the defendant and the city of Fayetteville.

There was evidence to the effect that the plaintiff did not for the years 1927 and 1928, nor for any other years file with the Corporation Commission an annual report required to be filed by all public utilities operating in the State of North Carolina, nor has the plaintiff filed with or secured the approval of the Commission of rates to be charged by it. There was further evidence that the plaintiff had not filed with the Department of Revenue reports required by the Revenue Act of

1927. It further appeared that the plaintiff corporation had listed no taxes for property in Cumberland County.

The judgment was as follows:

"This cause coming on to be heard at Fayetteville, N. C., on 27 March, 1929, having been continued by consent until this day, and being heard upon the pleadings, affidavits and exhibits filed, the court finds the following facts:

1. Plaintiff, Holmes Electric Company, Inc., is a corporation doing business in the city of Fayetteville, N. C., under the powers granted in its charter, as appears of record, and the defendant, Carolina Power and Light Company, is a public-service corporation, doing business as such, and it owns, operates and maintains plants, transmission lines and other equipment for the generation and distribution of electric power.

2. That the plaintiff owns certain disconnected lines of poles and wires near the city of Fayetteville, N. C., over which the city of Fayetteville transmits and delivers electric current to various consumers outside of the corporate limits of the city of Fayetteville, and the city of Fayetteville, through its Public Works Commission, collects and receives the revenue from such consumers, and the plaintiff company is not now and never has been, a distributory of electric current, or electric power, and has only maintained the lines over which the current is delivered and charged various tap fees therefor. That plaintiff company has demanded from the defendant that the defendant deliver to the plaintiff electric current to be used solely for redistribution, and as such the plaintiff is not a consumer of electric current, but expects to deliver such current to consumers at a profit.

3. That the Carolina Power and Light Company has never entered the field of delivering current for redistribution to persons, firms or corporations who expected to use the same solely for redistribution at retail, but it has only sold its current to municipal corporations for redistribution among the citizens of the municipality and community and to large manufacturing corporations who purchased electric current in large quantities for industrial purposes and for redistribution to its employees.

4. That if the plaintiff were furnished electric current by the defendant, same would be used by the plaintiff in competition with the defendant and the city of Fayetteville, with whom the defendant has a contract, as set out in the pleadings.

Under the foregoing facts, the court being of opinion that the application should be denied;

It is thereupon considered, ordered and adjudged by the court that the application for writ of mandamus be, and the same is hereby denied, plaintiff to pay the costs of this action."

From the foregoing judgment the plaintiff appealed.

Brooks, Parker, Smith & Wharton and C. Murchison Walker for plaintiff.

W. H. Weatherspoon, Pou & Pou and Rose & Lyon for defendant.

BROGDEN, J. 1. Can a plaintiff institute a mandamus proceeding returnable before a Superior Court judge, appear at the hearing, and after a full hearing and argument by counsel representing plaintiff and defendant, and after judgment has been tendered by the defendant, thereupon demand a jury trial upon issues of fact raised by the pleadings?

2. Was the judgment denying the mandamus correct?

The right of trial by a jury is guaranteed by the Constitution. Article IV, section 13, of the Constitution of North Carolina provides: "In all issues of fact, joined in any court, the parties may waive the right to have the same determined by a jury, in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury." The Constitution, of course, does not prescribe the method by which a jury trial may be waived. Such provision is made by statute. C. S., 568, provides three methods of waiver.

A mandamus proceeding, however, is governed by C. S., 868, when the relief sought is other than a money demand. This statute provides in substance that the summons must be made returnable before a judge of the Superior Court at Chambers and upon the return date, "the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court." The plain meaning of the statute is that the judge has the power to hear and determine the law and the facts; but, if an issue of fact is raised in the pleadings, and either party moves for a jury trial, the power of the judge to proceed further is at an end and he must continue the action until such issue of fact can be decided by a jury at the next regular term of court. It is, therefore, apparent that the right of jury trial is dependent "upon the motion of either party" (*Lenoir County v. Taylor*, 190 N. C., 366, 130 S. E., 25); and unless a party shall move for a jury trial in such cases, the issue may be determined by the court. *Cannon v. Mills Co.*, 195 N. C., 119, 141 S. E., 344.

It is thoroughly settled that where rights are dependent upon a motion, such motion must be made in apt time. Was the motion in the case at bar made in apt time as contemplated by law?

The record discloses that "after the argument and when the judgment was tendered by the defendant, counsel for the plaintiff made the fol-

lowing motion: "Plaintiff moves the court for a jury trial on the issues of fact raised by the pleadings for that it is a seriously controverted fact whether or not the defendant has been selling electric current to persons, firms and corporations for resale or redistribution, and for that it also is a seriously controverted fact as to whether or not the plaintiff and the defendant are competitors." The record further discloses that this motion was made "after full hearing and argument by counsel representing plaintiff and the defendant and when the judgment was tendered by the defendant." In *Baker v. Edwards,* 176 N. C., 229, 97 S. E., 16, this Court declared: "The defendant had attacked the report by exceptions, alleging radical error in it, and if plaintiff was not willing, as his conduct did not indicate, that the judge should hear and decide upon these exceptions with a jury, he could have enforced his constitutional right by framing such issues on defendant's exceptions as he thought were proper, and have them passed upon, not by the court, but by a jury, so that he might exercise his constitutional right and have the full benefit thereof by having a jury say whether there was any error of the referee, as specified in the defendant's exceptions. But this he did not do, but, by his silence, if not by his affirmative action and conduct, he manifestly evinced his purpose to make what he considered a wise and safe election, and have the judge decide upon the exceptions of defendants. If we should permit him now, after deliberately making this choice, and lost, to take another chance, it would not be fair to the defendants, who had trusted the matter to the judge, and who supposed, and had the right to suppose, that the plaintiff had likewise done so. The law rarely gives a litigant more than one fair chance." *Lumber Co. v. Pemberton,* 188 N. C., 532, 125 S. E., 19; *Jenkins v. Parker,* 192 N. C., 188, 134 S. E., 419.

The words "apt time" have been defined by this Court to refer "to the *order* of proceeding, as *fit* or *suitable* time." . . . When anything is done in proper *order,* then whether the time is long or short, makes no difference. *Pugh v. York,* 74 N. C., 383. For instance, an objection to remarks made by a judge during the trial must be made in apt time. An objection made after verdict is not in apt time. *S. v. Brown,* 100 N. C., 519, 6 S. E., 568; *S. v. Tyson,* 133 N. C., 692, 45 S. E., 838. It has also been held that "a party to an action cannot be heard to demand a jury trial after the facts are found against him when he has offered evidence and submitted to a trial by the court without objection." *Drewry v. Bank,* 173 N. C., 664, 92 S. E., 593.

In the case at bar, obviously, the motion for a trial by jury was not made until the judge had intimated his opinion and judgment in accordance therewith had been tendered by the defendant. Therefore, by analogy the motion came after verdict and under all the decisions was not made in apt time.

The second question of law involves the correctness of the judgment rendered. The plaintiff relies upon the *Southern Power Company cases,* reported in 179 N. C., 18, 101 S. E., 593; 179 N. C., 330, 102 S. E., 625; 180 N. C., 335, 104 S. E., 872, 282 Fed., 837. The *Power cases* reported in 179 N. C., 18, and 179 N. C., 330, develop and declare the principles of law pertinent to a decision of the present case. It should be observed at the outset that these cases were decided by a sharply divided Court. The true theory of the decision is contained in the opinion of *Justice Brown* upon the petition to rehear, reported in 179 N. C., 330. The opinion declares: "In my opinion the defendant had the right originally to confine its sales and contracts to those desiring electricity for direct personal consumption, and thereby retain control of the number of its consumers, limiting them to that number it could adequately serve. But when defendant voluntarily entered the field of supplying current to a person or corporation which does not desire it for consumption, but to sell and distribute to others for their consumption, the case is changed. It becomes subject to the provisions of law that it must extend the same treatment to all persons and corporations who stand in like case. It cannot sell to one and arbitrarily refuse to sell to another. One corporation desiring current from it for distribution purposes prima facie has precisely the same right to obtain it as another. A public-service corporation cannot arbitrarily refuse to supply one of a class which it has undertaken to serve. It must justify its refusal by good reason.

If the defendant in the beginning had elected to supply only the individual consumer, I am satisfied it could not have been compelled to supply smaller corporations engaged in retailing the electric current. But when defendant commenced and continued to sell its current to such smaller corporations for purposes of resale and distribution, every such corporation has an equal right, and it must not discriminate."

Thus it is manifest that the decisions of the Court in the *Power cases* rested upon the fact that the defendant had entered the field of selling and supplying current for resale and redistribution. Having so entered the field, it could not thereafter make arbitrary discriminations.

The record in the case at bar discloses that the trial judge found as a fact that "the plaintiff company is not now and never has been a distributory of electric current, or electric power, and has only maintained lines over which the current is delivered and charged various tap fees therefor." The court further found "that the Carolina Power and Light Company has never entered the field of delivering current for redistribution to persons, firms or corporations who expected to use the same solely for redistribution at retail," etc.

These findings of fact take this case out of the boundary of the *Power Company cases* upon which the plaintiff relies, and the judgment rendered by the court upon the facts appearing in this particular record correctly applies the law as formerly declared by this Court.

Affirmed.

LEONARD LILES, BY HIS NEXT FRIEND, v. HANNAH PICKETT MILLS, INC.

(Filed 20 November, 1929.)

Evidence K c—Competency of witness as expert is addressed to discretion of trial court and his finding is ordinarily conclusive.

Whether a witness is competent to testify as an expert is a question primarily addressed to the sound discretion of the trial court, and his decision is ordinarily conclusive, and where an X-ray photograph of an injury bearing upon an issue involved in the action depends upon the explanation of an expert to make it understandable to the jury, the finding of the trial court that the witness was not qualified as an expert to give the explanation and excluding the photograph offered will not be disturbed on appeal.

APPEAL by plaintiff from *Shaw, J.*, at June Term, 1929, of RICHMOND. No error.

Garrett & Page and W. R. Jones for plaintiff.
Fred W. Bynum for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for an assault alleged to have been inflicted upon him by an overseer of the defendant in a weaving room in which the plaintiff performed his work. The allegations of the complaint were denied and the first issue—"Was the plaintiff wrongfully assaulted by Arch White as alleged in the complaint?"—was answered in the negative. It was admitted that the plaintiff inflicted serious physical injury on the overseer, but the plaintiff contended that he had acted in self-defense. He alleged that during the encounter the overseer struck him with a wrench and fractured his skull. For the purpose of showing the fracture he offered in evidence an X-ray photograph taken by one of his witnesses. The judge expressed his willingness to admit the photograph in evidence provided expert testimony was introduced satisfactorily explaining the photograph to the jury, but held upon the evidence offered that the witness had not qualified himself as sufficiently expert in questions of anatomy to testify in reference to the proposed explanation. On this point he

therefore excluded the testimony of the witness. No other expert evidence was offered. We see no error in this ruling. Whether a witness is competent to testify as an expert is a question primarily addressed to the sound discretion of the court, and his decision is ordinarily conclusive. *S. v. Wilcox,* 132 N. C., 1120; *Hammond v. Schiff,* 100 N. C., 161. This is not in conflict with the decision of the Court in *Pridgen v. Gibson,* 194 N. C., 289. There it was held that the preliminary question as to the qualification of a witness is subject to review when it is obviously made to turn upon error in law, and that a witness who is an expert need not necessarily be a technical specialist. In this case it was found as a fact that the witness was not sufficiently qualified to express an expert opinion on questions of anatomy, and upon this finding the testimony was properly excluded.

No error.

AMANDA PAYLOR, ADMINISTRATRIX, v. B. S. WILLIAMS.

(Filed 3 April, 1929.)

APPEAL by defendant from *Devin, J.,* at October Term, 1928, of ORANGE.

Civil action to recover damages for the death of plaintiff's intestate, alleged to have been caused by the wrongful act, neglect or default of the defendant in running him down and striking him with a high-powered automobile.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of the plaintiff.

From the judgment entered on the verdict the defendant appeals, assigning errors.

Brawley & Gantt and Gattis & Gattis for plaintiff.
Fuller, Reade & Fuller, J. A. Giles and R. T. Giles for defendant.

PER CURIAM. A careful perusal of the record leaves us with the impression that no error was committed on the trial of the cause. The evidence was amply sufficient to carry the case to the jury, and we have discovered no ruling or action of the trial court which we apprehend should be held for reversible error. The verdict and judgment will be upheld.

No error.

CHAPEL HILL SUPPLY COMPANY v. HAGEDORN CONSTRUCTION COMPANY ET AL.

(Filed 3 April, 1929.)

APPEAL by defendants from *Devin, J.*, at August Term, 1928, of ORANGE. No error.

Gattis & Gattis for plaintiff.
King, Sapp & King for Construction Company.

PER CURIAM. On 24 November, 1924, the plaintiff and the Hagedorn Construction Company entered into a contract by the terms of which the plaintiff was to sell and deliver to the defendant a certain quantity of crushed stone, and by a subsequent oral agreement the quantity was changed from ten thousand cubic yards to twelve thousand, and the price was reduced from $3.20 to $3.15 per cubic yard. On 8 June, 1925, the Hagedorn Company gave the plaintiff a trade acceptance in the sum of $4,506.72, payable 15 July, 1925. The plaintiff alleged that on 8 December, 1925, it sold and delivered to the construction company 54.8 cubic yards of crushed stone at the price of $172.62, and 74 cubic yards of screenings at the price of $55.50. Suit was brought to recover the amount of these items.

The defendants denied that the plaintiff had complied with the contract, and alleged that at all times they had been ready to perform their contract, and that final measurements had not been made when the trade acceptance was given; that there was a shortage in the quantity of stone actually delivered; that the plaintiff had agreed to make good the deficiency, and that the construction company was thereby induced to sign the acceptance. They alleged that by reason of the plaintiff's failure to comply with the contract the construction company, in order to carry out its contract with the Highway Commission, had to buy stone in the open market at a cost of $2,237.62 in excess of what the cost would have been if the plaintiff had carried out its agreement, and that the construction company was entitled to recover this sum from the plaintiff, less $588.12, the balance alleged to be due the plaintiff for stone actually delivered, leaving as the amount due the defendant $1,649.50. The defendant demanded judgment against the plaintiff for this sum. In response to the issues the jury found that the defendant was indebted to the plaintiff in the sum of $4,734.84 with interest, and that the plaintiff was not indebted to the defendant. Judgment was rendered for the plaintiff and the defendant appealed.

The defendants say that incompetent evidence was admitted, and that error appears in the charge as to the burden of proof on the first issue. These contentions embrace all the exceptions, neither of which can be sustained. There is

No error.

CLORA HARDIN v. R. L. MYERS, ADMINISTRATOR OF JOHN T. HARDIN, LEONADAS (BUD) HARDIN AND WIFE, MRS. LEONADAS HARDIN, WILL CARMICHAEL AND WIFE, ELIZA HARDIN CARMICHAEL, AND SOUTHERN REALTY COMPANY.

(Filed 10 April, 1929.)

APPEAL by defendants from *Moore, J.*, at February Term, 1929, of FORSYTH. Affirmed.

This is an action brought by plaintiff against the defendants, administrator and heirs at law of John T. Hardin, who is dead, and the Southern Realty Company, to reform certain deeds made by the Southern Realty Company to John T. Hardin, for mutual mistake. Said deeds made "through and by the mutual mistake of the defendant, Southern Realty Company, and the plaintiff and her deceased husband," John T. Hardin. The alleged mistake was that the deed should have been made to John T. Hardin and wife, Clora Hardin, the plaintiff. The action was tried in the Forsyth County Court before Judge Oscar O. Efird, and a jury. All the issues submitted to the jury, and their answers thereto, were found in favor of plaintiff. Defendants made numerous exceptions and assignments of error on the trial in the Forsyth County Court, and from the judgment appealed to the Superior Court. In the Superior Court the exceptions and assignments of error made by defendants in the Forsyth County Court were overruled and defendants assigned errors and appealed to the Supreme Court.

Archie Elledge for plaintiff.

George W. Braddy and W. L. Morris for defendants.

PER CURIAM. We have read with care the record in this action and the briefs of the parties. We think the case was tried in the Forsyth County Court in accordance with well-settled principles of law. The exceptions and assignments of error, as to the admission and exclusion of evidence, the charge and prayer for special instruction are without merit. The judge in the Forsyth County Court was careful in his rulings on the evidence. The charge was clear and gave the law applicable to the facts and the contentions of the parties fairly on both sides. The

judge of the Superior Court on appeal overruled all the exceptions and assignments of error. The judge of the Forsyth County Court charged the jury: "The burden of proof, gentlemen of the jury, rests upon the plaintiff to satisfy you by clear, strong, cogent and convincing evidence of the affirmative of these several issues, as the facts shall severally apply to these three issues." This burden was repeated. The facts were for the jury to decide. The facts were found by the jury in favor of plaintiff.

On the entire record we find no error. The judgment of the Superior Court is

Affirmed.

H. P. ALSPAUGH v. COMMISSIONERS OF FORSYTH COUNTY DRAINAGE DISTRICT No. 2.

(Filed 10 April, 1929.)

APPEAL by plaintiff from *Moore, J.*, at February Term, 1929, of FORSYTH. Affirmed.

Hastings & Booe for plaintiff.
Manly, Hendren & Womble for defendants.

PER CURIAM. This was an action to restrain the defendants from levying an assessment and selling bonds for the establishment of a drainage district on the ground set out in the plaintiff's complaint. The defendants filed an answer, and upon the hearing the presiding judge found the facts which are set out in the record. Upon the facts as found, we are of opinion that the judgment is free from error and that it should be affirmed. No principle of law is presented requiring any special discussion. Judgment

Affirmed.

AMERICAN RADIATOR COMPANY v. DIXIE FIRE INSURANCE COMPANY.

(Filed 17 April, 1929.)

APPEAL by plaintiff from *Shaw, J.*, at August Term, 1928, of GUILFORD. No error.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

PER CURIAM. The questions involved in this case are the same as those in *Tomlinson Company, Inc., v. Fire Insurance Company, Inc., post,* 777, and the principles applicable here are the same as those controlling in that case. The amount found for the plaintiff was admitted by the defendant to be due.

No error.

TOMLINSON COMPANY, INC., v. DIXIE FIRE INSURANCE COMPANY, INC.

(Filed 17 April, 1929.)

APPEAL by plaintiff from *Shaw, J.,* at August Term, 1928, of GUILFORD. No error.

Shuping & Hampton for plaintiff.
Brooks, Parker, Smith & Wharton for defendant.

PER CURIAM. Two questions are involved in the appeal: (1) Is the evidence sufficient in law to warrant the submission to the jury of the question whether B. MacKenzie was an independent contractor? (2) Was there error in refusing the prayer directing a verdict for the plaintiff?

Three issues were submitted to the jury, and in response to the first it was found as a fact that MacKenzie was an independent contractor. The second and third issues relating to the alleged indebtedness of the defendant to the plaintiff and to the plaintiff's right to a lien on the premises were answered in the negative. Judgment was given for the defendant, and plaintiff excepted and appealed.

Upon an examination of the record we are satisfied that there was sufficient evidence to support the verdict upon the first issue, and are of opinion that no error was committed in refusing plaintiff's prayer for special instructions directing the verdict for the plaintiff.

The principles arising upon the exception have been so frequently before the Court as to make it unnecessary specifically to review the entire evidence in its application to the controlling principles of law. We find

No error.

STATE v. BURLEY CAGLE.

(Filed 24 April, 1929.)

CRIMINAL ACTION, before *Shaw, J.*, at January Term, 1929, of MOORE.

The defendant was indicted for killing Coley Smith. The solicitor did not ask for a conviction of murder in the first degree. There was a verdict of guilty of murder in the second degree, and the defendant was sentenced to serve not less than ten and not more than sixteen years in the State's prison.

From judgment pronounced the plaintiff appealed.

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

W. R. Clegg for defendant.

PER CURIAM. The evidence offered in behalf of the State tended to show that the defendant killed the deceased intentionally. Upon the other hand the evidence for the defendant tended to show that the killing was accidental. Both phases of the case were fairly submitted to the jury and the pertinent principles of law properly applied. It appears to us that the defendant has had a fair trial, and there is no error of law appearing in the record. Hence the judgment must stand.

No error.

SOUTHERN RAILWAY COMPANY v. SAM SCHWARTZ.

(Filed 1 May, 1929.)

APPEAL by plaintiff from *Harwood, Special Judge,* and a jury, at October Term, 1928, of MECKLENBURG. No error.

The facts of the controversy are fully set forth in the judgment of the court below, which is as follows:

"This cause coming on to be heard . . . and being heard, and the jury having answered the issues presented to it as follows:

(1) In what freight classification, under the tariffs of the Interstate Commerce Commission, was the shipment referred to in the complaint? Answer: Scrap iron. 7. Did the plaintiff wrongfully refuse to deliver said shipment? Answer: Yes. 8. If so, what damages is the defendant entitled to recover of the plaintiff on account thereof? Answer: $429.48, less freight. It is recommended by the jury that the defendant be allowed interest on the net amount recovered at the rate of six per cent

per annum. And by agreement of all parties the court answered the other issues; after the coming in of the verdict of the jury the court answering as follows:

(2) In what amount is the defendant indebted to the plaintiff for the transportation of said shipment from Charleston, S. C., to Norfolk, Va.? Answer: $121.91.

(3) In what amount, if any, is the defendant indebted to the plaintiff for demurrage on said shipment? Answer: Nothing.

And it having been agreed by the plaintiff and the defendant that the freight on scrap iron from Charleston, S. C., to Norfolk, Va., is $121.91:

It is, therefore, ordered, adjudged and decreed that the plaintiff recover nothing of the defendant; and that the defendant recover of the plaintiff the sum of $307.57, and interest on said amount from 12 July, 1924."

John M. Robinson and Hunter M. Jones for plaintiff.
Stewart, MacRae & Bobbitt for defendant.

PER CURIAM. From hearing the argument of counsel in this action and carefully reading the record and briefs, we can find no reversible or prejudicial error. The controversy narrowed itself down mainly to questions of fact, which were found by the jury in favor of the defendant.

There is no new or novel proposition of law appearing in the record. In the judgment below there is

No error.

R. D. McREE v. GEORGE H. TALBOT.

(Filed 1 May, 1929.)

APPEAL by defendant from *Sink, Special Judge,* at February Special Term, 1929, of MECKLENBURG.

Civil action to recover for material furnished and work done by plaintiff in repairing defendant's house, and to impress lien thereon.

Upon denial of liability and issues joined, the jury returned a verdict in favor of plaintiff, entitling him to enforce his lien.

Defendant appeals, assigning errors.

Stewart, MacRae & Bobbitt for plaintiff.
Bordeaux & Shelton and G. A. Smith for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, determinable alone by the jury. A careful perusal of the record leaves us with the impression that the case has been heard and concluded 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 error. The exceptions relative to the admission and exclusion of evidence must all be resolved in favor of the validity of the trial; the case presents no new questions of law, or one not heretofore settled by our decisions. The verdict and judgment will be upheld.

No error.

SALLIE D. WILDER v. ODOM ALEXANDER.

(Filed 8 May, 1929.)

APPEAL by defendant from *Harding, J.*, at October Term, 1928, of MECKLENBURG. No error.

The plaintiff alleged that she was the owner of a building in the city of Charlotte known as the Wilder Building; that K. M. Blake was directed to act for her in leasing it; that M. B. Rose was the rental agent, and that on 7 May, 1926, K. M. Blake and the defendant signed the following paper:

"Mr. M. B. Rose, Agent for K. M. Blake.

Dear Sir:

I propose to rent from you the storeroom No. 5 of the New Wilder Building, said store fronting on East Third Street, at a rental of $157.50 per month for a period of five years from 1 June, 1926. The regular lease of the building to be signed when prepared and presented.

ODOM ALEXANDER. (Seal)
K. M. BLAKE. (Seal)
Accepted."

It was further alleged that storeroom No. 5 was available for occupancy by the defendant from and after July, 1926, and that in September, 1926, the defendant notified the rental agent that he would not occupy the room, in consequence of which it remained vacant for fifteen and one-half months after 1 July, 1926; that the plaintiff was ready, able and willing to carry out her contract; that the defendant had failed to comply; and that the plaintiff was entitled to damages.

The defendant filed an answer, and upon issues joined the jury returned the following verdict:

1. Did the defendant and the plaintiff enter into the contract marked "Exhibit A," as alleged in the complaint? Answer: Yes.

2. Did the defendant breach said contract? Answer: Yes.

3. In what amount, if any, is the defendant indebted to the plaintiff? Answer: $1,501.25, with interest.

Judgment for the plaintiff and appeal by defendant upon assigned error.

Thaddeus A. Adams for appellant.
Stewart, MacRae & Bobbitt for appellee.

PER CURIAM. The defendant relies principally on the fourth and eleventh exceptions, which are addressed to the judge's refusal to dismiss the action as in case of nonsuit. We have scrutinized these exceptions and the remaining eleven, and find no error in any of them which entitles the defendant to a new trial.

No error.

BERRY JACKSON v. J. A. JONES CONSTRUCTION COMPANY.

(Filed 8 May, 1929.)

APPEAL by defendant from *Sink, Special Judge,* at February Special Term, 1929, of MECKLENBURG.

Civil action by plaintiff, employee of the defendant, to recover damages for personal injury, alleged to have been caused by the negligence of the defendant's foreman, in directing and requiring plaintiff, while engaged in construction work in the city of Charlotte, to carry a crooked piece of steel, 10 or 15 feet long, weighing three or four hundred pounds, across a ditch four feet wide and about four feet deep, without any assistance, which caused plaintiff to fall, as he jumped the ditch, and resulted in serious injury to one of his legs.

Upon denial of liability and issues joined, there was a verdict and judgment for the plaintiff, from which the defendant appeals, assigning errors.

G. T. Carswell and Joe W. Ervin for plaintiff.
J. Laurence Jones for defendant.

PER CURIAM. The case presents no new question of law. It is not different in principle from *Cherry v. R. R.*, 174 N. C., 263, 93 S. E., 783, or *Pigford v. R. R.*, 160 N. C., 93, 75 S. E., 860. On authority of these cases the judgment will be upheld.

No error.

DODSON & COMPANY v. GROVES COTTON COMPANY.

(Filed 8 May, 1929.)

APPEAL by defendant from *Stack, J.*, at January Term, 1929, of GASTON.

Civil action for breach of contract, tried upon the following issues:

"1. Did the defendant, L. C. Groves, doing business as Groves Cotton Company, contract with the plaintiffs, Dodson & Company, for a shipment and delivery of 100 bales of cotton, middling white, equal type, 'Best' to be shipped to Gastonia, N. C., on or before 15 December, 1927, at the price of 28½ cents per pound, as alleged in the complaint? Answer: Yes.

2. If so, did the plaintiff comply with the order and ship the cotton as directed? Answer: Yes.

3. If so, did the defendant breach his contract as alleged? Answer: Yes.

4. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: $3,176.64."

Judgment on the verdict for plaintiffs, from which the defendant appeals, assigning errors.

P. W. Garland for plaintiffs.
Mangum & Denny for defendant.

PER CURIAM. The appellant presents a large number of exceptions and assignments of errors, but a careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the principles of law applicable, and that the verdict and judgment should be upheld. No action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

The case narrowed itself largely to one of controverted facts, determinable only by a jury verdict, which has been rendered in favor of the plaintiffs.

No error.

SAM L. SMITH v. PILOT INSURANCE AND REALTY COMPANY, INC., ET AL.

(Filed 8 May, 1929.)

APPEAL by plaintiff from *Sinclair, J.*, at April Term, 1928, of MONTGOMERY. No error.

Action to recover damages for breach of contract to procure deed from owners of land conveying the same to plaintiff.

From judgment on an adverse verdict plaintiff appealed to the Supreme Court.

W. A. Cochran for plaintiff
No counsel for defendants.

PER CURIAM. The only exceptions set out and discussed in the brief filed for plaintiff in this Court are to instructions of the court in the charge to the jury. Other exceptions appearing in the case on appeal are abandoned. Rule 28.

The contract is in writing; its execution is admitted, and it is free from ambiguity. It was correctly construed by the court, as a contract to procure from the owners within thirty days a deed conveying the land to plaintiff, or upon failure to do so, to return to plaintiff the money paid to defendants on the purchase price. There was evidence tending to show that defendants had not breached the contract, and are therefore not liable to plaintiff for damages. The evidence was submitted by the court under instructions which are free from error. The judgment in accordance with the verdict is affirmed.

No error.

J. M. TALLANT AND MRS. MAUD TALLANT v. B. & H. COACH COMPANY.

(Filed 8 May, 1929.)

APPEAL by defendant from *Harding, J.*, at November Term, 1928, of MECKLENBURG. No error.

Actions begun by the above-named plaintiffs to recover damages for injuries caused by the negligence of the defendant were consolidated, by consent, for trial, and were tried together.

From judgment on the verdict, defendant appealed to the Supreme Court.

Stancil & Davis and D. E. Henderson for plaintiffs.
John W. Hester for defendant.

PER CURIAM. All the evidence offered at the trial tended to show that the automobile in which plaintiffs were riding from their home to their store, in the city of Charlotte, was forced from the highway into a ditch by the negligence of the driver of a bus. The controversy between the plaintiffs and the defendant arose chiefly from their conflicting contentions as to whether or not the bus was owned by the defendant and operated by its driver. There was evidence tending to sustain the contention of each party with respect to this matter. The conflicting evidence was submitted to the jury under a charge to which there were no exceptions. There was no error in excluding testimony offered as evidence that an attorney for plaintiffs, prior to the commencement of the actions, made inquiries for the purpose of ascertaining whether the bus whose driver forced the plaintiffs from the highway into the ditch was owned by defendants. Conceding that this testimony would have had some slight probative value had the inquiries been made by the plaintiffs, or either of them, it was not competent for that it does not appear that plaintiffs had authorized any one to make inquiries with respect to the matter. It does not appear that the person making the inquiries was at the time the attorney for either of the plaintiffs. The judgment is affirmed.

No error.

C. C. CRANFORD ET AL. v. W. W. BRYANT ET AL.

(Filed 8 May, 1929.)

APPEAL by defendants from *Oglesby, J.*, at July Term, 1928, of RANDOLPH. No error.

J. A. Spence and H. M. Robins for plaintiffs.
Brittain & Brittain, Gold & York, and Charles W. McAnally for defendants.

PER CURIAM. This is a civil action in which personal property was seized by the sheriff under proceedings in claim and delivery and replevied by the defendants. The only issue was as to the amount the plaintiffs were entitled to recover for the deterioration and detention of the property. We have examined the exceptions and find no error entitling the appellants to a new trial.

No error.

GEORGIA MULL, BY HER NEXT FRIEND, LORETTA MULL, v. J. M. MOCK ET AL., TRADING AS ALLEN-SILER COMPANY.

(Filed 29 May, 1929.)

APPEAL by defendants from *Harwood, Special Judge,* at the March-April Special Term, 1929, of HAYWOOD. No error.

John M. Queen and Alley & Alley for plaintiff.
Morgan, Ward & Stamey for defendants.

PER CURIAM. The plaintiff brought suit to recover damages for personal injury alleged to have been caused by the negligence of the defendants. There was evidence tending to show that on 30 June, 1928, the plaintiff, a girl 13 years of age, was returning to her home on highway No. 10, and that she was struck by a truck belonging to the defendants and operated by one of their employees. The defense was that the plaintiff's injury was caused solely by the negligence of a man named Morgan who was driving his automobile on the highway. The controversy was reduced practically to issues of fact, which were submitted to the jury and answered in favor of the plaintiff. We have examined the exceptions of the appellants and have been unable to find any substantial ground for a new trial.

No error.

FRANCES P. BOSTWICK v. L. B. JACKSON.

(Filed 12 June, 1929.)

APPEAL by defendant from *Sink, Special Judge,* at May Special Term, 1928, of BUNCOMBE. No error.

Action to recover for services rendered by plaintiff to defendant under a contract of employment. The controversy involves only the amount which plaintiff is entitled to recover of defendant, who admits that he is indebted to plaintiff for services in the sum of $1,200. Plaintiff contends that defendant is indebted to her in the sum of $1,800.

From judgment on an adverse verdict defendant appealed to the Supreme Court.

Roberts, Young & Lane for plaintiff.
Thomas S. Rollins for defendant.

PER CURIAM. Defendant's assignments of error on his appeal to this Court are based on exceptions to instructions in the charge of the court to the jury, and to the failure of the court to comply in the charge with the provisions of C. S., 564. They cannot be sustained. The judgment is affirmed.

No error.

J. R. JENKINS, ADMINISTRATOR OF LEVI JENKINS, v. SOUTHERN RAILWAY COMPANY ET AL.

(Filed 12 June, 1929.)

APPEAL by defendant, Southern Railway Company, from *Harwood, Special Judge,* at April Special Term, 1929, of HAYWOOD. No error.

Action to recover damages for the wrongful death of plaintiff's intestate.

There was a judgment of nonsuit as to defendants other than Southern Railway Company.

From judgment on the verdict that plaintiff recover of the defendant, Southern Railway Company, the sum of $4,500 as damages, the said defendant appealed to the Supreme Court.

W. R. Francis and Alley & Alley for plaintiff
Thomas S. Rollins for defendant.

PER CURIAM. From a judgment dismissing this action as of nonsuit, rendered at a trial in the Superior Court of Haywood County, October Special Term, 1928, plaintiff appealed to this Court. The judgment was reversed. 196 N. C., 466. We were of opinion, and so held, that the evidence offered at said trial should have been submitted to the jury, under appropriate instructions upon issues involving (1) actionable negligence on the part of the defendants; (2) contributory negligence on the part of deceased; (3) the principle of the "last clear chance"; and (4) damages.

At the trial resulting in the judgment from which defendant, Southern Railway Company, has appealed, the evidence was substantially the same as that on the former trial. Defendant on this appeal relies chiefly on its assignment of error based upon its exception to the refusal of the court to allow its motion for judgment as of nonsuit at the close of the evidence. This assignment of error cannot be sustained. The motion was properly denied upon the authority of our decision in the former appeal. We find no error, and the judgment is affirmed.

No error.

STACY, C. J., dissents.

IN RE WILL OF WILLIAM HARRIS.

(Filed 11 September, 1929.)

APPEAL by caveators from *Devin, J.*, and a jury, at February Term, 1929, of PASQUOTANK. No error.

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

"1. Were the paper-writings propounded as the last will and testament of William Harris, and the codicil thereto, executed in the manner and form as prescribed by the statute of the execution of a last will and testament? Answer: Yes.

2. At the time of the execution of said paper-writings was the said William Harris without sufficient mental capacity to make a will? Answer: No.

3. Was the execution of said paper-writings propounded as the will of William Harris procured by the undue influence of Mrs. Maggie Harris? Answer: No."

Thompson & Wilson, McMullan & LeRoy for caveators.
Aydlett & Simpson and Ehringhaus & Hall for propounders.

PER CURIAM. We have read the record and briefs with care. We do not think the exceptions and assignments of error made by caveators can be sustained. We can see no reason why the testimony objected to by caveators was incompetent. If the testimony had been incompetent, we think it harmless and not prejudicial.

No error.

ELIZABETH CITY HOTEL CORPORATION v. M. N. TOXEY.

(Filed 11 September, 1929.)

APPEAL by defendant from an order of *Devin, J.*, made on 31 May, 1929, permitting the defendant, upon affidavit filed, to inspect certain documents and papers of the plaintiff, together with the minutes of the corporation and the defendant's subscription to stock, and to examine W. G. Gaither and C. O. Robinson, officers of the corporation. From PASQUOTANK. Affirmed.

McMullan & LeRoy for plaintiff.
Aydlett & Simpson for defendant.

PER CURIAM. The defendant contends that his Honor's order is unduly restricted, but we are of opinion that it substantially recognizes all the material and determinative allegations in the defendant's affidavit, and that defendant has no just cause of complaint. The order allowing the examination is

Affirmed.

GEORGE MORRIS v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 11 September, 1929.)

CIVIL ACTION, before *Moore, Special Judge* at June Term, 1929, of PASQUOTANK.

Plaintiff alleged that on or about 1 April, 1912, he suffered the loss of his foot by reason of being struck and run over by a train owned and operated by the defendant. At the time of the injury plaintiff was a minor eight years and four months of age. The track of defendant crosses Culpepper Street within the corporate limits of Elizabeth City. At the time of the injury this was a much used and populous thoroughfare.

Plaintiff offered evidence tending to show that while he and other colored boys were playing in Culpepper Street he attempted to run across the track of defendant, stumbled and fell across the track, and was run over by box cars pushed by an engine. The evidence further tended to show that the right of way of defendant at the intersection was obstructed by weeds and a building; that no signal was given by the engine as it approached the crossing, and that there was no lookout on the box car.

The evidence of defendant tended to show that the plaintiff was attempting to board a moving train, missed his footing, and fell under the train.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff. The issue of damages was answered in the sum of $2,000.

From judgment on the verdict the defendant appealed.

W. L. Cohoon and Ehringhaus & Hall for plaintiff.
Thompson & Wilson for defendant.

PER CURIAM. There was evidence of negligence and strong evidence of contributory negligence. However, the material conflict in the testi-

mony created issues of fact. It was therefore necessary to submit the case to the jury. The verdict establishes facts imposing liability, and no error of law appears in the record. *Hoggard v. R. R.*, 194 N. C., 256, 139 S. E., 372; *Brown v. R. R.*, 195 N. C., 699, 140 S. E., 622.

Affirmed.

E. C. WEST v. NATHAN JOHNSON AND JOHNSON COTTON COMPANY.

(Filed 25 September, 1929.)

APPEAL by defendants from *Lyon, Emergency Judge,* and a jury, at April Term, 1929, of HARNETT. No error.

Clifford & Williams for plaintiff.
James Best and R. L. Godwin for defendants.

PER CURIAM. Plaintiff brings this action against defendants, alleging a written agreement between them, a performance on his part and a breach on the part of defendants. Defendants were to furnish plaintiff notes, judgments, accounts, etc., for plaintiff to collect on a basis of 25%. The plaintiff demanded judgment against defendants for $969.25, and interest.

The issues submitted to the jury and their answer thereto was as follows:

"Is the defendant due the plaintiff anything; if so, in what amount? Answer: $450 with interest."

From a careful inspection of the record, we do not think there is sufficient cause shown to disturb the verdict and judgment.

No error.

IN THE MATTER OF THE WILL OF M. IDA GULLEY.

(Filed 25 September, 1929.)

APPEAL by propounders from *Grady, J.,* at April Term, 1929, of WAYNE. No error.

Proceedings upon a caveat to the probate in common form of a paper-writing as the last will and testament of Mrs. M. Ida Gulley.

The caveator alleged that the paper-writing propounded as the last will and testament of Mrs. M. Ida Gulley is not her will for that (1) the execution thereof was procured by the undue influence of the bene-

ficiaries named therein, and (2) for that at the date of the execution of said paper-writing, Mrs. M. Ida Gulley did not have sufficient mental capacity to make and execute a will.

The issues submitted to the jury were answered in accordance with the contentions of the caveator.

From judgment in accordance with the verdict, the propounders appealed to the Supreme Court.

Dickinson & Freeman for propounders.
Kenneth C. Royall and J. Faison Thomson for caveators.

PER CURIAM. An examination of the record in this appeal does not disclose prejudicial error in any decision by the court below in a matter of law or legal inference for which a new trial should be ordered by this Court.

The evidence pertinent to the questions involved in the determinative issues was submitted to the jury under instructions which are in accord with authoritative decisions of this Court. This evidence, consisting largely of the diverse opinions of witnesses, as is usual in proceedings of this nature, was conflicting. The jury having answered the issues contrary to the contentions of the propounders, the judgment in accordance with the verdict must be affirmed. We find

No error.

H. P. WHITEHURST, RECEIVER OF THE BANK OF VANCEBORO, v. JEFFERSON STANDARD LIFE INSURANCE COMPANY, G. A. GRIMSLEY, TRUSTEE, L. E. SMITH AND WIFE, LYDIA C. SMITH, AND T. J. MARRINER, TRUSTEE IN BANKRUPTCY OF L. E. SMITH.

(Filed 2 October, 1929.)

APPEAL by plaintiff from *Daniels, J.*, at May Term, 1929, of CRAVEN. Affirmed.

Henry P. Whitehurst and Ward & Ward for plaintiff.
Brooks, Parker, Smith & Wharton and Warren & Warren for Jefferson Standard Life Insurance Company and G. A. Grimsley, trustee.
Guion & Guion for L. E. and Lydia C. Smith.

PER CURIAM. This is an injunction proceeding to restrain the sale of certain land by George A. Grimsley, trustee. The court below by agreement found the facts. The conclusions of law were as follows:

"1. That Lydia C. Smith was surety only on the note of her husband, L. E. Smith, to the Security Life and Annuity Company.

2. That Lydia C. Smith, wife of L. E. Smith and beneficiary in the life insurance policy, has a vested interest and property therein.

3. That the equitable doctrine invoked by the plaintiff does not apply.

4. That restraining order should be dissolved."

We have read the record and briefs carefully. We are of the opinion that the judgment of the court below was correct.

Affirmed.

GEORGE W. WILSON v. M. W. COOPER ET AL.

(Filed 2 October, 1929.)

APPEAL by plaintiff from *Nunn, J.*, at June Term, 1929, of LENOIR.

Civil action by plaintiff, employee, to recover of M. W. Cooper & Co., road contractors, the sum of $2,431.90 for services rendered and work done in and about the construction of a highway in Lenoir County.

Plaintiff alleges that M. W. Cooper & Co. is a partnership composed of M. W. Cooper and S. Strudwick. This is denied by S. Strudwick. Judgment by default final was rendered against M. W. Cooper for want of an answer. On the controverted issue as to whether S. Strudwick was a member of the alleged partnership, the jury answered in favor of said defendant. Plaintiff appeals, assigning errors.

Shaw & Jones for plaintiff.

P. D. Croom for defendant.

PER CURIAM. The controversy on trial narrowed itself to an issue of fact, determinable alone by a jury. It has answered the issue in favor of the defendant, S. Strudwick, and we have found no error in the trial. The verdict and judgment will be upheld.

No error.

JAMES B. BAREFOOT v. C. E. UNDERWOOD, C. DUDLEY DUGOSE, PARTNERS, TRADING AS UNDERWOOD MOTOR COMPANY, R. P. JACKSON, AND R. E. WEST.

(Filed 9 October, 1929.)

APPEAL by plaintiff from *Daniels, J.*, at August Term, 1929, of SAMPSON. Affirmed.

C. L. Guy and R. L. Godwin for plaintiff.

Butler & Butler, Faircloth & Fisher and E. C. Robinson for defendants.

PER CURIAM. The following judgment was rendered by the court below:

"This cause coming on to be heard, . . . and after reading the pleadings the defendants move the court for an order dismissing plaintiff's action on the ground set out in the second defense in the answer; that there has been a former trial, and judgment between the parties adjudicating the matter disclosed by the pleadings and set up a formal plea of *res adjudicata,* and the court from an inspection of the pleadings in this case and an inspection of the pleadings in a former case between James B. Barefoot and The Underwood Motor Company, and the issues and judgment and entries in said former suit and the order of Judge Harris in said former suit, and being admitted that there is no other concern by the name of the Underwood Motor Company, except the Underwood Motor Company referred to in these actions, and the partners composing the Underwood Motor Company appeared in court, employed counsel and defended said action, and the court further finding that the defendants in this action, to wit, R. P. Jackson and R. E. West, were only the agents and employees of the Underwood Motor Company. It is thereupon, on motion of the defendants, considered, ordered and adjudged that the plaintiff is estopped by the former judgment roll in the case of James B. Barefoot *v.* Underwood Motor Company, and that the plaintiff's action is dismissed."

We think there was evidence sufficient for the court below to find the facts as set forth in the judgment. The judgment below is

Affirmed.

O. E. GOODWIN v. DURHAM & SOUTHERN RAILWAY COMPANY.

(Filed 23 October, 1929.)

APPEAL by plaintiff from *Sink, Special Judge,* at April Term, 1929, of DURHAM. Affirmed.

Action to recover damages for the negligent killing of plaintiff's horses.

At the close of the evidence for the plaintiff, there was a judgment dismissing the action as upon nonsuit. From this judgment plaintiff appealed to the Supreme Court.

J. Grover Lee and L. P. McLendon for plaintiff.
Fuller, Reade & Fuller for defendant.

PER CURIAM. The evidence offered by plaintiff upon the trial of this action, viewed in the light most favorable to him, in accordance with the well established rule in this jurisdiction, fails to sustain the allegations of plaintiffs that his horses were killed by the negligence of defendant. There was no error in the judgment dismissing the action as upon nonsuit. The judgment is

Affirmed.

T. R. THOMPSON ET UX. V. N. A. CURRIE & COMPANY, INC.

(Filed 23 October, 1929.)

APPEAL by plaintiffs from *Cranmer, J.*, at April Term, 1929, of BLADEN. No error.

Action to enjoin foreclosure of mortgage on land, upon allegation that the debt secured thereby had been paid. Defendant denied the allegation, and prayed for judgment on the debt, and for decree of foreclosure.

The issue submitted to the jury was answered as follows: "In what sum, if any, are plaintiffs indebted to the defendant on note and mortgage described in the pleadings? Answer: $753.06, and interest to date."

From judgment on the verdict, and decree of foreclosure of the mortgage, plaintiffs appealed to the Supreme Court.

F. D. Hackett, Jr., for plaintiffs.
H. H. Clark for defendant.

PER CURIAM. Plaintiffs' assignments of error on their appeal to this Court cannot be sustained.

The receipt offered in evidence by the plaintiffs shows on its face that the money, to wit, the sum of $1,162.62, for which it was issued was paid by plaintiffs to defendant in settlement of plaintiffs' account with defendant. There was no contention that plaintiffs have paid to defendant any other money than that shown by the receipt. Plaintiffs kept the receipt as written for nearly nine years, before contending that they had paid the note secured by the mortgage and that the receipt was

evidence of such payment. They do not now contend that there was any mistake or fraud in the receipt. The instruction of the court with respect to the receipt cannot be held for reversible error.

The issue submitted to the jury involved only a question of fact. This question was submitted to the jury in a charge which we think is not subject to the exception that the court failed to comply with C. S., 564. The judgment is affirmed.

No error.

O. O. SNOW ET UX. v. W. C. LOMAN.

(Filed 6 November, 1929.)

APPEAL by defendant from *Finley, J.*, at June Term, 1929, of FORSYTH.

Civil action tried upon the following determinative issues:

"Were the plaintiffs induced by the fraud of the defendant to sell and convey their property and to accept as part payment therefor the $5,500 note, as alleged in the complaint? Answer: Yes.

What amount, if any, are the plaintiffs entitled to recover of the defendant? Answer: $5,397, with interest from 10 February, 1928."

From a judgment on the verdict the defendant appeals, assigning errors.

Ratcliff, Hudson & Ferrell for plaintiffs.

Parrish & Deal for defendant.

PER CURIAM. The principal question presented by the appeal is the sufficiency of the evidence to support the issue of fraud. A careful perusal of the record leaves us with the impression that the evidence in this regard, while slight, was such as to require its submission to the jury. It would serve no useful purpose to set out the testimony of the witnesses in detail, as the chief question presented is whether it is sufficient to carry the case to the jury, and we think it is.

The verdict and judgment will be upheld.

No error.

RUFUS ISENHOUR AND G. M. ISENHOUR, TRADING AND DOING BUSINESS AS YADKIN BRICK YARDS, v. J. W. KIMBALL AND WIFE, CORDIE E. KIMBALL.

(Filed 20 November, 1929.)

APPEAL by defendant, Mrs. Cordie E. Kimball, from *Shaw, J.*, at May Term, 1929, of STANLY.

Civil action to recover for materials purchased from plaintiffs and used by J. W. Kimball in his contracting business, and to hold Mrs. Cordie E. Kimball liable therefor as partner with her husband in said business.

From a verdict and judgment in favor of plaintiffs, the *feme* defendant appeals, assigning errors.

R. L. Smith & Sons for plaintiffs.
Brown & Sikes and Armfield, Sherrin & Barnhardt for defendants.

PER CURIAM. A careful perusal of the record leaves us with the impression that the evidence is not sufficient to hold the *feme* defendant liable, as a partner with her husband, for the plaintiffs' claim. It follows, therefore, that the appellant's motion for judgment of nonsuit should have been allowed.

It would serve no useful purpose to set out the evidence in detail, as we deem it insufficient to support a finding of partnership, and this renders the other questions academic.

Reversed.

DISPOSITION OF APPEALS FROM THE SUPREME COURT OF NORTH CAROLINA TO THE SUPREME COURT OF THE UNITED STATES

Garysburg Manufacturing Company v. Board of Commissioners of Pender County. Dismissed for reason that judgment of State Court sought to be reviewed was based on non-Federal ground.

PRESENTATION OF THE PORTRAIT

OF THE CLERK OF THE SUPREME COURT
OF NORTH CAROLINA, 1868-1886

MAJOR WILLIAM HENRY BAGLEY

ADDRESS BY

CHARLES WHEDBEE
OF PERQUIMANS COUNTY

MAY 14TH, 1929

May it please the Court:

As a representative of Perquimans County, and as a friend of the family, it is my privilege to present to you today a portrait of Major William Henry Bagley, a son of Perquimans and one of her contributions to the State's history.

As a representative of Perquimans County, may I indulge for a few moments in recalling briefly the historic and characteristic background of the people and the county from which the subject of my sketch came?

With its fertile acres stretching back on each side of the beautiful stream which bears its name, the county of Perquimans is nestled near the center of that tier of counties in northeastern North Carolina, lying north of the Chowan River and Albemarle Sound, and adjoining the State of Virginia and the Atlantic Ocean, sometimes referred to in modern times as the lost provinces of the east. Each of these counties has its facts of historic interest of which it is justly proud, and not unlike her sisters, Perquimans has her facts of history to which she points with pride, but not with boastfulness. The records of her sons, the Harveys, the Durants, the Skinners, the Bagleys, the Blounts and others, are blazoned in the annals of the early history of the State. The first religious service held in North Carolina was held at Phelps Point, now Hertford, by Hugh Edmonson, and a tablet marking the spot and giving the data will be dedicated with appropriate ceremonies by the Friends on 11 June next. There are many other matters of historic interest that cluster about this good county. But while we are justly proud of the facts of historic interest, we are more proud of the characteristics of her people. Her people are kindly and retiring; they believe to every one should be accorded his just due; they are long suffering and patient, but when once aroused and feel that their rights have been improperly taken from or denied them, they will fight a rattle-snake and give him the first strike. These characteristics are quite aptly illustrated by two incidents in the life of George Durant, one of the early settlers and one of the leaders of that section; one is when Durant came to settle in Perquimans County, instead of taking the land, as was the usual wont

in that day, he bargained with and bought the land from the Indians, and the deed of the King of the Yeopims, on record in Perquimans County, recites that the King conveyed the land with the consent of his people. So well and faithfully did George Durant deal with the Indian that John Durant, son of George, was elected honorary King of the Yeopims. This incident, I think, aptly illustrates the kindly and just attributes of her people. The other incident relates to the time when Miller, a representative of the King of England, came to Perquimans County and denied to her citizens certain rights that they had rightfully been enjoying. George Durant pleaded with Miller to allow the people to exercise these rights and privileges, and so insistent did he become that Miller ordered Durant's arrest; but outwitting Miller, Durant called a meeting of the leading men of the realm and had himself appointed Attorney-General of North Carolina. Immediately he brought an indictment against Miller, with the result that he was banished from the realm under pain of being hung for high crimes and misdemeanors should he return to the community.

Of this community, with this historic and characteristic background, the Bagley family was a part, and with these ideals firmly imbedded in his nature, the subject of my sketch was born on the banks of the beautiful Perquimans River, which he loved so devotedly all his life.

Among the earlier settlers in this county we find the Bagleys, and the records disclose that from a very early period they took an active part in the civic and official life of the county. We find them filling the offices of sheriff, Clerk and Master in Equity, Justice of the County Court and similar positions; later we find them active in the Masonic Order.

The first American paternal ancestor of Major William Henry Bagley, of which we have a record, was Thomas Bagley, who died in July, 1727, and devised to his son Thomas the plantation on which he lived; to his son William the land on Great Branch, and other property to his daughter Hanna, and his wife Susannah; a grandson of this Thomas Bagley, another Thomas, fought in the Revolutionary War; his son William fought in the War of 1812. William Bagley married Dinah Holmes, daughter of William Holmes and Ann Gregory. Their son, Willis Holmes Bagley, was born 15 March, 1808; in 1828 he married Mary Elizabeth Clary, daughter of James Clary and Susannah Scarborough. Twelve children were born to them, of whom five attained mature age, William Henry, subject of this address, the eldest; Stephen D. Bagley, educator, was born in 1840; Willis Bagley, attorney, was born in 1845; Grizelle Clary Bagley was born in 1847, and Leroy G. Bagley, who was born in 1849. Those were the only children who lived to maturity and married.

Stephen was a lieutenant in the Confederate Army, serving through the war with Company A of the Eighth North Carolina Regiment. He

was at one time principal of the Littleton Female College, and was later president of the Louisburg Female College for Women.

Willis Bagley, at the age of 18, was principal of Hertford Academy; at 26 he was appointed Solicitor of the First Judicial District of North Carolina, and later became Assistant United States District Attorney. During the last illness of his brother, Major Bagley, he filled, unofficially, but with credit, the place of Clerk of the Supreme Court.

Grizelle Bagley became the wife of Mr. Benjamin Moffitt, cotton mill president at Franklinville, Randolph County, and died 6 April, 1902.

Leroy G. Bagley, accountant, married Miss Minnie Haywood, of Raleigh. He died in 1888.

On his mother's side Major Bagley was descended from the well known Scarborough family of Virginia and North Carolina. The line goes back to William Scarborough, who married Frances McRora, in Middlesex County, Virginia, in 1691. Their son, McRora Scarborough, was a member of the Colonial Council and a colonel in "His Majesty's" Militia. In 1729 he married Anna Peterson, daughter of Thomas Peterson, who owned the land upon which Edenton is built, and Johannah Taylor. Their son, Benjamin Scarborough, married Sarah Long, daughter of Thomas and Susannah Long. Susannah Scarborough, their daughter, became the wife of James Clary, son of William Clary. Willis Holmes Bagley, father of Major Bagley, married their daughter, Mary Elizabeth Clary.

Major Bagley's mother and father lived only a short time after the Civil War. He was devoted to them both, and his mother particularly made a deep impress on his whole life. She was a woman of decided personality and strength of character. During her last illness she kept in touch with and discussed intelligently current events. Major Bagley, when he was away from home, and after he moved to Raleigh, wrote her constantly, and particularly he never let his own birthday pass without writing her a letter.

It may be of interest to pause just here and note the record of both sides of Major Bagley's family made about 100 years ago: In the will of William Bagley in 1826 he devises, "to my son the land whereon I live and the still erected thereon to him and his heirs forever." In the will of John Clary, in 1825, he devises, "to my son all the lots and common grounds and the improvements thereon I own in the town of Hertford. The whiskey apparatus alone excepted." We can judge from the attitude of the two branches of the family that the mother well might be the guiding star in the succeeding generations.

William Henry Bagley was born in Perquimans County on 5 July, 1833, at the home of his father, Col. Willis Holmes Bagley, on the banks of Perquimans River. Colonel Bagley was a popular and influential citizen of the county, having been sheriff, and was also Grand Master of

the Masons. His portrait hangs today in the Masonic Hall in the historic courthouse of Perquimans County. William Henry received his early education or instruction from Rev. Benjamin F. Bronson, a scholarly divine of the Episcopal Church, and long a rector at Wilson, North Carolina, and a liberal education at the academy located in Hertford under the able and accomplished instruction of Professor John Kimberley, afterwards a professor at the University of North Carolina. The boy showed remarkable precocity, for at the age of 19 he was register of deeds of Perquimans County. He moved to Elizabeth City in 1855 and became the editor of a paper called *The Sentinel.* In 1859 he was licensed to practice law, but the appeal of journalism was still strong in him, for in 1860, with Colonel James W. Hinton, he became co-editor of *The State.* He was afterwards editor of a paper which supported the American Party, which became strong for a period in northeastern North Carolina, with the passing of the Whig party, of which the Bagleys were members.

Then came the Civil War. He immediately enlisted as a private and was, on 15 May, 1861, commissioned lieutenant of Company A, Eighth Regiment North Carolina Troops. On 8 February, 1862, he fought in the battle which resulted in the capture of Roanoke Island, and was captured by the Federals. After exchange of prisoners he was, on 25 October, 1862, commissioned Captain of Company A, Eighth Regiment. In April, 1864, he was transferred to the 68th Regiment North Carolina Troops, and was commissioned major on 16 April, 1864. He resigned as major on 11 June, 1864, in order to serve as Senator from Perquimans and Pasquotank counties, to which office he had been elected. This was his second term as State Senator. In July, 1865, President Johnson appointed Major Bagley as superintendent of the United States Mint at Charlotte, but Major Bagley was not able to take the "Ironclad" oath required, and this office passed into other hands. In that year, however, Jonathan Worth, in the first vote of the people after the war, was elected Governor, and he made the young man from Perquimans his private secretary, and on 1 March, 1866, Major Bagley and Adelaide Ann, daughter of Governor Worth, were married.

In January, 1869, after a governor, supported by Federal bayonets, had supplanted the governor elected by native ballots, Governor Worth wrote his brother:

"There is now a strong probability that Major Bagley, who has been on his oars for six months, will be elected Clerk of the Supreme Court. This office is worth at least $3,000 a year. He is admirably fitted to fill it, and would be likely to retain it permanently." Governor Worth, whose influence counted heavily for Major Bagley, was right. Major Bagley was elected, and he loved the office, and held it when Pearson

was Chief Justice, and when Smith presided over the Court, and "permanently" until his death.

In those days the Supreme Court had its court room and its chambers in the State Capitol. Major Bagley's office is now occupied by the Secretary of State. Outside the windows was the Capitol Square, informally lovely behind its old iron fence. He loved it. It became part of him, its huge oaks, the sweet grass which grew about their roots, the birds that sang there every spring and summer. There is a legend that it was he who brought the squirrels, the ancient ancestors of those squirrels there today eating peanuts timidly from the delighted children. In that office in his fine legible hand he kept the clear record of the Court. There were not so many assistants as there are today. A woman stenographer would have been something approaching the scandalous.

But the records were kept neatly, accurately, and filed in high cabinets along the walls. In office Major Bagley was cordial and courteous to attorneys who came from all parts of the State to appear before the Court. He held the respect and regard of the Justices of the Court. Particularly he loved to hand the parchment licenses to newly fledged young lawyers, and if these young fellows in post-war poverty lacked the clerk's fee, Major Bagley was glad to wait. One successful New York attorney sent to Major Bagley's widow, after his death, the fee which the Major had waived when the young man, then poor, received his license. Major Bagley was happy in the place where life had put him.

There have been many changes in the personnel of the Court since its organization in 1819, but there have been only seven clerks during that time. The first Clerk was William Robards, who served from 1819 to 1828. He was succeeded by John Lawson Henderson, who served from 1828 to 1843. He in turn was succeeded by Edmund B. Freeman, who held office from 1843 to 1868. He was succeeded by Major William Henry Bagley, who held office from 1868 to 1886. He was succeeded by Colonel Thomas S. Kenan, who held office from 1886 to 1911. He was succeeded by Joseph Seawell, from 1911 to 1923, and he was succeeded by Edward C. Seawell, who now holds the position of Clerk.

At the time of the appointment of Major Bagley the Court consisted of Richmond M. Pearson, Chief Justice, and Associate Justices Edwin G. Reade, William B. Rodman, Robert P. Dick, and Thomas Settle.

Settle resigned in 1871, and Governor Caldwell appointed Nathaniel Boyden to succeed him.

Dick resigned in 1872 to become United States District Judge of the Western North Carolina District. Thomas Settle came back on the Court as his successor.

Boyden died in November, 1873, and William P. Bynum was appointed to succeed him.

Thomas Settle resigned again in 1876, and William T. Faircloth was appointed to succeed him.

Chief Justice Pearson died in 1877, and on 14 January, 1878, Governor Vance appointed W. N. H. Smith to succeed him.

In August, 1878, a Court of three (the size being reduced from five to three) was composed as follows: W. N. H. Smith, Chief Justice, and Thomas S. Ashe and John H. Dillard Associates.

Dillard resigned in 1881, and Governor Jarvis appointed Thomas Ruffin to succeed him.

Ruffin resigned on 29 September, 1883, and Augustus S. Merrimon was appointed to succeed him.

At the time of Major Bagley's death, 21 February, 1886, the Court was composed as follows: W. N. H. Smith, Chief Justice, and Thomas S. Ashe and Augustus S. Merrimon, Associates.

We may be pardoned for paraphrasing a well known poem and say: Courts may come and courts may go, but a clerk, if faithful, as was Major Bagley, holds on "forever."

During Major Bagley's last illness the duties of Clerk were carried on by his brother, Willis Bagley, of Jackson, N. C.

After Major Bagley's death Chief Justice Smith wrote Willis Bagley:

"Your brief note has been received this morning, and we are glad to give you our appreciation and approval of the manner in which during the illness of your brother, our late Clerk, you have discharged the onerous and responsible duties of the office. The Court desires me in giving this assurance to request that you will continue to perform these duties until a successor has been appointed and conducted into office."

A short time later Colonel Thomas S. Kenan, former Attorney-General, was elected Clerk and served for many years.

Shortly after Major Bagley became Clerk of the Supreme Court that Court faced the situation created by the activities of Governor Holden and his armed emissaries under the infamous Kirk.

Major Bagley, as Clerk, had no discretionary part in that thrilling episode, but he must have been stirred, as were other North Carolinians in that crisis, although his place as Clerk made him refrain from expressing his feelings. The action of Chief Justice Pearson and the action of Judge Brooks, from our own bailiwick, is history with which all of us are familiar, and is another example of the characteristics of our people to which we point with pride, but not with boastfulness.

There was a large trekking of North Carolina Quakers and others from Guilford and Randolph counties in the central part of the State, and from Perquimans in the east to Indiana and other Western States in the early fifties and earlier—some following the lure of cheap, rich new lands, some because not believing in slavery they wished to live in a non-slave holding State; some for perhaps both reasons. Among those going

from Guilford and Randolph were the parents of Hon. Joseph G. Cannon, afterwards Speaker of the House. Among others going from Guilford and Randolph were two sisters of Jonathan Worth, father of Major Bagley's wife.

From Perquimans there went to Indiana members of the Nathan Bagley family and settled in same section where the Guilford and Randolph Friends had made their homes. In those days it was a far cry from Perquimans to Randolph, without good highways or railroads or other means of communication, there was more intercourse between Hertford and New York than between Perquimans and Guilford, though there was early exchange of greetings through traveling delegates to the various Friends assemblies in different parts of the State. After visiting eastern North Carolina, following in the footsteps of Hugh Edmonson, who preceded him, John Fox visited the Friends meeting-houses in Guilford and Randolph. But between the people generally of the two sections it was as if a great gulf was fixed.

It is not so remarkable that going to Raleigh as a Senator in the days of the war, that William Henry Bagley, young, unmarried and eligible, should meet the daughters of Governor Worth, nor remarkable or surprising that a union between the Bagleys and Worths should follow by the marriage of Major Bagley and Miss Adelaide Ann Worth. It was but natural that the young Senator in the days after Appomattox should be invited to the social functions of the capital city, making a brave attempt to restore the social life of the older and more prosperous days. Raleigh has always been a center of social activities in North Carolina, though without the settings, surroundings and refreshments that characterized the days of former prosperity, youth could not be denied its pleasures because calico reigned in the place of silk and satin. Raleigh was gay in those days, when Major Bagley and other young men fresh from the war, and Miss Worth and other young women, suffering the privations of war, met in the hospitable homes, no less hospitable because there was enforced absence of luxuries. There was no event celebrated with more eclat than when Governor Worth's daughter and the Senator from Perquimans were married in the First Presbyterian Church. If the trousseau and flowers were simpler than in these days, the bells rang as merrily and marriage then, as later, was "one grand sweet song."

It was, however, a much further cry from Perquimans to the Quaker settlement in Indiana than from Perquimans to Randolph, which witnessed the union of the Worth and Bagley families. But truth is stranger than fiction. The Reuben Bagley family of the succeeding generation from Perquimans in Indiana became the friends of the descendants of the Worths from Randolph. Later the family friendship ripened and the descendants of the Perquimans Bagleys and the Randolph Worths plighted their troth in holy matrimony in far off Indiana as another

Perquimans Bagley and Randolph Worth had done in Raleigh in 1866. This seemed to evidence some sort of magnetic attraction by which love leaped barriers of space and territory and time, as it has a way of doing.

Called to Indiana to deliver the address at Earlham College, an institution founded by the Friends and at one time presided over by David Worth Dennis, kinsman of Jonathan Worth of Randolph, Josephus Daniels, who had married Addie Worth Bagley, daughter of Major Bagley, and granddaughter of Governor Jonathan Worth, visited relatives of his wife—Worth descendants. At one home near Richmond, Indiana, he met a lady who had married a cousin of his wife. "My family also came from North Carolina," she said to Mr. Daniels. "They were of the Nathan Bagley stock of Perquimans County." She had not known of the intermarriage of the Bagleys and Worths in North Carolina. Mr. Daniels did not then know of the Nathan Bagleys of Perquimans County. It was rather a strange coincidence that these two families, who had not either known or known of each other in North Carolina, should constitute another chain in the marriage relations of the Bagleys and Worths.

This incident shows how little one generation can look into the future, and recalls an incident related by Dr. C. Alphonso Smith in presenting the tablet of O. Henry, which was unveiled in this building, appropriate here because it concerned the Worth family: "Dr. David Worth, father of Ruth, made minute inquiries into the past of his would-be son-in-law (Sidney Porter), and became convinced, writes a descendant, that 'Mr. Porter was a man of strictly upright character and worthy of his daughter's hand.' The marriage took place at Center, the ancestral home of the Worths, on 22 April, 1824, and was really a double celebration. Ruth Worth's brother, Jonathan, who was later to become Governor of North Carolina, had married Martitia Daniel, of Virginia, two days before, and the brother's infare served as a wedding reception for the sister. It was a notable occasion for the little Quaker village in more ways than mere festivity. Could I have been present when the infare was at its height, when congratulations and prophecy were bringing their blended tributes to father and mother, and to son and daughter, I should not have been an unwelcome visitor, I think, could I have lifted the veil of the future for the moment and said to Dr. Worth and his wife: 'Eighty years from now a statue will be dedicated in the capital of North Carolina to one of Jonathan Worth's grandsons, the first statue to be erected by popular subscription to a North Carolina soldier, and the name engraved on it will be that of Worth Bagley, and ninety years from today a memorial tablet will be dedicated in the same city to one of Ruth's grandsons, the only monument ever erected in the State to a literary genius, and the name engraved upon it will be that of William

Sidney Porter.' But the roads of destiny along which the two cousins were to travel to their memorial meeting place were to be strangely diverse."

I might go on and recount a great many incidents in the lives of these two families from their earliest settings in Perquimans and in Randolph and many of them would prove interesting and instructive reading, but I desire now to speak more particularly of Major Bagley himself and his life in Raleigh. It was here that his last days were spent, and here it was that he served as Clerk to this Court.

Life to Major Bagley was a gracious and beautiful thing. And in that life he was such a one as we now too seldom see—a man content with his world, bent on blessing his own sphere and making it beautiful, undisturbed by the driving madness that has come in these later years tending to rob leisure of its grace and living of its dignity. He was a man content, but content only because he had found beauty and happiness at the center of the circle of his personal and official life, making it only folly to go seeking upon tangents more flamboyant, or satisfactions more startling.

Raleigh people thought it strange that he was not born in Raleigh—he became so definitely a part of it. Every man, woman and child in the city, which was then an oak-shaded town of six thousand persons, knew him and loved him. To every one he was the "Major." Picture him now moving along the streets of that pretentious town which insisted it was a city. Erect, with his immaculate beard trimmed in smart precision, he walked like a soldier along those sidewalks of foot-packed earth between the encroaching grass. People saw him coming, and accepted his joyous greeting with a rising sense of friendliness in their own hearts. Each day he walked from his office in the capitol down the wide, shaded Fayetteville street, to its foot and the old Governor's palace, now turned into a school, and east two blocks to his own house on South street. He loved that house with the two great oaks that shaded it and the magnolia trees at its door.

Inside the house would be his wife, the lovely Adelaide Ann, his three daughters, Adelaide, now Mrs. Josephus Daniels, Belle and Ethel, and his three sons Worth, later to be known as Ensign Worth Bagley, the first fallen of Naval officers in the Spanish War, and whose monument now stands on the capitol square, William Henry, now a journalist of Fort Worth, Texas, and David, now Captain David Worth Bagley, U. S. Navy. There would be a satisfying fragrance in the house part of the roses from the garden under his bedroom, and part from the aroma of supper coming from the detached kitchen behind the rambling house. There would be something for supper that a friend had sent or that he had bought that morning in the big cool market on Fayetteville street. There might be partridges, wild turkey or best of all, shad or oysters

from the eastern country where he was born and which he loved. After supper perhaps Ethel played on her violin, or Belle would be at the piano, and they would all sing together contemporaneous songs, one of the dearer hymns, and finally always the rollicking political battle song which the Major himself had written when the presidential campaign of Greely stirred his heart. I am giving you herewith two of the verses of the battle song:

CINCINNATI.

They went from the EAST and they went from the WEST,
Sent there by the people who love the land best;
The NORTH and the SOUTH had gathered there, too,
United once more "'neath the red, white and blue."

They are crossing "the chasm"—"the BLUE and the GRAY,"
And soon the two colors will mingle away;
God bless the "OLD FARMER," and long may he live,
To teach a brave people, "FORGET AND FORGIVE!"

CHORUS.

Then, Hip! hip!! hurrah!!!
For the HERO so true,
Who clasps the GRAY hand
In that of the BLUE!

And afterwards, when the children were in bed, there would be the *New York Herald.* But there would be other nights—cold nights, when the mud would be jagged steel—when he would go out with basket or with buggy piled with provisions or firewood on errands that satisfied his heart. Once he broke his leg in the sleet when he was carrying a load of wood to an old negro servant. But usually he came back whistling a little, to read his *New York Herald,* or to talk to his wife of things that happened at the capitol that day. He came to love Raleigh as he ever loved the sweep of the broad and beautiful Perquimans River, on which his infant eyes opened, and where in boyhood he swam and fished and boated. Up to his last days he often spoke with the sincerest affection of his happy boyhood days on the banks or the bosom of the Perquimans and of his early manhood on the banks of the Pasquotank. The love of the waters of the section where he was born, the spirit of its people, its history and tradition, were part of his very being. In his latter days in the bed of sorrow he often sighed for a sight of the rivers "his ain country," and delighted in living over again the incidents that made his early home and companions dear to him. He became so much a part of Raleigh, he came to love it for his own, and it loved him. Life was so beautiful. He tasted it so gracefully, so thankfully. It seemed to be no part of the story begun, that his life had to be cut off in agony and tragedy. And yet there was a time when Raleigh hardly

knew him. That was the time when sturdy, sober old Jonathan Worth sat down at his desk and wrote a letter to his friend, John Pool, prominent then in the eastern part of the State:

"I desire, in strictest confidence, to make an inquiry of you, which it may be unpleasant to you to answer. If so, I will not complain of your silence.

"I learn from one of my daughters that Major Bagley, Senator from Pasquotank and Perquimans, has asked leave to address her. I do not know enough of him to approve his suit till I know more about him. My daughter is young, intelligent, well educated and in every way fitted to be the wife of an intelligent, energetic and virtuous husband. You will treat this as a just description, not springing from excess of parental affections. My fortune is not large and I have many children, and consequently she can receive but a moderate outfit from me. Will you favor me in perfect candor, and in strictest confidence, the information I ought to have. Sober and virtuous habits, intelligence and capacity to make a living are qualities without which no one is deserving of my approval." We have no way of knowing what John Pool answered; his letter has been lost, but we do know the facts which would have built his answer.

As he loved life, so he loved men and cherished the fraternity of men, one of the great interests of his life was his devotion to Odd Fellowship. As a young man be became a member of Anchorre Lodge, No. 14, at Elizabeth City. In 1865, when he moved to Raleigh, he affiliated with Seaton Gales Lodge, No. 64, and McKee Encampment No. 15. In 1871 he entered the Grand Lodge, and the next year he was chosen grand master. He was elected grand representative to the Grand Lodge of the United States in 1874; he was reëlected in 1875 and again in 1877. During his lifetime he held every office in the gift of the fraternity in the State. He continued to be prominent in the affairs of the order until his death. His attitude toward religion was deep and reverent. The Bagleys were Methodists, but most often Major Bagley went with his wife to the Presbyterian Church, to which the Worths had gone when Jonathan Worth's marriage to a non-Quaker had resulted in his being dropped from the church rolls of the then ultra rigid Friends. Major Bagley was a protestant, but above all he was a Christian. One who loved him remembers his friendship for a young Catholic priest who had come to North Carolina with an empire for a diocese and a scattered few for a flock. No one dreamed in that day the priest would one day wear the red hat of a Cardinal, as Cardinal Gibbons, but Major Bagley knew him and liked him, because he was a sweet-souled man following an ideal in a country where his ideal had but few followers.

While the office of Clerk provided a competence for Major Bagley and his family, he had good business foresight and made wise investments,

but like many of his time he, too, signed with a friend and paid to the last penny, leaving him only his office and his insurance. He paid without ever a word of reproach. He was the mould of man Stevenson had in mind when he said they could "renounce when that shall be necessary and not be embittered." He went smiling down the street, and few knew of the privations he bore in order to meet the obligations assumed for a friend. All the time he was smiling and cordial, friendly and helpful. People loved to see him coming down the street with smiling eyes.

And then one day the life he had loved added savagery to the troubles he had borne, added to it in the most casual way. The negro barber who had served him for years was trimming his beard and remarked, "Major Bagley, there's a little lump on your throat here right under the chin."

And that was all. But two months later Dr. E. Burke Haywood, perfect friend and perfect physician, went with him and his wife to Baltimore. Major Bagley wore a handkerchief around his throat where his collar had been, but he held his head like a soldier, and the same smile lived in his eyes. But there had come a sudden gray in the gold hair of Adelaide Worth. She loved him and she lacked the spirit he had for smiling.

The great doctors at Baltimore were kind, so kind and so helpless and so sorry to have to be frank. There had been examinations and consultations. The Bagleys, man and wife, waited bravely in a boarding-house desperately afraid of each other's unhappiness. They made a gallant show to shield each other. Then the great doctor told her:

"You must go home. There is nothing we can do. Nothing anybody can do. I am so sorry. You will just have to wait. There isn't any hope."

She could not help but hope. She did not tell the Major, but he knew, and a thousand times worse—she knew that he knew. So they came home. Life was done with its kindness to him. It held him savagely, cruelly, unwilling to let him go to the kinder death. Delirium drove the smile from his kindly eyes. Death came slowly like a torturer, but it came at last on 21 February, 1886. He loved life, but it was death in the end that set him free.

After so much suffering, you might well realize how he could appreciate Swinborne's thought thus expressed:

> "I have lived long enough, having learned one thing—
> That life hath an end.
> Goddess and maiden and queen be near me now and befriend;
> Thou art more than the day or the morrow—
> The seasons that laugh or that weep—
> For they give joy and sorrow,
> But thou, Presephane, sleep."

And now we come to remember him. He would want us to speak frankly of him, and so we would. We say it truly: In the office in this Court he was no great man; he was faithful; he was competent; he was honest. And yet somehow his service here, efficient and valuable as it was, was not the great thing in his life. His genius was in living. His genius lay in his love of life, in his love of its fine things, its good things, its lovely things. He had a genius for joyous living, but there was something greater than that: It was that he could sacrifice and remain wholesome in spirit.

Write him down then, not primarily as a public officer with whom public office was a sacred trust, but as a man who could go smiling after sacrifice for an ideal.

On behalf of his loved ones, I now have the honor of presenting to the Court the portrait of him who for many years served this Court, that it may take its place among the silent images of his predecessors, who have gone the way of all flesh.

REMARKS OF CHIEF JUSTICE STACY, UPON ACCEPTING PORTRAIT OF FORMER CLERK WILLIAM H. BAGLEY, IN THE SUPREME COURT ROOM, 14 MAY, 1929

For seventeen years, beginning in 1869, and ending with his death in 1886, Major William H. Bagley served as Clerk of this Court. It is fitting that his portrait should adorn the walls of the office which he filled so long; and we welcome the opportunity of thus honoring his memory.

His achievements—military, public and private—have been faithfully chronicled by his friend and ours, and to this admirable and sympathetic sketch nothing can be added by way of improvement. That he was "an upright, capable and efficient officer, loyal friend and excellent citizen," was the judgment of his contemporaries and this has been handed down to us as a correct estimate of his worth.

> He who serves well his day and generation,
> Foreshadows a life of effort beyond his own.

The Marshal will hang the portrait in the hall of our records, where it will remain as a testimonial of the lasting impression which Major Bagley made upon the State and its people; and these proceedings will be published in the forthcoming volume of our Reports.

INDEX.

ABANDONMENT see Husband and Wife A.

ABATEMENT AND REVIVAL (Pleading of matters in abatement see Pleadings B f).

B Pending Actions.

a Time from which Action is Pending

1. An action is pending in the Superior Court from the time the clerk issues the summons for service by the proper process officer, and where the action has not abated by failure to complete service as the law requires, another action later begun, involving the same subject-matter between the same parties, will be dismissed when this is properly made to appear. C. S., 475. *Morrison v. Lewis*, 79.

b Same Subject of Action and Abatement of Subsequent Actions

1. The pendency of a suit involving substantially the same cause of action will prevent the plaintiff from maintaining a subsequent action upon any matters which were, or should have been, properly included within the scope of the former one, and the plaintiff may not maintain two separate actions for different damages resulting from the same negligent act, and a later action will be dismissed when this is properly made to appear. *Underwood v. Dooley*, 100.

2. Where an insurance company, under a policy covering damage to an automobile alone, has paid the insured for damages to it caused by the negligence of a third person, and has recovered judgment in its action against the *tort-feasor*, the owner may maintain a subsequent action against the *tort-feasor* to recover damages for personal injury arising from the same tort, as such action is not substantially the same as the pending action nor between the same parties. *Ibid.*

3. It is the policy of our courts and system of pleading to avoid multiplicity of suits, and where full and adequate relief may be had in a pending prior action a subsequent action on the same cause of action by the same party will be abated. *Bank v. Broadhurst*, 365.

4. Where in a creditor's bill the plaintiffs seek to set aside certain of the debtor's conveyances on the ground of fraud, and the owner of a note executed by the debtor, and secured by hypothecated bonds, joins in the creditor's bill and seeks to recover on the note and to sell the collateral, and in defense to the action on the note the debtor alleges that he was only an accommodation endorser and that usurious interest thereon was paid which he seeks to recover under the statute, and a motion is made and granted that the other makers and endorsers on the note be made parties and their respective liabilities determined: *Held*, a second action on the same note by the owner thereof, seeking the same relief, brought in a different county against all the makers and endorsers will be abated, since all the issues can be determined in the pending prior action and full and adequate relief granted therein. *Ibid.*

ACCORD AND SATISFACTION.

A Transactions Operating as Accord and Satisfaction.

a Acceptance of Check for Account in Full

1. The acceptance by a creditor of a check stating thereon to be in full for a disputed account is a satisfaction thereof when there is no ambiguity in the transaction and nothing to show that its acceptance was upon a different understanding or agreement. *Walston v. Coppersmith*, 407.

ACTIONS (Right of aliens to sue in courts of this State see Aliens A a—Time from which action is pending see Abatement and Revival B a—Actions against municipal corporations see Municipal Corporations J—Misjoinder of parties and causes see Pleadings D b—Separate actions lie on sheriff's bonds see Principal and Surety B c 3, 4, 5—Separate actions for injury to person and property see Abatement and Revival B b 2—Independent action must be brought to subject surplus after foreclosure to payment of subsequent judgment see Mortgages H l 1).

D Commencement of Actions.

a Manner, Form, and Time of Commencement of Actions

1. The commencement of a civil action is at the time of the issuance of the summons, from which time the action is pending. *Atkinson v. Greene*, 118.

ADVANCEMENTS see Descent and Distribution C b.

ADVERSE POSSESSION (Easements by prescription see Easements A a).

A Nature and Requisites.

f Adverse Claim by Tenant or those Claiming under Him

1. Where the relation of landlord and tenant exists, the tenant will not be permitted to dispute the landlord's title, either by setting up an adverse claim to the property or by undertaking to show title in a third person, during the continuance of the tenancy, or without first surrendering the possession to the landlord. *Pitman v. Hunt*, 574.

2. Where a tenant on land takes possession under the title of the landlord, the possession of the tenant is deemed in law the possession of the landlord, and in order for the tenant to acquire title by adverse possession he must show possession for twenty years after the termination of the tenancy under a written lease, or, where there is no written lease, from the payment of the last rent, and if the title is claimed under color, seven years sufficient possession must be shown. *Ibid.*

AGENT see Principal and Agent.

AIDERS AND ABETTORS see Criminal Law C a.

ALIENS.

A Rights and Disabilities.

a Right to Sue in Courts of this State

1. A nonresident alien of a friendly nation may invoke the jurisdiction of the courts of this State to maintain his rights of property in the absence of statutory restrictions. *Berger v. Stevens*, 234.

ALIMONY see Divorce E.

ANSWER see Pleadings B.

APPEAL AND ERROR (In criminal cases see Criminal Law L).

A Nature and Ground of Appellate Jurisdiction of Supreme Court and Judgments and Decisions Reviewable.

c Right to Appeal upon Overruling Demurrer

1. Where a demurrer to a complaint in a civil suit on the ground of its insufficiency to state a cause of action, has been overruled, the procedure for the defendant is to except and duly appeal to the Supreme Court, and where he has appealed, but has failed to prosecute it, he may not plead and again demur before another judge of the Superior Court at a subsequent term of court, the action of the former judge in refusing the motion being conclusive. C. S., 601. *Power Co. v. Peacock*, 735.

d Finality of Judgment; Premature Appeals

1. An appeal to the Supreme Court will lie only from final judgment, and an appeal from the denial of a motion for judgment on the pleadings will be dismissed. *Shelton v. Hodges*, 221.

E Record.

a Matters which Record Should Contain and Sufficiency of Record

1. Under Rule 19, section 1, the complaint is a necessary part of the record proper, and when it is not contained therein, the case on appeal will be dismissed. *Schwarberg v. Howard*, 126.

b Matters not set out in Record Deemed without Error

1. Where there is exception on appeal to the charge of the court, the charge will be presumed to be correct where it is not set out in case on appeal. *S. v. Weston*, 25.

g Conclusiveness of Record

1. On appeal the Supreme Court is bound by the record as it is sent up. *S. v. Stansberry*, 350; *S. v. Griggs*, 352.

h Questions Presented for Review

1. Where a running train of defendant railroad company has injured the plaintiff's automobile by a collision with it at a grade crossing, and the sole controverted matter on the trial in the Superior Court related to the question of defendant's negligence in failing to stop its train in time to have avoided the injury, the railroad company may not on appeal assume the position that it is not liable upon a different theory not controverted on the trial in the lower court. *Stone v. R. R.*, 429.

F Assignment of Error (Discussion of in Briefs see Appeal and Error G b).

b Form and Requisite; Rules of Court

1. Where exceptions and assignments of error in a special municipal court are overruled upon appeal to the Superior Court, and are again relied on in an appeal to the Supreme Court, they must be sufficiently definite to enable the Supreme Court to understand what questions are sought to be presented without a voyage of

APPEAL AND ERROR F *b—Continued.*

discovery through the record, Rule 19, sec. 3, and otherwise the appeal will be dismissed on the appellee's motion. *Cecil v. Lumber Co.*, 81.

G Briefs.

b Exceptions not Discussed in Briefs Deemed Abandoned

1. Assignments of error based on exceptions to instructions which are not discussed in the brief filed in the Supreme Court are taken to be abandoned on appeal under Rule 28. *Stone v. R. R.*, 429.

2. Exceptions upon the trial and taken in the record on appeal are abandoned when they are not discussed in appellant's brief. Rule 28. *Rhodes v. Tanner*, 458; *Bryant v. Construction Co.*, 639.

J Review (In actions contesting elections see Elections I d—In criminal cases see Criminal Law L e).

a Of Injunctions, Interlocutory Orders and Judgments

1. In injunctive proceedings the Supreme Court has the power to find the facts and to review the findings of fact by the trial court. *Scott v. Gillis*, 223.

2. While the Supreme Court may review the evidence on appeal in injunction proceedings, there remains the presumption that the proceedings and judgment of the lower court are correct with the burden of proof on the appellant to show error. *Land Co. v. Cole*, 452; *Roebuck v. Carson*, 492.

3. An appeal involving the validity of an order dissolving a temporary restraining order made upon a motion to show cause will not be considered on appeal to the Supreme Court when it appears that the act sought to be restrained has already been done. *Boyd v. Brooks*, 644; *Glenn v. Culbreth*, 675.

4. Where a temporary restraining order has been granted against an assessment against property by a town for street improvements upon the grounds of insufficiency of petition, and that the assessments were confiscatory, the plaintiffs being some of those assessed who had not paid: *Held*, the refusal of the trial judge to continue the injunction to the hearing will be sustained on appeal in the absence of satisfactory evidence to support the determinative allegations of the complaint. *Marshall v. Kernersville*, 674.

b Of Discretion of Court

1. A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice is addressed to the sound discretion of the Superior Court judge, and is not subject to review in the Supreme Court except upon abuse of this discretion. C. S., 470. *Grimes v. Fulton*, 84.

c Of Findings of Fact (See, also, Appeal and Error J a 2).

1. Where a judgment of nonsuit has been granted, and thereafter the trial judge has restored the cause to the docket upon the ground of excusable neglect and a meritorious defense, the appellant must aptly request the trial court to find the facts upon which the judgment is based, and when this has not been done, and they do not

APPEAL AND EROR J *c—Continued.*

appear of record, it will be presumed that they support the judgment rendered and it will be affirmed on appeal. *Rutledge v. Fitzgerald*, 163.

2. Where the record does not show a request by the defendant for a finding of fact by the trial court upon which he continues a temporary injunction to the final hearing, the presumption is that the court found the facts to be as alleged in the complaint, and his order based thereon will be affirmed. *Scott v. Gillis*, 223; *Roebuck v. Carson*, 492.

3. Where the trial court is authorized to find the issuable facts in controversy in lieu of a jury, his findings supported by sufficient legal evidence will be sustained on appeal. *Brown v. Sheets*, 268.

4. Where the statute authorizing the establishment of a county court provides that a party waives his right to a jury trial unless he demands it, the finding of the court that a jury trial had been expressly waived by the parties litigant will be controlling on appeal, the presumption being in favor of the correctness of the proceedings with the burden of showing error on the appellant. *Ibid.*

5. On appeal when there is no finding in the record in regard to facts upon which a writ of assistance is granted, and no exception to the refusal of the court to make such finding, it is presumed that the judgment authorizing the issuance of the writ is correct and that the petitioner acquired only the land described in the deed of trust, in the judgment of the court, and in the commissioner's deed, and the judgment will be upheld. *Warehouse Co. v. Willis*, 476.

6. Where an agreement was signed by one purporting to be an attorney for petitioner in proceedings under the Torrens Act, and the Superior Court has denied the motion of the petitioner to dismiss the action upon the ground of an invalid jurat apparently issued by the clerk, it will be presumed on appeal that the judge below made sufficient findings of fact to sustain his action in denying the petitioner's motion to dismiss the proceedings, and the petitioner may not sustain his averment that the attorney was not authorized by him to so act, there being no finding to support his contention. *Morgan v. R. R.*, 568.

7. Where the finding of fact and conclusions of law of the referee are supported by competent evidence and approved by the trial judge, they are presumed correct on appeal, and upon failure of the appellant to show error the judgment will be affirmed. *Buie v. R. R.*, 655.

d Burden of Showing Error on Appeal

1. While the burden is on the plaintiff in an action seeking injunctive relief to show irreparable injury entitling him to the equitable relief sought, where the equity has been granted in the Superior Court, it is upon the appealing defendant to show error in the Supreme Court. *Realty Co. v. Barnes*, 6.

2. On appeal to the Supreme Court the burden of showing error is on the appellant. *Nance v. Hulin*, 222; *Scott v. Gillis*, 223; *Brown v. Sheets*, 268; *Roebuck v. Carson*, 492; *Buie v. R. R.*, 655.

APPEAL AND ERROR J—*Continued.*

e Harmless Error and Questions Necessary to Determination of Cause

1. The appellant is not entitled to a new trial for error of law relating to an issue answered by the jury in his favor. *Lipscomb v. Cox*, 64.

2. A new trial will not be granted on appeal when the action of the trial judge excepted to can by no possibility injure the appellant. *Steel Co. v. Rose*, 464.

3. Objections to the admission in evidence of the contents of a letter alleged to have been lost upon the ground that a proper search for it had not been made is untenable when the objecting party has testified to the contents thereof on cross-examination. *Nelson v. Nelson*, 465.

4. Testimony of a witness over appellant's exception in explanation of matter elicited from him on cross-examination, with but little, if any, bearing upon the issue submitted, is not held for reversible error under the facts of this case. *In re Will of Brockwell*, 545.

5. Where questions eliciting evidence objected to are covered by admissions of the objecting party, the admission of such evidence, if erroneous, is harmless and not prejudicial. *Bridgeman v. Ins. Co.*, 599.

6. Where the physician of the plaintiff who attended him after a personal injury he had received testifies as to matters the plaintiff had told him after the injury, the admission in evidence of the testimony of the physician will not be taken as error when the matter objected to has been admitted in the pleadings and is cumulative of evidence of other witnesses not objected to. *Bryant v. Construction Co.*, 639.

7. Where the plaintiff cannot recover in his action under any aspect of the evidence, error which may have been committed upon certain phases of the case will not be regarded as reversible, and a new trial will not be granted. *Rhodes v. Upholstery Co.*, 673.

8. The refusal of the trial court to strike out a certain paragraph of the reply contradictory to one in the complaint will not be held for reversible error on appeal when the allegations thereof do not affect the result of the trial in the lower court. *Check v. Gregory*, 761.

f Of Judgments Sustaining or Overruling Demurrer

1. On appeal from the sustaining of a demurrer the only question presented is the sufficiency of the pleading, taking its allegations to be true, and matters outside of pleading will not be considered. *Glass Co. v. Hotel Corporation*, 10.

k Dismissal, Withdrawal or Abandonment

1. Where the plaintiff seeks injunction against the sale of a certain part of the lands under foreclosure of a mortgage, and appeals from the refusal of the court to continue the temporary restraining order to the final hearing, and then agrees that the foreclosure sale should not be restrained as to this part, his agreement is in effect

APPEAL AND ERROR J *k—Continued.*

a withdrawal of his appeal in relation to such lands, and he may not successfully prosecute it further in the Supreme Court. *Boyd v. Brooks*, 644.

APT TIME see Jury C a 2.

ARBITRATION AND AWARD.

E Pleading as Defense.

a Right to Plead Award, Admissibility of Award in Evidence, and Consideration thereof by Jury

1. Where an award is set up in the defendant's answer in an action by the plaintiff to recover for materials furnished the defendant, and the award is attacked for being improperly, unlawfully and unfairly made, and the award was admitted in evidence without objection, a charge of the court to the jury that it could not consider the award is error to the defendant's prejudice, entitling him to a new trial. *Coe v. Loan Co.*, 689.

ARREST.

B On Criminal Charges.

a Amount of Force Officer May Use in Making Arrest (killing officer making arrest as murder see Homicide).

1. An officer of the law in making an arrest is required to execute his warrant by overcoming force with such sufficient force as is apparently necessary under the circumstances to comply with his duty at the time, and in so doing he is regarded in law as rightfully the aggressor. *S. v. Miller*, 445.

ASSAULT UPON A FEMALE.

D Trial.

c Instructions

1. Evidence which tends only to show that a male person over eighteen years of age met the prosecuting witness on her way to a spring near a school she was attending, and that he caught her by the arms for a moment and then released her, using no improper language, and that she was then afraid to continue her way to the spring because she did not know "who all was over there" without testimony that the defendant caused her not to go to the spring is insufficient to support an instruction that if, under the circumstances, the prosecuting witness left the place where she had a right to be, or did not go to the spring by reason of the defendant's putting her in fear, the defendant would be guilty under the provisions of C. S., 4215, is reversible error, and a new trial will be awarded. *S. v. Stansberry*, 350.

ASSISTANCE, WRIT OF.

B Issuance.

a Grounds

1. Where land has been sold by commissioners in foreclosure proceedings under a decree of court, and the sale duly confirmed, upon possession being withheld from the purchaser at the sale it is

ASSISTANCE, WRIT OF, B *a—Continued.*

proper for the court in its equitable jurisdiction to order a writ of assistance to evict the wrongful possessor and to place the purchaser in possession of the lands. *Warehouse Co. v. Willis*, 476.

c Pleadings

1. Where the respondents in their answer to a petition for a writ of assistance allege that the petitioner has caused a subdivision of the property so as to convey land not described in the deed of trust under which the petitioner seeks his relief, and the allegations in respect thereto are not denied by the petitioner: *Held*, the allegations have reference to matters of defense which do not require denial. *Warehouse Co. v. Willis*, 476.

ATTACHMENT.

C Proceedings to Secure.

b Affidavits

1. An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of the court, and where the court has found with plaintiff upon conflicting oral evidence, his findings has the effect of an amendment allowed by him. C. S., 799. *Thornburg v. Burton*, 193.

2. In attachment proceedings it is within the discretionary power of the judge of the Superior Court to allow amendments in regard to minor defects. *Pierce v. Mallard*, 679.

E Levy, Lien, Custody and Disposition of Property.

b Notice, Lien and Priority

1. C. S., 500 and 807 are to be construed *in pari materia*, and where notice of levy of attachment on defendant's land in a county has been given under the provisions of C. S., 807, by certification of the levy to the clerk of the court for that county and his notation thereof on his judgment docket and indexing in the index to judgments the effect is to take the land in *custodia legis*, and is not an action affecting the title to lands within the purview of C. S., 500, but from the day of such notice, unless the land is released, the attachment constitutes a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings relates back to the filing and indexing of the attachment, and where such notice under C. S., 807, has been given, the filing of *lis pendens* in the same county under the provisions of C. S., 500, is unnecessary. *Pierce v. Mallard*, 679.

ATTRACTIVE NUISANCES see Electricity A b.

AUTOMOBILES—Negligent driving of see Highways B; constituting manslaughter see Homicide C; liability of employer for employees see Master and Servant D b 2, 3; Execution against the person for wanton injury from see Execution K a 1, 2; injury from placing planks under wheels in snow see Negligence A d 1; *res ipsa loquitur* does not arise from skidding see Negligence A e 2; liability of manufacturer for warranties made by dealer see Principal and Agent A b 1, 2).

BANKRUPTCY see Building and Loan Associations D a 2.

BANKS AND BANKING (Liability of banks on checks see Bills and Notes I—worthlessness of stock as defense to action on note given therefor see Bills and Notes A a 1).

C Functions and Dealings.

c Deposits

1. The certificate of deposit by a bank in the name of the husband, payable to himself "or" his wife does not fall within the provisions of C. S., 230, the statute applying only where the deposit is made in the names of two persons and payable to either, nor can construing the word "or" as meaning "and" have the effect of creating a tenancy in common. *Jones v. Fullbright*, 274.

H Stockholders, Depositors and Creditors.

a Statutory Liability of Stockholders

1. Section 13, chapter 113, Public Laws 1927, is constitutional and valid, and is not in contravention of the Due Process Clause of the Federal Constitution or the Law of the Land Clause of the State Constitution, since under its provisions the statutory liability of a stockholder of an insolvent bank is not enforceable by execution under the order of the Corporation Commission until after he has been given notice and an opportunity to be heard in the course and practice of our courts, and an appeal has the effect of staying execution until his defense has been determined before a jury. *Corporation Commission v. Murphey*, 42.

2. Where a former owner of shares of stock in a bank has sold, and on the certificate, assigned his shares to a purchaser, and some time thereafter the bank has become insolvent and the liquidating agent of the bank appointed by the Corporation Commission has assessed the shares against the former owner whose name still appears as such owner on the books of the bank owing to the neglect of the transfer agent to reissue the shares to the purchaser: *Held*, the ostensible owner should be relieved of the assessment so made against him. *Darden v. Coward*, 35.

3. Entry on the books of a bank of the issuance of stock to the defendant sought to be held for his statutory liability is only prima facie evidence that the defendant is such owner, which may be rebutted by his evidence, and a verdict directed against him upon conflicting evidence is reversible error. C. S., 219(a). *Corporation Commission v. Harris*, 202.

4. In an action against an alleged stockholder in a bank to recover his statutory liability, C. S., 219(a), evidence tending to show that he had not subscribed for the stock, had received no dividends nor acted as such owner is sufficient to take the case to the jury in rebuttal of the prima facie case raised by his appearing on the books of the bank as a subscriber to its stock, and alone furnishes no evidence of ratification or estoppel. *Ibid.*

5. A subscriber to the shares of stock of a bank is not relieved of his statutory liability thereon by selling the stock unless the transfer is made on the books of the bank in accordance with the statute. 3 C. S., 219(d). *Ibid.*

BANKS AND BANKING H *a—Continued.*

6. Where the name of a person remains on the books of a bank as a stockholder on the date of the bank's insolvency, and so appears when the insolvent bank is in the hands of a liquidating agent appointed by the Corporation Commission, C. S., 219(a), Vol. 3, his statutory liability to the amount of the par value of his shares subscribed is not affected by the fact that he had prior requested the cashier of the bank to sell his shares when the cashier had not been able to do so, and the sale had not been made and the shares had not been transferred on the books of the bank to another. *In re Trust Co.*, 613.

7. The statutory liability of the holder of bank stock for the amount equal to the par value of his shares is contractual and exists from the time of the purchase of the stock, and chapter 113, Public Laws of 1927, does not alter nor enlarge this liability, but has reference only to the procedure to enforce it, and the defense that the stock was bought prior to the enactment of the statute of 1927, and that the statute could have no retroactive effect, is untenable. *Ibid.*

8. Where the holder of stock of an insolvent bank is also a depositor therein, only such dividends as he receives on his deposit may be credited by the liquidating agent of the bank upon his indebtedness to the bank on his statutory liability as a stockholder, and he is not entitled to have the total amount of his deposit applied as a payment on the assessment made against him by reason of his statutory liability. *Ibid.*

BILLS AND NOTES (Agreement in note to waive homestead see Homestead D a 1).

A Requisites and Validity.

a Consideration

1. Where in an action on a note, the evidence tends to show that the consideration for the note was certain shares of bank stock and the promise of the payee to make the payer a director of the bank, and that the payer was made a director and, acting as such director, voted for and received dividends upon his stock, the execution of the note being admitted, upon the later insolvency of the bank the payer may not maintain the position that there was a total failure of consideration, and an instruction that the jury should answer the issue of indebtedness in favor of the defendant if they found the stock to be worthless is reversible error. *Owens v. Carstarphen*, 424.

2. Where a husband and wife execute a promissory note under seal secured by a mortgage on lands, the seal affixed thereto imports that a good and sufficient consideration had been given for it, and in an action against them by the holder of the note in due course the defense of *nudum pactum* is not available to the wife. *Cowen v. Williams*, 432.

B Negotiability and Transfer.

b Transfer by Endorsement

1. Where the plaintiff has agreed to lend money to a borrower upon security of a deed of trust on lands, and has sent its check payable

BILLS AND NOTES B *b—Continued.*

to the borrower and to the attorney in order that the title to the lands be unencumbered before the money should pass to the borrower, an endorsement by the attorney for himself and as agent, for the borrower, is an improper endorsement for the borrower. *Bank v. Bank*, 526.

2. In an action to recover of the drawee bank for the payment of a check when it was not properly endorsed, and the question of whether the endorsement was proper, is the sole matter at issue under the pleadings and admissions upon the trial, the introduction of the check in evidence by the plaintiff showing payment and endorsements, is competent over the objection of the drawee bank. *Ibid.*

C Rights and Liabilities upon Endorsement or Transfer.

a Rights and Liabilities of Endorsers

1. Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of C. S., 446, to determine the liability of the parties. *Morris v. Cleve*, 253.

2. There is no contractual relation between the drawer and endorsers of a check, and each endorser is responsible only to its immediate endorsee upon an invalid endorsement by the payee, and the drawer of the check is not entitled to a judgment against them for the amount of the loss. *Bank v. Bank*, 526.

D Construction and Operation.

a Notes in Series; Acceleration

1. Where there is no provision for acceleration in a series of notes secured by a mortgage on lands, but the mortgage itself provides that a failure to pay any of the notes or interest when due shall mature all the indebtedness thereby secured: *Held*, the provisions for acceleration appearing only in the mortgage affects only the right to foreclose the mortgage and does not affect the notes, and when action is taken before the maturity of some of the notes, as to them no recovery can be had. *Brown v. Osteen*, 305.

b As to whether Signers are Makers or Endorsers, Evidence thereof and Liability

1. An endorser of a note is one who writes his name on the back thereof, C. S., 3044, and one who writes his name, with others, on the face thereof after the written obligation to pay, is prima facie regarded as a maker, and he may not show a different liability as against the holder or payee acquiring without notice, but may show primary and secondary liability as against the other signers of the instrument by sufficient competent evidence. C. S., 2977, 3041. *Howell v. Roberson*, 572.

BILLS AND NOTES—*Continued.*

I Checks (Endorsement see Bills and Notes B, C).

a Acceptance and Liability of Drawee Bank

1. Where the evidence is conflicting as to whether a drawee bank accepted the check of a drawer bank, charged it to the account of the drawer bank, and that the charge remained on the books of the drawee bank until the next day, when the drawee bank marked the charge "error" on account of the insolvency of the drawer bank on that day, and returned the check protested, the question of the liability of the drawee bank thereon is properly submitted to the jury, and judgment upon its verdict in favor of the plaintiff will be affirmed on appeal. *Morris v. Cleve*, 253.

2. While a bank is not ordinarily liable to the payee of a check it may become liable to him upon its acceptance or certification of the check, and where the bank has paid the check otherwise than to the payees or some person authorized by them to receive payment and has charged the amount to the drawer, the bank has accepted the check and the payees may hold it liable thereon. In this case the drawer having authorized payment as if made to bearer is estopped from holding the bank liable, and had agreed to save the bank harmless in the action. *Dawson v. Bank*, 499.

3. The obligation of a bank to pay the check of a depositor from the moneys on deposit rests upon the relationship of debtor and creditor, the bank being required to make payment to the drawer's payee upon proper presentment and endorsement of the check, with the burden of proof on the drawee bank to show a proper payment when this is at issue, and in the absence of evidence thereof its motion for judgment as of nonsuit will be denied. *Ibid; Bank v. Bank*, 526.

4. Where a check is payable to two or more persons as payees, or to their order, the amount of the check must be paid to both payees or upon the order of both, and payment to one of the payees or to the order of one without the authority of the other, does not discharge the bank of its liability unless the payees are partners, and evidence of payment to one of the payees is properly excluded. C. S., 3022. *Dawson v. Bank*, 499.

5. Evidence of a local custom of paying checks of tobacco warehousemen as if made to order, is properly excluded in an action by the payees of a check, after acceptance by the bank, against the bank for paying the check to others without their authority or endorsement, title to a check being transferable only by endorsement and delivery. C. S., 3010. *Ibid.*

6. Where the drawee bank has received through the course of collection from other banks and paid a check with an improper or unauthorized endorsement which has not been subsequently ratified by the payee of the check, the relation of debtor and creditor exists between the drawer of the check and its drawee bank, and the drawee bank is liable to the drawer of the check upon the unauthorized payment. *Bank v. Bank*, 526.

BILLS AND NOTES I—*Continued.*

b Rights and Liabilities of Drawer, Payee, Bank of Deposit and Banks in Course of Collection

1. A collecting bank makes a good presentment of a check for payment by forwarding it to the drawee bank in another city by mail. 3 C. S., 220(n). *Braswell v. Bank*, 229.

2. A bank receiving from the payee a check on a bank in a different town performs its duty by sending it for collection in due course to its reputable correspondent bank at or near the place of payment. *Qualls v. Bank*, 438.

3. One depositing a check for collection in a bank is not ordinarily bound by a custom among banks that a collecting bank accepts the draft of the drawee bank on another bank in payment. *Braswell v. Bank*, 229.

4. Where the payee of a check deposits it in a bank for collection and does not thereon indicate that the collecting bank is to require payment in money, he authorizes the collecting bank to collect in due course of mail and comes within the provisions of 3 C. S., 220(aa), 220(g) as being a check presented by or through a "postoffice," and the collecting bank is not liable for accepting the check of the drawee bank on another bank, resulting ultimately in nonpayment, and the payee must suffer the loss thereon. *Ibid.*

5. The payee of a check has the right to demand payment by the drawee bank in cash if the drawer has therein a deposit sufficient for payment; and where a bank receives a check in payment of a note and elects to put it in the hands of a Federal reserve bank for collection, which bank accepts the check of the drawee bank on another bank in payment, when the check would have been paid in course of collection had cash been demanded, the drawer and endorsers on the original check are relieved of liability thereon, and may not be held if the check of the drawee bank was not paid because of its later insolvency, C. S., 3108, 3167, 3042; and this result is not affected by 3 C. S., 220(aa), providing that a drawee bank may pay a check drawn on it by its check on another bank, unless the face of the check demands payment in cash, when the check is presented for payment by any Federal reserve bank, since the payee bank has the option of presenting the check for payment through the Federal reserve bank or not. *Morris v. Cleve*, 253.

6. Where the payee of a check drawn on a bank in a different town deposits it for collection in a bank without requesting that payment by the drawee bank be demanded in cash, and in due course of collection the check is sent by the bank of deposit to its reputable correspondent bank, which in turn sends it to an intermediate bank for collection: *Held*, the check, being sent through the postoffice, is payable by the drawee bank by its draft on its reserve funds in another bank, and the bank of deposit is not liable to the payee upon the ultimate nonpayment of the check because of the insolvency and nonpayment of the draft of the drawee bank. Public Laws of 1921, ch. 4, sec. 39. *Qualls v. Bank*, 438.

7. Where a bank receives from the payee a check drawn on a bank in a different town, and sends it in due course to its reputable corres-

BILLS AND NOTES I *b—Continued.*

pondent bank, which sends it to an intermediate bank for collection: *Held*, the bank in course of collection is the agent of the payee and not the bank of deposit, and the bank of deposit is not liable to the payee for the negligence, if any, of the collecting bank. *Ibid.*

8. The failure of the bank of deposit to promptly notify the payee of the nonpayment of a check deposited by him will not subject the bank to liability in damages when no damages are shown to have resulted therefrom. *Ibid.*

9. Where banks in the course of collection of a check have successively guaranteed all prior endorsements of a check, each of such banks is responsible only to its immediate endorsee upon an invalid endorsement by the payee under the separate contracts or agreements among themselves, and the drawer of the check is not entitled to a judgment against them all for the amount of the loss. *Bank v. Bank*, 526.

c *Rights and Liabilities of Parties upon Certification*

1. A drawer of a check by having the drawee bank certify it before delivering it to the payee of the check does not change the status of his liability thereon, the effect being to add the credit of the bank to that of his own; but it is otherwise if the payee of the check accepts it uncertified and then has it certified by the drawee bank instead of presenting it for payment, for then the credit of the bank is substituted for that of the drawer of the check and the liability of the latter on the check he has issued ceases. C. S., 3115. *Investment Trust v. Windsor*, 208.

2. Where the evidence is conflicting as to whether the drawer of a check has it certified at the drawee bank or whether this was done by the payee thereof or his agent, a peremptory instruction that the drawer of the check was relieved from liability is reversible error, the issue being for the determination of the jury under proper instructions. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

D Insolvency and Receivers.

a *Rights and Liabilities of Borrowing Stockholders*

1. Equality among the stockholders of an insolvent building and loan association requires that the solvent credits of the association be collected, thus placing the borrowing and nonborrowing stockholders on a parity; second, that the debts be paid, and third that the balance be distributed according to the respective rights of the parties, and the borrowing stockholders are not entitled to first deduct from their debt to the corporation the amounts they have respectively paid on their shares of stock from the amount they are obligated for on the mortgage debt. *Earnhardt v. Brown*, 204.

2. Where a borrowing stockholder in a building and loan association has filed his proof of claim in bankruptcy proceedings of the association in the Federal court and brings suit in the State court to enjoin the foreclosure of the mortgage securing the loan, he may not successfully maintain that the trustee in bankruptcy, appointed in pro-

BUILDING AND LOAN ASSOCIATIONS D *a—Continued.*

ceedings regular upon their face, made a party by order of the State court, was not a necessary party therein, nor are his rights prejudiced thereby. *Ibid.*

CANCELLATION OF INSTRUMENTS.

A Right thereto and Defenses.

b Cancellation for Fraud

1. Where the presumption of fraud does not apply to a deed given by a mortgagor to the mortgagee on lands not embraced in the mortgage, the mortgagor in her action to set aside the deed must allege in her complaint facts with such particularity as to show the fraud upon which the action is based, and in the absence of sufficient allegations in this respect a demurrer thereto is properly sustained. *Tull v. Harvey*, 329.

CARRIERS (Duties of railroads other than as carriers see Railroads; use of freight platform as trespass see Trespass A b 1).

B Carriage of Goods.

g Liability for Goods after Arrival at Destination

1. Where a shipment by common carrier arrives at its destination and is placed on a platform of a station owned by another carrier and used by it and the initial carrier jointly, and notice of the arrival of the shipment is duly given, the liability of the carriers is that of warehousemen; and in this case *held*, evidence of the negligence of the carriers, resulting in the destruction of the shipment by fire, was sufficient to be submitted to the jury, and the jury might place the liability upon either one or both as they found the negligence of the parties to be from the evidence, with the burden of proof on the plaintiff to show negligence by the greater weight of the evidence. *Groves Mills v. R. R.*, 388.

CAVEAT see Wills D.

CHARITABLE HOSPITALS see Hospitals B.

CHATTEL MORTGAGES see Sales I.

CHECKS see Bills and Notes I.

CIRCUMSTANTIAL EVIDENCE see Criminal Law G m.

CITIES see Municipal Corporations.

CLAIM AND DELIVERY see Replevin.

COMMUNICATIONS WITH DECEDENT see Evidence D b.

COMPROMISE AND SETTLEMENT see Accord and Satisfaction—As ratification of fraud see Fraud B c 1.

CONDITIONAL SALES see Sales I.

CONSOLIDATED STATUTES (for convenience in annotating).

SEC.

91. Deed void because not registered under the provisions of this section may be admissible as evidence of equitable title. *Sears v. Braswell*, 515.

137(5). Where niece is entitled to distribution as next of kin and survives intestate, upon her death her husband is entitled to distribution. *In re Estate of Wallace*, 334.

219(a), Vol. 3. Name on books of bank as stockholder therein is prima facie evidence of fact and takes case to the jury, but may be rebutted. *Corporation Commission v. Harris*, 202. Request by stockholder for cashier to sell his stock does not relieve stockholder of statutory liability thereon when sale has not been made. *In re Trust Co.*, 613.

219(d), Vol. 3. Stockholder of bank is not relieved from statutory liability unless transfer of stock appears on books of bank as provided for by this section. *Corporation Commission v. Harris*, 202.

220(aa), Vol. 3. Bank of deposit not liable on check when mailed for collection when there was no instruction to demand cash. *Braswell v. Bank*, 229.

220(n). Collecting bank makes good presentment of check by sending it through the mail. *Braswell v. Bank*, 229.

230. Certificate of deposit to husband payable to husband or wife does not make them tenants in common, nor operate as gift *inter vivos* to wife, and upon husband's death wife's agency to withdraw is terminated. *Jones v. Fulbright*, 274.

279. Section is of retroactive effect, and, being in derogation of common law, to be strictly construed, and does not extend to inheritance from maternal uncle. *In re Estate of Wallace*, 334.

358. Where parties have conflicting interest, admissions of administrator bank is not admissible against surety. *Commissioners of Chowan v. Bank*, 410.

441(1), 1160, 1165. Construed in *pari materia* in regard to assessing stock to pay creditors. Statute of Limitations runs from demand of directors when corporation solvent, otherwise from demand of receiver. *Redrying Co. v. Gurley*, 56.

441(9). Creditor taking mortgage not barred in action to set aside deed for fraud which had been registered for three years, under the facts of this case. *Rhodes v. Tanner*, 458.

446. Endorser of check paying it is subrogated to rights of payee. *Morris v. Cleve*, 253.

456, 507. Joinder of purchaser under conditional sales contract and his vendee is proper. *Music Store v. Boone*, 174.

470. Motion to remove cause for convenience of witnesses is discretionary with trial judge, and his action not reviewable in absence of abuse of discretion. *Goins v. Sargent*, 84.

475. Action is pending in Superior Court from issuance of summons, and subsequent action on same subject-matter will be abated. *Morrison v. Lewis*, 79.

CONSOLIDATED STATUTES—*Continued.*

SEC.

500, 807. Statutes construed in *pari materia*, and notice of *lis pendens* unnecessary in attachment. *Pierce v. Mallard*, 679.

511(6), 535. Pleadings will be liberally construed to give substantial justice. *Cole v. Wagner*, 692.

515. Superior Court may allow filing of amended pleadings within ten days after certification by Supreme Court Clerk of judgment upholding judgment sustaining demurrer. *Morris v. Cleve*, 253.

517. Plea in abatement on ground of pending action may be taken by way of answer. *Bank v. Broadhurst*, 365.

518. When and where demurrer to sufficiency to complaint may be made. *Power Co. v. Peacock*, 735.

534, 537. Defendant must ask for bill of particulars or move that plaintiff be required to amend if he desires complaint to be made more definite. *Cole v. Wagner*, 692.

635. Demurrer sustained where evidence, though conflicting, was sufficient. *Lee v. Produce Co.*, 714.

547, 549. Judge may allow amendment which does not substantially change cause of action. *Bridgeman v. Ins. Co.*, 599.

564. Failure to give alternate instructions held not reversible error. *Lipscomb v. Cox*, 64. Instructions which do not fully explain law arising from evidence reversible error. *Williams v. Coach Co.*, 12.

567. Judgment as of nonsuit rendered where plaintiff's evidence discloses contributory negligence barring recovery was proper. *Davis v. Jeffries*, 712.

568. Parties may waive right to trial by jury under provisions of statute, and in *mandamus* waiver is made by failure to move in apt time for jury trial. *Electric Co. v. Light Co.*, 766.

596. Where judgment by default and inquiry is rendered plaintiff is entitled to at least nominal damages, but inquiry should be made at subsequent term. *Foster v. Hyman*, 189.

600. In setting aside judgment meritorious defense must be found by trial judge. *Bowie v. Tucker*, 671.

601. Judgment of Superior Court unappealed from is binding on another Superior Court judge. *Power Co. v. Peacock*, 735.

626. Special judge at chambers may not hear controversy without action when he has not been appointed to hold term of court. *Green v. Stadiem*, 472.

768, 673. When execution against person in civil action is proper. Evidence held sufficient for order for execution against person of defendant after return of judgment unsatisfied in action for injury caused by reckless driving of automobile. *Foster v. Hyman*, 189.

799. Court may allow amendment of affidavit in attachment, and court's finding of fact may have effect of allowing amendment. *Thornburg v. Burton*, 193.

CONSOLIDATED STATUTES—*Continued.*

SEC.

868. Party must move in apt time for trial by jury in mandamus or right thereto is waived. *Electric Co. v. Light Co.*, 766.

869, 870, 871. It is not necessary that taxpayer be candidate to office contested in order to be relator in *quo warranto*. Jurisdiction of Superior Court not ousted by provisions in charter of municipality. *Boulding v. Davis*, 731.

987. Statute as to debt or default of another does not apply where parties have pecuniary interest in transaction. *Coxe v. Dillard*, 344.

996. Voluntary trust in personalty is revokable by donor when remainder affected by contingent interests. *Stanback v. Bank*, 292.

1097. Order of Corporation Commission that defendants submit plans for new passenger station is appealable. *Corporation Commission v. R. R.*, 699.

1139. Where agent for the making of conditional sales contract is a corporation signing of contract by it by its president is sufficient. *Pick v. Hotel Co.*, 110.

1193, 1194, 1198. Upon the expiration of the charter of a corporation the directors hold the assets in trust for creditors and stockholders. *Smith v. Dicks*, 355.

1476, 1477. Possessory action in ejectment in justices' court terminates upon questions as to title being raised. *Ogburn v. Booker*, 687.

1654. Rule 2. Advance to child defined. *Paschal v. Paschal*, 40.

1654. Rule 9. Devise to husband and wife for life remainder to their heirs takes the estate to her illegitimate child to the exclusion of his. *Battle v. Shore*, 449.

1662. Instruction that evidence was sufficient to support issues of marriage, separation and residence held not to be directed verdict or contrary to provisions of this section. *Nelson v. Nelson*, 465.

1667, Vol. 3. Allegations in complaint in action for support, board, and conspiracy to secure a deed of separation are good, and granting of alimony *pendente lite* need not be postponed until decision of action to set aside deed for fraud. *Taylor v. Taylor*, 197.

1737. Devise to granddaughter for life, and if no children to grandson, gives estate to child of granddaughter by purchase under the will. *West v. Murphy*, 488.

1795. Declarations as to transaction with decedent in regard to agreement that check was to be in full payment held inadmissible even though adverse party "opened the door" to other separate transactions with decedent. *Walston v. Coppersmith*, 407.

1795. Testimony in action in ejectment by witnesses not interested in event competent. *Pitman v. Hunt*, 574.

1798. Communications made after termination of relationship of physician and patient do not fall within provisions of this section. *S. v. Wade*, 571.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1799. Presumption of innocence of defendant in criminal action sufficient to take case to jury. Burden of proof—Questions for jury. *S. v. Allen*, 684.

1802. Conversation between husband and wife may be testified to by witness overhearing it in criminal action. *S. v. Freeman*, 376.

2306, 1743. Usurious interest does not affect the validity of a mortgage, and foreclosure will not be enjoined on that ground. *Briggs v. Bank*, 120.

2355. Sublessee liable for advancement to make crop to his lessor's landlord. *Land Co. v. Cole*, 452.

2384. Petitioners may not deny sufficiency of jurat to petition under circumstances of this case. *Morgan v. R. R.*, 568.

2433, 2469, 2470. When contract is entire itemized statement is not required. Contract attached to lien held sufficient itemization: judge to find facts from evidence. Lien relates back to time material furnished. Dates in statement presumed correct. *King v. Elliott*, 93.

2437, 2439, 2442. Where owner has had to complete building at a loss subcontractor cannot recover. *Electric Co. v. Electric Co.*, 495.

2459, 8107, 2460, 4925(a), 511(a). Sections construed together apply to warehousemen for compensation only. *Machinery Co. v. Sellers*, 30.

2572. *Mandamus* to compel another registration will not lie where there is adequate remedy by challenge to voters. *Glenn v. Culbreth*, 675.

2591. Section is to be liberally construed, and substantial compliance is sufficient. *Banking Co. v. Green*, 534. Purchaser of mortgage security before confirmation of foreclosure sale acquires lien and may enforce security. *Davis v. Ins. Co.*, 617. Clerk may revoke order for deed to be made to purchaser and order resale when prior order was premature. Last bidder acquires no rights until statute has been complied with. *Hanna v. Mortgage Co.*, 184.

2615. Violation of this section not actionable when plaintiff's evidence shows his own negligence was proximate cause of injury. *Davis v. Jeffries*, 712.

2705, 2706, 2708, 2709, 2710, 2711, 2712, 2713, 2714. Not evidence of fraud for city to agree with railroad company to pay its assessments along underpass in proceedings to compel the railroad to build underpass. *Jones v. Durham*, 127.

2707. Railroad right of way properly included in lineal feet of petition for street improvements. *Jones v. Durham*, 127.

2713, 2716. Assessments for street improvements are a lien only on lands assessed and not a personal debt payable out of assets of estate. *Carawan v. Barnett*, 511.

2714. Where statute as to appeal has not been followed, injunctive relief against levy of assessments will be denied. *Jones v. Durham*, 127.

CONSOLIDATED STATUTES—*Continued.*

SEC.

2807, 2808. Municipal corporation may by valid statute distribute electric current for hire within radius of three miles. *Holmes v. Fayetteville*, 740.

3010. Title to check transferable only by endorsement. *Dawson v. Bank*, 499.

3022. Where there are two payees to check bank must pay to both or their order, and payment to one without authority of other does not relieve bank of liability thereon. *Dawson v. Bank*, 499.

3044, 2977, 3041. Name upon face of note is presumed as maker and different liability by parol as against holder thereof. *Howell v. Robertson*, 572.

3108, 3107, 3042. Drawer of check not liable where collecting bank failed to demand payment in cash as requested. *Morris v. Cleve*, 253.

3115. Status of maker of check unchanged by his having it certified before delivery; but when certified by payee maker is relieved of liability. *Investment Trust v. Windsor*, 208.

3171. Bank may become liable on check it certifies to payee thereof. *Dawson v. Bank*, 499.

3311. Unconditional sales contract binding as between parties thereto. *Music Store v. Boone*, 174.

3312. As between parties probate and registration not required. *Pick v. Hotel Co.*, 110.

3449. Railroad company liable in damages when it permits its tracks to be used as public crossing and fails to properly maintain such crossing. *Stone v. R. R.*, 429.

3456. State alone may sue under this section to revoke charter of railroad company. Waiver of provisions by the State. *Brummitt v. R. R.*, 381.

3846(j), (e 5), Vol. 3. Authority of State Highway Commission to abandon part of highway not subject to interference by county commissioners, and where grade crossing has been abandoned county commissioners may not reopen it. *Rockingham County v. State Highway Commission*, 116.

3930, 3932. Impose separate liability on surety for each bond of successive terms, and applies where sheriff has been put upon salary basis during life of bond, and suit against sheriff and sureties on all bonds is misjoinder. *Pender County v. King*, 50.

4103. Section not invalid. Land constituting home site: operation and effect of section. *Boyd v. Brooks*, 644.

4144(2). In this case held evidence that paper-writing purporting to be holographic will was found among valuable papers was sufficient. *In re Will of Shemwell*, 332.

4162. Devise presumed to be in fee simple. *West v. Murphy*, 488; *Brown v. Lewis*, 704.

CONSOLIDATED STATUTES—*Continued.*

SEC.

4200. Killing with deadly weapon raises presumption of malice; State must show premeditation in order to convict of first degree murder. *S. v. Miller*, 445.

4215. Instruction assuming fact in issue held erroneous. *S. v. Griggs*, 362. Evidence of assault upon female held insufficient to warrant instructions in this case. *S. v. Stansberry*, 350.

4339. Physician may testify as to virtue of prosecutrix from communications between them after relationship of physician and patient had terminated. *S. v. Wade*, 571.

4447, 4448. Wilfulness is essential element of crime and is not presumed from failure to provide support. *S. v. Roberts*, 662. Abandonment held to have taken place in this State and subject to its jurisdiction. *S. v. Sneed*, 668.

4643. All evidence considered on motion to nonsuit whether offered by State or elicited from defendant. *S. v. McKinnon*, 576.

5469. Prior condemnation does not preclude county board of education from another condemnation proceedings when amount of land sought is within statutory limit. *Board of Education v. Pegram*, 33.

5784. Upon expiration of charter of corporation corporate property does not escheat. *Smith v. Dicks*, 255.

6295. Section is invalid and does not prevent foreign insurance corporations from removing cause from State to Federal Court. *Rhodes v. Insurance Co.*, 337.

6420, 3311. Mortgagee having prior registered security has superior lien on proceeds under loss payable clause of insurance policy. *Bank v. Bank*, 68.

6436, 6437. Statutory conditions are valid and binding. *Midkiff v. Ins. Co.*, 139.

CONSPIRACY (Complaint alleging conspiracy not demurrable for misjoinder see Pleadings D b 5).

A Civil Actions.

b Testimony of Codefendants or Conspirators (In criminal actions see Criminal Law G k)

1. Where a conspiracy to defraud the plaintiff is not alleged in a suit against the corporation and certain of its officers for fraudulently inducing the plaintiff to subscribe for stock in the corporation, conversations of some of the defendants in the absence of the others are erroneously admitted in evidence as to them. *Morrison v. Finance Co.*, 322.

B Criminal Conspiracy (Acts, declarations and testimony of conspirators as evidence see Criminal Law G k).

a Elements of the Crime

1. A criminal conspiracy is the unlawful concurrence of two or more persons in a scheme or agreement to do an unlawful act, or to do a lawful act in an unlawful way or by unlawful means, and does not require the accomplishing of the purpose in contemplation or any overt act in furtherance thereof. *S. v. Ritter*, 113.

CONSTITUTION (for convenience in annotating).

ART.

I, sec. 11. Rendering verdict in absence of prisoner is invalid. *S. v. O'Neal*, 548.

I, sec. 13. Agreement that judge find facts in criminal action is invalid. *S. v. Cranford*, 513.

I, sec. 14. Statutory sentence for violation of prohibition law held not cruel or unusual punishment. *S. v. Daniels*, 285.

I, sec. 17. Assessments of special drainage district are not unconstitutional as a taking of private property without compensation. *Kennelworth v. Hyder*, 85.

I, sec. 32. *Ex post facto* relates to criminal laws, and retroactive law affecting contingent interest is not objectionable. *Stanback v. Bank*, 292.

II, sec. 29. Statute relating to drainage district is not local or special legislation. *Kennelworth v. Hyder*, 85.

IV, sec. 8. Jurisdiction of Supreme Court on appeal in criminal action is confined to matters of law or legal inference. *S. v. Freeman*, 376. Supreme Court alone has power to hear appeal from judgment overruling demurrer, and where appeal, in effect, is from one Superior Court judge to another is nullity. *Power Co. v. Peacock*, 735.

IV, sec. 11. Special judge does not have power to hear controversy without action at chambers when not appointed to hold term of court. *Green v. Stadiem*, 472.

IV, sec. 13. Parties may waive trial by jury. *Electric Co. v. Light Co.*, 766.

V, sec. 3. Classification of trucks for license taxes in accordance with distance between termini is not discriminatory. *Clark v. Maxwell*, 604. Notes for purchase price of timber to be cut under usual terms of timber deeds are solvent credits subject to taxation. *Alston v. Warren County*, 470.

V, sec. 6. Bonds issued by county commissioners to refund moneys temporarily borrowed is for special purpose and do not fall within provisions of this section. *Barbour v. Wake County*, 314.

VII, sec. 2. County had authority in this case to refund bonds to take care of moneys borrowed from its general fund for road purposes. *Barbour v. Wake County*, 314.

VII, sec. 7. Bonds for highway are for necessary expense and are valid without vote of people. *Barbour v. Wake County*, 314. Taxation for drainage district is for necessary purpose and does not require submission to voters. *Kennelworth v. Hyder*, 85. Where expenses for enlargement of electric plant are to be paid out of profits the question does not fall within provisions of this section. *Holmes v. Fayetteville*, 740.

VIII, sec. 1. Applies only to private and not municipal corporations. *Holmes v. Fayetteville*, 740.

VIII, sec. 4. General Assembly may authorize city to sell electric current within three-mile zone of city limits. *Holmes v. Fayetteville*, 740.

CONSTITUTIONAL LAW (Right to trial by jury see Jury C; in criminal cases see Criminal Law I a—Right of prisoner to confront accusers see Criminal Law I b—Cruel or unusual punishments see Criminal Law K d—Constitutionality of statutes see Statutes A—Constitutional restrictions on Taxation see Taxation A).

I Due Process of Law—Law of the Land (Eminent domain see Eminent Domain—Drainage assessments not taking of property see Drainage Districts B a 3).

b What Constitutes Due Process of Law

1. The Fourteenth Amendment to the Federal Constitution does not control the power of the State to determine the process by which legal rights may be asserted or legal obligations enforced if the method of procedure gives notice and a fair opportunity to be heard. *Corporation Commission v. Murphey*, 42.

CONTRACTS (Of infants see Infants B—Money received see Money Received—*Quasi*-contracts see *Quasi*-Contracts—Insurance contracts see Insurance—With decedent for services rendered see Executors and Administrators D a—Contract to marry see Marriage Promise—Contracts of sale see Sales—For sale of timber see Deeds and Conveyances F—Option see Vendor and Purchaser—Election of remedies see Election of Remedies).

A Requisites and Validity.

f Contracts in Restraint of Trade

1. A contract not to engage in a certain business within a reasonable area for a reasonable length of time, and which does not affect the interests of the public is not void as being a contract in restraint of trade, and is valid and enforceable. *Scott v. Gillis*, 223.

2. A contract between a certified public accountant and his employee providing that the employee was not to solicit or do business as an accountant for any one of the plaintiff's customers for a period of three years after the termination of the employment, is not one in restraint of trade against public policy, and, in a suit by the employer to restrain its breach, a continuance of a restraining order against the employee to the final hearing upon proper facts being made to appear in plaintiff's favor, will be upheld on appeal. *Ibid.*

B Construction and Operation.

a General Rules of Construction

1. An interpretation that the parties to a contract have given it will be generally adopted by the court, and a contract for the purchase of furniture for a hotel subject to an itemization given therein and to such minor adjustments as may take place from time to time as the unit prices set forth, is held to cover additional items amounting to about $11,000, ordered and accepted by the vendee and shipped by the vendor under the contract. *Pick v. Hotel Co.*, 110.

D Rescission, Abandonment or Denial of Validity.

e Actions to Rescind or Attacking Validity of Contract and Defenses

1. A party may not accept the benefits of a contract and at the same time deny its validity. *Owens v. Carstarphen*, 424.

CONTRACTS—*Continued.*

E Performance or Breach.

a Breach or Performance in General

1. Where there is a contract to furnish the defendant board and lodging during his life in consideration of his willing all his property to the plaintiffs, the defendant does not breach his contract by merely leaving the plaintiff's house without objecting to the board and lodging, which the plaintiffs are ready, able, and willing to furnish, and residing elsewhere, and the plaintiffs may not maintain an action for the amount of the board and lodging to the date of his so leaving without showing that the defendant has breached the same by refusing to comply with its terms. *Harrison v. Sluder*, 76.

F Actions for Breach or to Recover Upon Contract (Measure of damages see Damages F b).

b Evidence and Burden of Proof (Instruction thereon see Contracts F c 2).

1. In an action to recover upon a contract for the division of profits from sale of timber by the defendant, the defendant to sell 'to the best of his ability," the burden is on the plaintiff to show that a profit had been made or that the defendant had acted in bad faith in the sale in order to recover, and evidence as to profits made by other like manufacturers is immaterial. *Harper v. Lumber Co.*, 539.

c Instructions

1. Where, in an action on contract to recover the purchase price of a carload of peanuts sold and delivered, the defendant sets up a counterclaim for damages for the failure of the plaintiff to ship three other carloads of peanuts under an alleged contract, the plaintiff contending that he was the agent for the purchase of the three carloads and not under contract to ship them: *Held*, under the facts of this case, it was error for the trial court to refuse to give the jury instructions upon the counterclaim so pleaded and proven. *Hassell v. Peanut Corp.*, 444.

2. Where in the action by a material furnisher to enforce a statutory lien against the owner of a building the question is involved as to whether the defendant had breached her contract with her contractor, the submission of two issues to the jury, one as to the owner's breach and the other as to the contractor's breach of the same contract, under instructions placing the burden of proving one of these issues on the defendant and the other on the plaintiff, is reversible error, the effect being to put the issue as to defendant's breach upon both parties at the same time. As to the question of waiver of the defendant's breach *quære?* but not decided. *Brown v. Broadhurst*, 738.

CONTROVERSY WITHOUT ACTION.

A Submission and Proceedings.

a Judge, Jurisdiction and Venue

1. A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the pro-

CONTROVERSY WITHOUT ACTION A *a—Continued.*

visions of C. S., 626, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, sec. 2; Public Laws 1929, ch. 137, and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed. *Greene v. Stadiem*, 472.

CORPORATION COMMISSION.

C Appeals from Orders of Commission.

a Parties

1. The petitioners in proceedings before the Corporation Commission for the establishment of an adequate union passenger station are not proper parties to move in the Superior Court for the dismissal of the appeal of the respondents from an order of the Commission, but where such motion is made to appear to be with the assent and concurrence of the Commission the Supreme Court may decide the appeal from the order dismissing the action in the Superior Court. *Corporation Commission v. R. R.*, 699.

c Order Appealable

1. Where the Corporation Commission in proceedings before it to compel certain railroad companies to provide an adequate union passenger depot in a city has found upon evidence regularly taken in hearings before it that the existing depot was inadequate and ordered the respondents to prepare and submit plans and specifications for a new depot, to which exceptions were duly and regularly filed and an appeal taken by the respondents, and the Commission orders the proceedings be certified and transferred to the Superior Court for trial, which has been done, all in conformity with the statute, C. S., 1097: *Held*, error for the judge presiding at the trial in the Superior Court to dismiss the appeal upon the ground that the order of the Commission was not appealable, and the proceedings remain in the Superior Court to be proceeded with upon the issues of fact raised for the determination of the jury. *Corporation Commission v. R. R.*, 699.

CORPORATIONS.

D Stock (Limitation of action on unpaid stock see *Limitation of Actions* B b—Statutory liability on bank stock see Banks and Banking H a—Rights of stockholders of building and loan associations upon receivership see Building and Loan Association D a).

h Actions for Fraud in Procuring Subscriptions thereto

1. Where a corporation and some of its officers are sued to cancel certain shares of stock issued to the plaintiffs for fraudulent representations alleged as an inducement to purchase them, there must be sufficient evidence that the corporation was implicated in the transaction to hold it liable thereon. *Morrison v. Finance Co.*, 322.

K Dissolution, Expiration or Forfeiture of Charter.

a Parties who may Attack Validity of, or Sue for Forfeiture

1. The State alone, acting through the Attorney-General, may institute a proceeding against a railroad company to forfeit its charter under

CORPORATIONS K *a—Continued.*

the provisions of C. S., 3456, for failure to begin construction of the railroad and complete the same within the two separate periods therein prescribed. *Brummitt v. R. R.*, 381.

b Grounds for Forfeiture and Defenses

1. Construing C. S., 3456, as to the forfeiture of the charter of a railroad company when construction of the proposed road is not commenced within three years or completed and put into operation within ten years after its charter has been granted, to make the two provisions consistent it is held that they are not alternative, and upon failure of a railroad to comply with either one of the provisions the suit of the Attorney-General will be maintained in the absence of acts or conduct upon the part of the sovereign that amount to a waiver of the default. *Brummitt v. R. R.*, 381.

2. Where a railroad company has not commenced the construction of its road within three years after its charter has been granted as required by statute, C. S., 3456, and thereafter by statute the Legislature declares that certain bonds may be issued by a township to aid in the construction of the railroad shall be valid, and the county has acted in recognition of the existence of the corporation: *Held*, the State by its acquiescence in the delay and by its recognizing the railroad company as an existing corporation has waived its right to insist on a forfeiture. *Ibid.*

d Rights of Parties in Corporate Assets upon Dissolution or Forfeiture

1. Upon the expiration of the charter of a corporation the directors thereof hold the assets as trustees, first for the creditors, and secondarily for the stockholders in good standing at the time of the expiration of the charter, C. S., 1193, 1194, 1198, and there is no escheat as against the rights of stockholders under the provisions of C. S., 5784. *Smith v. Dicks*, 355.

2. Where an incorporated social club has continued for more than three years after the expiration of its charter to operate as though the charter had not expired, the members or stockholders in good standing at the time of the expiration of the charter are entitled in equity to a pro rata share in the assets of the corporation to the exclusion of members taken in after its expiration, with the right to sell and convey the same, where the rights of creditors are not involved. *Ibid.*

3. Where the constitution and by-laws of an incorporated social club clearly provide that its property should be owned and controlled by its resident membership to the exclusion of nonresident members such nonresident members, taken in at greatly reduced membership dues, are not entitled to share in the assets of the corporation upon the expiration of its charter. *Ibid.*

COUNTY—Taxation see Taxation—Sheriffs see Sheriffs—Liability of sureties of bonds of sheriffs and treasurers see Principal and Surety B c—Schools see Schools and School Districts.

COURTS—Supreme Court see Appeal and Error—Where appeal has not been taken from judgment overruling demurrer, demurrer cannot again be pleaded in Superior Court see Pleadings D e 3).

CRIMINAL LAW (Particular crimes see Particular Titles—Indictment see Indictment).

B Capacity to Commit and Responsibility for Crime.

a Mentality (Intoxication as affecting premeditation see Homicide B a 2)

1. Where the defense in the prosecution for a capital felony is mental disability resulting from hereditary weakness and augmented by a syphilitic infection, the burden is on the defendant to establish his defense to the satisfaction of the jury. *S. v. Wilson*, 547.

C Parties and Their Offenses (See, also, Homicide H c 1).

a Principals and Aiders and Abettors Guilty as Principals

1. One who is present when another commits a capital felony with the knowledge of the other, and does some act to render aid in the perpetration of the crime, is guilty of the offenses as an aider therein, though he takes no direct share in its actual commission, and when present advising, instigating or encouraging the other to commit the crime, is guilty as an abettor therein. *S. v. McKinnon*, 576.

D Jurisdiction.

a Determination as to Whether Crime Was Committed in this State

1. The constructive domicile of the wife is that of her husband, and where he has resided in another State and has left her there, and where for business or other reasonable purposes he has come to this State and made his domicile here, and she has followed him and he has then abandoned her and ceased to contribute to her support and that of his child born to them in lawful wedlock, the abandonment occurs in this State and is within the jurisdiction of the courts of this State and subject to the provisions of our statute making it a misdemeanor. C. S., 4447. *S. v. Sneed*, 668.

G Evidence (Of particular crimes see Particular Titles, Homicide, Abandonment, etc.—Testimony of communication between husband and wife see Husband and Wife F c).

a Presumptions and Burden of Proof

1. Where the defense in the prosecution for a capital felony is mental disability resulting from hereditary weakness and augmented by a syphilitic infection, the burden is on the defendant to establish his defense to the satisfaction of the jury. *S. v. Wilson*, 547.

2. A defendant in a criminal action may rely upon the presumption of his innocence, which remains with him throughout the trial and introduce no evidence in his own behalf, and though this may have its moral effect on the minds of the jury, it does not of itself as a matter of law create a presumption against him, and the question of his guilt is for the determination of the jury under the evidence, with the burden upon the State to prove him guilty beyond a reasonable doubt. C. S., 1799. *S. v. Allen*, 684.

c Character Evidence

1. Where a defendant in a criminal action testifies in his own behalf the credibility of his testimony is subject to impeachment, and it is competent for the State to ask him on cross-examination whether there was then a warrant out for him from the Federal Court, when relating only to his credibility as a witness. *S. v. Dalton*, 125.

CRIMINAL LAW G *c—Continued.*

2. Where a defendant in a criminal action testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence affects only his credibility as a witness, and an instruction that such evidence might be taken as substantive evidence of guilt will be held for reversible error. *S. v. Roberson*, 657.

d Materiality and Competency in General

1. The defendant in a criminal action is not entitled to the introduction in evidence of the list of State's witnesses endorsed on the bill of indictment for the purpose of showing that all of them had not been examined by the grand jury nor called as witnesses at the trial. *S. v. Moore*, 196.

2. Testimony of a witness as to the contents of a telegram sent by the defendant while in the presence of the witness who heard the defendant narrate it to the telegraph operator and saw the operator write it down, which tended to show the defendant's anxiety as to the knowledge of another of "something on" him, is admissible with other circumstantial evidence of defendant's guilt of murder, as a circumstance tending to show guilt, the probative force being for the jury. *S. v. Fox*, 478.

i Expert Testimony

1. When the position of the deceased when killed is relevant to the inquiry it is competent for a physician who had examined the deceased and who has qualified as an expert, to testify that the killing was done with a 44 bullet while the deceased was lying down and explain the facts and circumstances upon which he based his opinion, and such testimony does not violate the rule that the issue of the defendant's guilt is exclusively for the determination of the jury. *S. v. Fox*, 478.

j Testimony of Convicts, Accomplices and Codefendants

1. Upon the trial for arson under the provisions of C. S., 4238, testimony of an accomplice that the two defendants set fire to a dwelling at night in which the prosecuting witness was sleeping is competent, but should be scutinized by the jury and not accepted as evidence unless they find beyond a reasonable doubt that it is true, and under correct instructions, it is within the province of the jury to accept it in part and reject it in part, and to convict one of the defendants and acquit the other upon conflicting evidence. *S. v. Freeman*, 376.

k Acts, Declarations and Testimony of Conspirators

1. The acts and declarations of each conspirator, while done in furtherance of the unlawful purpose or the testimony of one of them in regard to the conspiracy, is competent evidence against them all, but testimony given by one of the conspirators of his acts done in the absence of the others and in derogation of the purpose of the conspiracy is incompetent against the others, and as to them its admission constitutes reversible error. *S. v. Ritter*, 113.

CRIMINAL LAW G—*Continued.*

l Confessions

1. Where the confession of the defendant of his guilt of murder, made to an officer of the law, is excluded by the judge upon a *voire dire* on the ground that it was induced by fear or favor and therefore not voluntary, a later confession, made to another witness, is admissible when the judge finds upon sufficient evidence upon *voire dire* that it was not influenced by the causes which had induced the previous confession and that it was free and voluntary, and made without fear or favor. *S. v. Fox*, 478.

m Weight and Sufficiency

1. Where the evidence as to the possession of intoxicating liquor is capable of two inferences, one sufficient to convict and one to acquit the defendant, the case should be submitted to the jury, and on the defendant's appeal from an adverse verdict, the question of the sufficiency of the evidence to be submitted to the jury will be determined in the Supreme Court. *S. v. Weston*, 25.

2. If in a criminal action there is any evidence tending to prove the fact in issue and which raises more than a suspicion or conjecture in regard to it, the same should be submitted to the jury, otherwise not. *S. v. Allen*, 684.

p Evidence of Identity

1. Where the foot tracks of the defendant on trial for the unlawful possession of intoxicating liquor are relevant to the inquiry, the similarity between them and the shape of the defendant's identified shoes is competent to be testified to by the witnesses, being a "shorthand statement of the fact" of identification resulting from a mental conclusion made by them at the time. *S. v. Weston*, 25.

H Time of Trial and Continuance.

a Right of Defendant to Time to Prepare Defense, Employ Counsel, etc.

1. Where a trial of the defendant for violating the prohibition law is had within thirty or forty minutes from the time of his arrest, in the regular course of procedure, and the defendant does not demand time to employ and consult counsel or subpœna witnesses he waives any right thereto, and a sentence in the action will be sustained in law. *S. v. Daniels*, 285.

I Trial.

a Right to Trial by Jury

1. Where the defendant in a criminal action enters the plea of "not guilty," the requirement of our State Constitution, Art. I, sec. 13, of trial by jury may not be waived by the accused nor another method substituted by agreement, and where a defendant is indicted for violating the statute commonly known as the "bad check law," an agreement between the State and the accused that the judge may find the facts under a plea of "not guilty," will be disregarded on appeal and the case remanded to be tried according to law. *S. v. Crawford*, 513.

2. Where the defendant in a criminal prosecution for a misdemeanor under the "bad check law" has entered a plea of "not guilty," he may not waive his constitutional right to a trial by jury without changing his plea. *Ibid.*

CRIMINAL LAW I—*Continued.*

b Right of Prisoner to Confront Accusers, etc., and be Present During Trial

1. The returning into court by the jury of a verdict of guilty of violating our prohibition law, while the defendant is in prison, violates the defendant's constitutional rights (Declaration of Rights, sec. 11), and in the absence of a proper waiver of this right a new trial will be ordered on appeal. *S. v. O'Neal*, 548

e Arguments and Conduct of Counsel

1. In a criminal action the defendant is entitled to the protection of the court against the unwarranted abuse of his character by the solicitor in his argument when not supported by the evidence or by reasonable inference therefrom, and a new trial will be awarded on appeal where the trial judge refuses the appeal to him by the defendant's counsel and affords no relief from the unwarranted imputations. *S. v. Green*, 624.

2. Where in the prosecution for murder for the reckless driving of an automobile the counsel for the private prosecution in his argument to the jury appeals for a conviction because others had been killed by drunken drivers on the same highway and no one had been punished for it, and upon objection by the defense on the ground that the argument was not sustained by the evidence, the trial court remarked that he could not regulate argument of counsel unless beyond bounds, and instructed the counsel to continue: *Held*, the counsel for the prosecution went outside the record and overstepped the bounds, and the defendant is entitled to a new trial. *S. v. Phifer*, 729.

g Instructions (In prosecution of particular crimes see Assault Upon a Female D c, Homicide H and particular titles of crimes).

1. An instruction upon a vital question at issue on the trial of an assault of a male person over eighteen years of age upon a female, C. S., 4215, which assumes the fact at issue is reversible error. *S. v. Griggs*, 352.

2. Where the requests for instruction by the defendant are substantially contained in the charge, the refusal of the trial court to give the particular instructions requested will not be held for error. *S. v. McKinnon*, 576.

3. Where the judge in his charge to the jury inadvertently misstates a contention of the defendant in one particular, the inadvertence should be called to his attention before the jury retires, and under the circumstances of this case where the judge warned the jury not to be governed by his recollection, but by their own, the appellant's assignment of error in this respect cannot be sustained. *Ibid.*

j Nonsuit

1. Upon defendant's motion as of nonsuit (C. S., 4643), made after the close of the State's evidence and renewed after the close of all the evidence, all the evidence which tends to prove the defendant's guilt will be considered in the light most favorable to the State, and in this case *held:* the evidence, although circumstantial, raised more

CRIMINAL LAW I *j—Continued.*

than a conjecture, scintilla or suspicion, and was sufficient to be submitted to the jury, the probative force being for them. *S. v. McKinnon*, 576.

K Judgment and Sentence.

b Suspended Judgments

1. The refusal of the judge to hear evidence in executing judgment under a suspended sentence is a matter within his legal discretion and is not reviewable on appeal. *S. v. Vickers*, 62.

c Costs

1. Costs are no part of the punishment in a criminal action. *S. v. Cornett*, 627.

d Cruel or Unusual Punishments

1. A sentence prescribed by statute for the violation of the prohibition law is held not to be cruel or unusual within the meaning of Article I, section 14, of our Constitution. *S. v. Daniels*, 285.

L Appeal in Criminal Cases.

a Prosecution of Appeals under Rules of Court

1. An appeal from the conviction in a criminal case will be docketed and dismissed on motion of the Attorney-General when not prosecuted as required by the Rules of Court, but the record will be examined for errors appearing upon its face, and where it so appears that the defendant was convicted without a trial by jury after he had entered a plea of "not guilty," the cause will be remanded to the Superior Court for trial according to law. *S. v. Straughn*, 691.

d Record

1. On appeal the Supreme Court is bound by the record as it is sent up. *S. v. Stansberry*, 250; *S. v. Griggs*, 252.

e Review

1. Where the identity of the defendant and the loss by the deceased of his pocket-book on the day of the crime have been established by the testimony of competent witnesses, incompetent testimony of another witness to these facts thus established is immaterial under the facts of this case, and the admission of the incompetent testimony is not held for reversible error. *S. v. McKinnon*, 576.

2. Where the judgment in a criminal action for a misdemeanor has been suspended until the trial of a civil action against the defendant, the cost is no part of the punishment, the effect of the imposition of cost being to vest the cost in those entitled thereto, and an appeal therefrom, not being from a final judgment or one which is final in its nature, will be dismissed. *S. v. Cornett*, 627.

g Nature and Grounds of Jurisdiction of Supreme Court on Appeal in Criminal Cases

1. The Supreme Court is ordinarily confined to matters of law or legal inference on appeal from a judgment upon a verdict of guilty in a criminal action where the evidence is conflicting upon the question of the defendant's guilt or innocence. Const., Art. IV, sec. 8. *S. v. Freeman*, 376.

CRUEL OR UNUSUAL PUNISHMENTS see Criminal Law H d.

CUSTOMS AND USAGES see Bills and Notes I b 2.

DAMAGES.

F Measure of Damages.

b Breach of Contract or Warranty

1. Where the buyer, damaged by the fraud of the seller in the sale of machinery, elects to keep the machinery and recoup the damages in the seller's action for the purchase price, the measure of damages, in the absence of proof of special loss brought home to the knowledge of the seller, is the difference between the value of the machinery as warranted and its value as delivered, and an instruction for the recovery of further damages, consisting of the cost of supplying a deficiency, is reversible error in the absence of evidence that such was done. *Frick Co. v. Shelton*, 296.

DEADLY WEAPON see Homicide G b.

DEDICATION see Trespass A c 1.

DEEDS AND CONVEYANCES (Contracts for sale of realty see Vendor and Purchaser—Fraudulent conveyances see Fraudulent Conveyances—Threatened breach of restrictions as ground of injunctive relief see Injunctions D b 1.

g Mental Capacity

1. In an action by the grantor's daughter-in-law and devisee to set aside a deed to the unrelated tenant of the grantor, evidence that tends to show that the grantor was a woman seventy-one years of age, feeble in body, easily influenced, and with the mind of a child, and that the consideration recited in the deed was ten dollars and other consideration, and the grantor refuses to testify as to the amount of the consideration paid: *Held*, sufficient to take the case to the jury under proper instructions from the court. *Gilliken v. Norcom*, 8.

C Construction and Operation.

c Estates and Interests Created

1. Under a deed of gift to the grantor's son, using the words "lend to him during his life, and after his death to this children," with *habendum* "to them and their heirs in fee simple," the word "lend" will be construed as a word of conveyance to effectuate the intent of the grantor as expressed in the instrument, and the son takes a life estate in the lands with remainder over to his children living at the time of his death, and the deed does not operate as a conveyance directly to the children living at the time the deed was made, reserving a life estate to the son, and they do not take to the exclusion of the children born thereafter. *Waller v. Brown*, 508.

d Reservations

1. A reservation in a deed in the chain of title to the *locus in quo*, contained in the description "thence south 5 degs. east, running on the west side of the creek 7 poles to a stake on the west side of the

DEEDS AND CONVEYANCES C *d—Continued.*

creek; thence same course 1 pole to a stake, reserving at all times the full and entire use of the distance of 40 yards of said creek" is held too vague and indefinite a description to admit of identification by parol evidence, and is not contrary to a covenant in a later deed against encumbrance. *Gruber v. Eubank*, 280.

f Conditions and Covenants

1. The grantee in a deed containing covenants and stipulations purporting to bind him becomes bound for their performance even though he does not execute the deed, and where a grantee of lands assumes a prior mortgage thereon he is bound thereby without signing the deed. *Coxe v. Dillard*, 344.

F Timber Deeds.

a Rights of Parties under Deed to Cut, Remove, Reënter, and Covenants in Respect Thereto

1. Under a deed conveying such right the grantee of standing timber may reënter and construct and operate a tramway on the land of the grantor for the purpose of removing timber he had acquired from owners of other lands. *Lowery v. Lumber Co.*, 299.

2. Where the purchaser of standing timber has knowledge of the right of his vendor's mortgagee to stop him from cutting timber on the *locus in quo* until a certain amount had been paid the mortgagee, and enters upon the land and cuts and manufactures timber under a provision that he pay therefor when sold, and there is evidence that he has not paid accordingly, and some time thereafter the mortgagee exercises his right to stop the cutting, and soon thereafter the vendor satisfies him and acquires the right to have the purchaser continue under his contract of sale of the timber, which the purchaser does not do: *Held*, the purchaser's action for damages for breach of contract is not upon warranty or covenant of peaceful enjoyment of the right of cutting timber, etc., and an instruction that the vendor's breach in the respect stated would prevent his recovery upon his counterclaim for the purchaser's breach is reversible error. *Poe v. Gill*, 326.

b Renewal or Forfeiture of Right to Cut Timber

1. In an action to declare a forfeiture in a timber deed for nonpayment of the sum of money stipulated to be paid on demand for renewal period, the plaintiff must show a proper demand according to the terms of the deed, and upon the failure of evidence in this respect a nonsuit is properly granted. *Sutton v. Lumber Co.*, 38.

G Torrens Deeds.

a Proceedings for Registration of Land under Torrens Act

1. Where the petitioner, to have his title to land registered under the provisions of the Torrens Act has signed an oath reciting that he has been duly sworn, he may not contend that the oath lacked validity under the requirement of C. S., 2384, upon the ground that the clerk of the court had not signed the jurat, and that in consequence the proceedings which followed were absolutely void, and thereafter, upon his own motion have them set aside. *Morgan v. R. R.*, 568.

DESCENT AND DISTRIBUTION.

B Person Entitled and Their Respective Shares.

b Illegitimate and Legitimized Children

1. The provisions of C. S., 279, are retroactive as well as prospective in effect, and a child born out of wedlock whose mother marries his reputed father prior to the enactment of the statute is the heir of his parents who die subsequent to its enactment. *In re Estate of Wallace*, 334.

2. C. S., 279, declaring legitimate a child born out of wedlock whose reputed father subsequently marries his mother is strictly construed as being in derogation of the common law. *Ibid.*

3. The provisions of C. S., 279, legitimizing a child born out of wedlock when his reputed father subsequently marries his mother for the purpose of inheritance from its father and mother does not extend to such inheritance from his maternal uncle dying intestate after the death of his mother through whom he claims as next of kin. *Ibid.*

4. A devise of lands by the testator to his wife for life and at her death to his and her heirs carries the title to the land upon the death of the wife to her illegitimate children as her heirs to the exclusion of his illegitimate child. C. S., 1654, Rule 9. *Battle v. Shore*, 449.

c Heirs and Next of Kin in General and Those Claiming Under Them

1. The estate of the intestate descends to his surviving brother and the children of his deceased brother living at his death, who are entitled to the distribution of the estate as his next of kin, C. S., 137(5), as also the husband of a deceased niece who was living at the death of the intestate, under the facts of this case. *In re Estate of Wallace*, 334.

C Rights and Liabilities of Heirs and Distributees.

b Advancements

1. Where a son insures his life for the benefit of his mother in case she survives him, and otherwise to his estate, and some of the premiums on the policy are paid by the insured and some by the mother, upon the prior death of the mother her administrator may not recover from the son the premiums paid by the mother on the theory that they were advancements to him to be accounted for, the arrangement appearing to be their joint enterprise. *Paschall v. Paschall*, 40.

2. An advancement is a gift *in præsenti* by a parent to a child for the purpose of advancing the latter in life, and thus for the child to anticipate the inheritance to the extent of the advancement. *Ibid.*

DIVORCE.

D Jurisdiction, Proceeding and Relief.

e Trial and Instructions

1. In an action for absolute divorce a charge in reference to the admissions of counsel that the evidence was sufficient to support an affirmative answer to the issues of marriage, separation and residence is held not equivalent to a directed verdict and not to be at variance with the provisions of C. S., 1662. *Nelson v. Nelson*, 465.

DIVORCE—*Continued.*

E Alimony.

a Pendente Lite

1. Where in proceedings by the wife to secure her subsistence and reasonable counsel fees under the provisions of 3 C. S., 1667, it is alleged that a separation agreement was procured by fraud, sufficiently pleaded, objection that the validity of the separation contract must be first determined in an independent action is untenable, the statute expressly providing that alimony may be granted "pending the trial and final determination of the issue." *Taylor v. Taylor*, 197.

DOWER.

A Nature, Rights and Incidents.

b Lands and Interests to Which Dower Attaches (See, also, Home Site A b 2).

1. Where a wife joins in the mortgage conveyance of her husband to exclude her claim for inchoate dower therein her relation to the transaction is that of surety, and should she survive him and the land is sold to satisfy the debt she becomes a creditor of the estate in the amount equal to her dower. *Blower Co. v. MacKenzie*, 152.

B Inchoate Dower.

a Nature, Rights and Incidents

1. Inchoate dower is not an estate in land but is a subsisting, substantial right of the wife in the lands of her husband during his life, possessing some of the incidents of property, and which has a present cash value capable of computation, and becomes a right of dower upon the husband's death if she survive him. *Blower Co. v. MacKenzie*, 152.

2. Where the husband's lands are sold by a receiver appointed by the court, and the husband and wife join in the receiver's deed to the purchaser, who assumes prior mortgage indebtedness thereon, and the parties agree that the wife's inchoate dower shall attach to the proceeds of the sale, the sale is not a foreclosure of the prior mortgages and the wife's right of inchoate dower attaches to the proceeds of the sale, and the cash value of the inchoate right is computable and the wife is entitled thereto as against other creditors of the husband. *Ibid.*

b Computation of Value and Inchoate Dower

1. The rule by which the present value of the wife's inchoate right of dower in her husband's lands is obtained is to ascertain the present value of an annuity for her life equal to the interest on one-third of the value of his lands to which her contingent right of dower attaches, and then deduct from the present value of the annuity for life the value of the annuity during the joint lives of herself and husband, the difference being the present value of her contingent right. *Blower Co. v. MacKenzie*, 152.

2. The value of the wife's inchoate dower in the proceeds of sale of her living husband's lands upon which there are unpaid mortgages is calculated upon the value of the entire proceeds of sale of the lands without deduction of the mortgage indebtedness assumed by the purchaser, and as the individual and joint life expectancies

DOWER B *b*—*Continued.*

according to the mortuary tables are dependent in part upon health and habits, the question of the present value of the inchoate right of dower must be submitted to a jury under proper instruction from the court unless otherwise agreed to by the parties interested. *Ibid.*

DRAINAGE DISTRICTS.

A Establishment and Maintenance.

a Validity and Construction of Statutes Creating Drainage District

1. Where proceedings for the establishing of a special taxing drainage district are referred to in a later statute and confirmed therein with an additional provision establishing its boundaries, the two being interrelated, are to be construed together by the courts when the constitutionality of the district is questioned. *Kenilworth v. Hyder*, 85.

b Boundaries of Drainage District

1. Where an incorporated town having a sewerage system is included in a special drainage district later established by statute giving defined boundaries overlapping those of the town, it is not required that those owning land within the lappage should be notified or give their consent to be also included within the boundaries of the special district. *Kenilworth v. Hyder*, 85.

2. The General Assembly of North Carolina has the power to create drainage districts without regard to the boundaries of the other political subdivisions of the State, such as county or municipal boundaries and the like. *Ibid.*

3. Where a statute creating a special drainage district includes in its expressed boundaries an incorporated town already having a drainage system, a proviso therein that no person, firm or corporation owning any water system shall be compelled to become a part of such sanitary district unless satisfactory, etc.: *Held*, the word "district" used in the proviso means "district system" and not the boundaries of the area, and does not operate to relieve those living in such section from the drainage assessments. *Ibid.*

B Assessments and Special Taxes.

a Constitutionality and Validity of Assessments

1. A statute which authorizes the laying off of a drainage district with power given the trustees provided therein to lay an *ad valorem* tax for its construction and maintenance is not unconstitutional for failing to provide that notice be given the owners of land situate therein that the lands will be included within the area or of the amount of the taxes to be levied or the specific purpose therefor. *Kenilworth v. Hyder*, 85.

2. A statute creating and designating the boundaries of a drainage district and providing taxation for its construction and maintenance is for a necessary purpose and does not fall within the purview of the State Constitution, Art. VII, sec. 7, requiring its submission to the voters within the district, nor is it a local, private or special act relating to health or sanitation inhibited by our Constitution, Art. II, sec. 29. *Ibid.*

DRAINAGE B *a—Continued.*

3. The creation by statute of a special drainage district with the power to levy an *ad valorem* tax therein for its construction and maintenance is not a taking of property within the purview of our Constitution, Art. I, sec. 17, and does not fall within the intent and meaning of the due process clause, Federal Constitution, Art. XIV, sec. 1. The distinction between taxation of this character and assessments pointed out by ADAMS, J. *Ibid.*

4. Where some of the citizens of an incorporated town having a sewerage system therein have their property also included in a special taxing drainage district defined and created by statute, the constitutionality of the later act may not be successfully questioned on the grounds either of double taxation or a taxation without benefit received. *Ibid.*

DUE PROCESS see Constitutional Law I.

EASEMENTS.

A Creation.

a By Prescription

1. Evidence that paths on a tract of land were intermittently and permissively used by tourists and others is insufficient to create an easement on the lands. *Gruber v. Eubank*, 280.

EJECTMENT.

C Pleading and Evidence.

b Evidence of Title in General

1. A paper-writing expressing that the deceased signer lets O. have certain described property at the signer's death, O. to keep all buildings in good condition, and at the death of O. "this property goes back" to the signer's estate is inoperative as a deed, as it contains no apt word of conveyance and not being under seal, or as a will or as a lease or contract specifically enforceable, and will not be received in evidence in an action in ejectment. *Walker v. Owens*, 412.

2. The recitations in a deed made by the administrator of the deceased's common source of title, that the grantee therein had paid the full purchase price, though the deed is void because of the lack of proper registration under the provisions of our statute, C. S., 91, it is competent in evidence to show an equitable title in the grantee therein. *Sears v. Braswell*, 515.

ELECTION OF REMEDIES.

a When Election May or Must Be Made

1. Where fraud is alleged in the transaction wherein a mortgage is given on lands involving the assumption thereof by a grantee of the equity of redemption, and there is evidence tending to show that the defendant by his acts and conduct with knowledge of the alleged fraud received the benefits: *Held*, he was put to his election within a reasonable time after he discovered the fraud or should have done so in the exercise of reasonable diligence, to disaffirm his contract, and where he has not done so, and has received the benefits under

ELECTION OF REMEDIES *a—Continued.*

the contract he may not successfully maintain his suit to cancel the contract, and ordinarily this is not open to him unless he is in a position to put the plaintiff in *statu quo*. *Brown v. Osteen*, 305.

ELECTIONS.

D Qualification of Voters.

c Registration

1. Failure to administer an oath to voters applying for registration does not result in a forfeiture of their right to vote, nor does their registration by third persons necessarily work a disqualification. *Glenn v. Culbreth*, 675.

2. Where it is alleged that the registration of voters in a primary municipal election was irregular and fraudulent, and the plaintiffs seek *mandamus* to compel a proper registration, and the statute under which the election is to be held provides for challenge to voters so registered: *Held*, *mandamus* being a proceeding in equity will not be issued, there being an adequate remedy at law by way of challenge provided by statute. *Ibid.*

I Action to Try Title to Office.

a Right of Action, Form of Action, Parties, Procedure and Jurisdiction

1. Where the plaintiffs, residents of a city, institute an action praying that the use of the registration for a primary election be enjoined and that *mandamus* issue for a new registration, and a temporary restraining order issued therein has been dissolved, and the election has been held, an appeal from the dissolution of the temporary restraining order, if decided in favor of the appellants, would be in effect an action to try title to office, which cannot be done by *mandamus*, the proper remedy being *quo warranto*. *Glenn v. Culbreth*, 675.

2. It is not required that a resident taxpayer and qualified voter of a municipality be a competitor of the present incumbent in an election to the municipal office in order for him to be a relator with the approval of the Attorney-Gnereal of the State in proceedings in the nature of *quo warranto*. C. S., 869, 870. *Bouldin v. Davis*, 731.

3. The jurisdiction of the courts to entertain action in the nature of *quo warranto* existed at common law and does not exclusively rest by statute, and where a municipality is authorized by certain provisions in its charter to determine the result of an election held for the election of its own officers, recount of the votes, etc., it does not oust the jurisdiction of the Superior Court to entertain original jurisdiction of the proceedings in the nature of *quo warranto* to try the disputed title to the office of one of its officials. C. S., 869. The provisions of the Federal and State Constitutions having reference respectively to the rights of Congress and the State Legislature to determine the rights of contestants to seats in the respective bodies have no application. *Ibid.*

4. In this case *held:* that a provision in the charter of a municipal corporation giving to the city commissioners the authority and right to determine the question of a contested election of one of its officers did not attempt to deprive the Superior Court of its jurisdiction, or

ELECTIONS I *a—Continued.*

make it derivative or subordinate to the action of the municipal authorities, but at most to provide a cumulative remedy. As to whether the Ligislature may by statute deprive the courts of their original jurisdiction in proceedings in the nature of *quo warranto* to determine title to office, *quære? Ibid.*

d Appeal and Review

1. Where there is no allegation or finding of fact by the trial judge that irregularities complained of in the registration of voters would have affected the result of an election, an appeal from his order dissolving a temporary order restraining the use of the registration will not be disturbed on appeal. *Glenn v. Culbreth*, 675.

ELECTRICITY (Power of municipal corporation to manufacture and sell current see Municipal Corporations B d).

A Duties and Liabilities in Respect Thereto.

a Degree of Care Required in Respect Thereto

1. A company engaged in the transmission of deadly electric currents by wires strung on poles is held to a high degree of care in the maintenance of this equipment commensurate with the danger, and its failure in this duty renders it liable in damages for injuries proximately caused thereby. *Arrington v. Pinetops*, 433.

b Trespassers, Licensees, and Attractive Nuisances

1. Where the defendants in an action for the negligent killing of plaintiff's intestate are guilty of negligence proximately causing the injury, in impairing and failing to properly maintain a power line, they may not avoid liability on the ground that plaintiff's intestate was a trespasser when the father of the plaintiff's intestate rented and cultivated a field eleven steps from the power line, and his child was killed by coming in contact with a wire permitted to remain five feet from the ground, the doctrine of attractive nuisances applying under the facts of this case. *Arrington v. Pinetops*, 433.

c Duty to Inspect and Repair Lines, etc.

1. Where an incorporated town owns and maintains its own poles and wires for the transmission of electricity from another town from which it buys its power, and there is conflicting evidence that it permitted one of its poles carrying a high voltage wire to remain for a month or more fallen so that the wire hung only five feet from the ground, the question of whether the town, in the exercise of due care, should have discovered and made the necessary repairs is for the jury, and is properly submitted to them upon the issue of its secondary liability in an action against the town and the company impairing the power line for the negligent killing of the plaintiff's intestate. *Arrington v. Pinetops*, 433.

d Acts of Third Persons and Their Liability

1. Where there is evidence tending to show that a company authorized to do so entered on the land upon which power lines were maintained, and excavated sand and gravel therefrom, and in so doing, undermined one of the poles upon which transmission wires were strung so that the pole slipped down until the wires hung about five feet from the ground at a place where it could be reasonably antici-

ELECTRICITY A *d—Continued.*

pated injury would likely result, and that the company left the wires in this dangerous condition, and that a child caught hold of one of the wires and was killed thereby: *Held*, the evidence was sufficient to take the case to the jury upon the issue of the defendant's actionable negligence. *Arrington v. Pinetops*, 433.

B Regulation and Control of Power Companies.

a Right to Force Power Companies to Sell Current for Resale at Retail

1. Where an electric power company has not held itself out or furnished other distributing lines electricity for redistribution or resale to the latter's customers, it may not be compelled to do so by mandamus, as it has the right to restrict its services to the consumers of electricity alone when not discriminatory against distributors. *Electric Co. v. Light Co.*, 766.

EMINENT DOMAIN (Power of county board of education to exercise see Schools and School Districts B a.

B Delegation of Power.

a Agencies for Exercise of Power for Acquisition of Lands by the State

1. Under the provisions of chapter 48, Public Laws of 1927, the North Carolina Park Commission is neither a body politic nor corporate in the ordinary sense, but an agency of the State clothed with the power of eminent domain to be exercised in behalf of the State and in its name, and a demurrer to the petition of the State in condemnation of lands for the purposes of act, on the ground that the commission and not the State was the proper party, is bad. *S. v. Lumber Co.*, 4.

2. The verification of a petition, in a proceeding to condemn land for the purpose of a park authorized by chapter 48, Public Laws of 1927, to restrain cutting of timber on land sought to be condemned, is properly made by the chairman of the North Carolina Park Commission. *Ibid.*

C Compensation.

b Right to Compensation for Lands Taken and Evidence of Value

1. Where the opinion of a witness upon the value of land condemned by a town is based upon his knowledge of the value of lands situated nearby, the competency of the testimony depends upon the evidence introduced tending to show the value in the one place was sufficiently similar to that in the other, and the question is for the jury. *Ayden v. Lancaster*, 556.

2. Where a witness has testified in condemnation proceedings by a town for an addition to its cemetery with reference to the damage the owner has sustained by its taking, and on cross-examination makes inconsistent answers as to the correct basis of his opinion, his testimony is for the jury upon the credibility of the witness. *Ibid.*

3. Where on appeal from the levy of assessments for street improvements involving also the issue of compensation for land taken in condemnation proceedings, it is competent for the owner of the land, for the purpose of impeachment, to cross-examine the city's

EMINENT DOMAIN C *b—Continued.*

witness, an appraiser in the proceedings, as to the amount allowed other adjacent owners in the same proceedings when a sufficient similarity as to the comparative value of the lands taken is shown. *Greensboro v. Bishop*, 748.

c Right to Compensation for Injuries or Depreciation of Land Adjacent to Land taken and Evidence of Damage

1. Plaintiff is not entitled to nominal damages in an action against a city for the constructive taking of property by depreciating its value by its sewerage disposal plant when the city has the right of eminent domain and the jury has found that no actual damage was sustained. *Black v. Bessemer City*, 195.

2. Where a civil engineer has testified as to the area of the land petitioned by a city to be taken for an addition to its cemetery, it is but a matter of calculation as to how many cemetery lots of the usual size could be made therefrom, and testimony thereto is competent, taken with other evidence in the case, as to the damage to the value of other contiguous lands of the owner. *Ayden v. Lancaster*, 556.

3. The evidence of the depreciation in value of the owner's lands contiguous to that taken in condemnation proceedings by a town as an addition to its cemetery, it is competent for a civil engineer who has made a survey to testify from his own observations that the owner could have divided his land into lots along a certain extended street but for the condemnation. *Ibid.*

d Special Benefits

1. Where assessments for special benefits against property abutting a street sought to be improved have been levied by the commissioners and regularly confirmed by the municipal governing body in accordance with statutory provisions, the action of the commissioners is ordinarily conclusive, and the owner of the property so assessed is not entitled to have an issue submitted to a jury to fix the amount of such assessment to be charged against his property in the absence of an allegation of bad faith, or arbitrarily conduct, or abuse of discretion, or wilful misconduct on the part of the governing body, or gross injustice, or that the assessments were confiscatory, and his appeal without such allegations or evidence supporting them will be dismissed. *Greensboro v. Bishop*, 748.

e Measure and Amount of Damages

1. Where lands of the owner are taken by a town for an enlargement of its existing cemetery, compensation therefor should be awarded for the market value of the land appropriated and for the depreciation in value of other contiguous lands of the owner naturally and proximately resulting from the particular use to which the land taken is to be put, less the special benefits accruing therefrom. *Ayden v. Lancaster*, 556.

D Proceedings to Take Property.

d Judgments

1. The judgment in condemnation proceedings by a town against private lands should describe the land appropriated with certainty and

EMINENT DOMAIN D *d—Continued*

set forth the rights of the petitioner to the land and easement, and that upon the payment of the amount assessed the title of the petitioner shall become absolute. *Ayden v Lancaster*, 556.

ESTATES (Creation of, see Wills E b, Deeds and Conveyances C c).

A Nature and Incidents of Estates Generally.

b Equitable Estates

1. An equitable estate in lands is descendible and alienable in the same manner as legal titles. *Sears v. Braswell*, 515.

2. Under our Constitution equitable rights are not destroyed, but are administered in one court, though the distinction between actions at law and suits in equity is abolished. *Ibid.*

C Merger of Estates.

a Merger of Legal and Equitable Estates

1. Upon the payment of the purchase price of certain land according to the terms of a contract to convey it, the legal and equitable titles merge in the purchaser. *Sears v. Braswell*, 515.

ESTOPPEL.

A By Deed.

a Creation and Operation in General

1. Where the interest of a contingent remainderman under a will has been divested by the happening of the contingency, the remainderman who takes the lands by purchase under the will is not estopped by a deed of the life tenant and the contingent remainderman from setting up his title as against the grantee therein. *West v. Murphy*, 488.

B By Judgment (Judgments operating as bar to subsequent action see Judgments L b).

a Creation and Operation in General

1. Where the purchaser of lands at a judicial sale insists on confirmation and appeals from an adverse judgment, he may not thereafter maintain the inconsistent position on another appeal in the same case that the sale should not be confirmed. *Harvey v. Knitting Mills*, 177.

EVIDENCE (Of negligence see Negligence, Master and Servant C, D, Railroads D, Highways B—In criminal cases see Criminal Law G, Homicide C c, G, and Particular Crimes—In ejectment see Ejectment C—In condemnation proceedings see Eminent Domain C—In caveat proceedings see Wills D h—Competency of ancient documents see Lost or Destroyed Instruments A a 1—Of conspirators see Criminal Law G k, Conspiracy A b—Newly discovered evidence see New Trial B g—Upon nonsuit see Trial D a).

A Judicial Notice.

a Legislative Acts and Proceedings Thereunder

1. The Supreme Court will take judicial notice on appeal of the appointment of a certain person as a special judge under the provisions of chapter 137, Public Laws 1929. *Greene v. Stadiem*, 472.

EVIDENCE—*Continued.*

C Burden of Proof see Criminal Law G a, Homicide G b, Insurance P c, Contracts F b.

D Relevancy, Materiality and Competency.

b Transactions and Communications with Decedent

1. Testimony of a party interested in the result of the action that the deceased predecessor of the common source of title of the parties had agreed as to the boundary of the lands in dispute preliminary to making the deeds, that the deceased had the lands surveyed and that the witness saw the deceased mark the boundary claimed by him as controlling the description given in the deeds later made, is that of a transaction or communication between the witness and a deceased person prohibited by C. S., 1795, and its exclusion on the trial is not error. *Pool v. Russell*, 246.

2. Evidence of the declarations of a deceased partner tending to show that the deceased partner made an agreement with plaintiff that check given for a disputed account and marked thereon balance on account was not to be taken as full settlement is incompetent as a transaction or communication with a deceased person prohibited by C. S., 1795. *Walston v. Coppersmith*, 407.

3. In order to "open the door" for the admission of evidence of transactions or communications with a deceased person, prohibited by C. S., 1795, such evidence must relate to the particular subject-matter of the evidence testified to by the adverse party, or the same transaction, and the door is not necessarily opened to all transactions or fact situations growing out of the controversy. *Ibid.*

4. Where some of the witnesses in an action in ejectment are not interested in the event, their testimony does not fall within the intent and meaning of the statute, C. S., 1795, disqualifying a party interested in the event from testifying as a witness in his own behalf as to transactions or communications with a decedent, and the exclusion of their testimony tending to show the tenancy of a decedent under whom one defendant claims as adverse possessor, is reversible error entitling the plaintiff to a new trial. *Pitman v. Hunt*, 574.

c Facts in Issue and Relevant to Issues

1. Letters that do not relate to the matters in controversy are properly excluded as evidence. *Connor v. Mfg. Co.*, 66.

2. Where the plaintiff seeks to enjoin the foreclosure of a mortgage, a conversation between himself and defendant that is evidence of the indebtedness that plaintiff denies, is competent. *Ibid.*

e Privileged Communications

1. Upon the trial under an indictment for the seduction of an innocent and virtuous woman, C. S., 4339, a statement by the prosecutrix to a physician, whom she had consulted, tending to show that she was not innocent or virtuous at the time of the alleged seduction, does not fall within the principle of a privileged communication between physician and patient when made by her after this relationship has

EVIDENCE D *c—Continued.*

ceased, C. S., 1798, and its rejection as evidence by the court is reversible error to the defendant's prejudice, entitling him to a new trial. *S. v. Wade*, 571.

F Admissions.

b By Parties or Others Interested in the Event

1. Where the evidence is sufficient to sustain an action for a negligent personal injury, the defendant's acts of mercy in taking the plaintiff to a hospital after the injury and paying the bill cannot be imputed as an admission of liability for damages. *Norman v. Porter*, 223.

c Admissions in Pleadings and Introduction in Evidence

1. Under the facts of this case: *Held*, exceptions to the introduction in evidence of the pleadings as admissions of the parties are untenable under the decision of *Weston v. Typewriter Co.*, 183 N. C., 1, and other cases cited. *Morrison v. Finance Co.*, 322.

I Documentary Evidence.

b Accounts, Records, Private Writings and Letters

1. Where a finance company is sued for fraudulent representations of its financial condition in procuring a sale of its shares of stock to the plaintiff, exceptions to the introduction of some of its books relative to the inquiry and used by both parties in the examination and cross-examination of the secretary of the company as a witness will not be sustained as error. *Morrison v. Finance Co.*, 322.

2. Upon the issue of fraudulent representations inducing the plaintiff to subscribe for stock in a corporation, letters of general circularization, purporting to have been signed by the corporation's president and received by the plaintiff, having a material relation to the determination of the issue, are improperly introduced in evidence upon the trial when not further identified as issued by the company, but where the subject-matter of the letters is proved by competent evidence the error is harmless. *Ibid.*

J Parol or Extrinsic Evidence Affecting Writings see Bills and Notes D b.

K Expert Testimony (In criminal cases see Criminal Law G i).

b Subjects of Expert Testimony

1. In an action to recover damages for an alleged personal injury it is competent for the attending physician to testify as to what his patient told him of his symptoms and physical condition at the time of the physician's examination. *Bryant v. Construction Co.*, 639.

c Qualification and Competency of Experts

1. Whether a witness is competent to testify as an expert is a question primarily addressed to the sound discretion of the trial court, and his decision is ordinarily conclusive, and where an X-ray photograph of an injury bearing upon an issue involved in the action depends upon the explanation of an expert to make it understandable to the jury, the finding of the trial court that the witness was not qualified as an expert to give the explanation and excluding the photograph offered will not be disturbed on appeal. *Liles v. Pickett Mills*, 773.

EXECUTION (Right of subsequent judgment creditor to subject surplus after foreclosure to judgment see Mortgages H 1 1).

K Execution Against the Person.

a Wilful and Wanton Injuries

1. Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper. C. S., 768, 673. *Foster v. Hyman*, 189.

2. Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: *Held*, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper. C. S., 768, 673. *Ibid.*

3. An act causing injury to person or property is wilfully done when it is done purposely and deliberately in violation of law, and wantonly done when done recklessly, manifesting a reckless indifference to the rights of others, but wilfulness may be constructive, and where the wrongdoer's conduct is so reckless as to amount to a disregard for the safety of others it is equivalent to actual intent. *Ibid.*

EXECUTORS AND ADMINISTRATORS (Descent and distribution see Descent and Distribution—Estates created see Wills E).

A Appointment, Qualification and Tenure.

d Designation or Appointment of Executors

1. Where a letter written by a deceased person to his brother is proven as the holographic will of the deceased, it is not necessary that the writing specifically make use of the word "executor" if the terms employed in the letter confer the powers of executor upon the person addressed. *Dulin v. Dulin*, 215.

D Allowance and Payment of Claims.

a Liability of Estate on Expressed or Implied Contracts to Pay for Services Rendered Deceased

1. Evidence that the deceased's mother had told the witness, her son, in plaintiff's absence, that 'whoever waited on her should have all that she had" is too vague and indefinite to constitute an express contract to pay her daughter for services rendered, and the daughter may not recover thereon, after her mother's death, against the administratrix. *Staley v. Lowe*, 243.

2. An adult child living with her mother as a part of the family, and rendering services to her cannot after her mother's death recover their value upon a *quantum meruit*, it being assumed that the services were rendered gratuitously in the absence of evidence to the contrary, and the mere rendition of the services is insufficient evidence of an expectation of payment on one hand and the intention to pay on the other, and the mere moving from the old family

EXECUTORS AND ADMINISTRATORS D *a—Continued.*

home to a new home without evidence of a change in the relationship is insufficient to change this result, and defendant's motion as of nonsuit is properly granted. *Ibid.*

b Other Liabilities of Estate

1. An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself, C. S., 5362. The provisions of C. S., 91, as to the order of payment of debts of the deceased has no application. *Caraway v. Barnett*, 511.

E Sales and Distribution of Estate.

a Power to Sell for Distribution

1. The power given in a will to an executor to divide the estate among the beneficiaries therein named implies the power to sell and convey both the real and personal property when necessary to effectuate the intent of the testator as gathered from the instrument. *Dulin v. Dulin*, 215.

FALSE PRETENSE.

A Elements of Crime and Grounds for Civil Liability.

b Deception and Damage

1. In order to constitute the crime of false pretense it is required that the representations alleged to be false were relied upon, and under the evidence in this case it is held the action should have been dismissed. *S. v. Poe*, 601.

d Misrepresentation of Past or Subsisting Fact

1. Where the owner of land employs agents to subdivide and sell it at public auction, and there is an existing registered deed of trust on the land of which the selling agents had knowledge, and at the sale the selling agents stated that "we guarantee a good, clear title and no encumbrance" to purchasers, the statement of the agents was not a representation that there was no encumbrance on the land, but a promissory statement that the lots would be conveyed to the purchasers with a covenant against encumbrances, and where the owner delivers to the purchasers such a deed, but fails to apply the proceeds of the sale received by him to the deed of trust, and the land is sold under foreclosure thereof, a purchaser at the auction sale may not recover against the selling agents on the representation made by them. *Shoffner v. Thompson*, 664.

FEDERAL EMPLOYERS' LIABILITY ACT see Master and Servant E.

FOOD.

A Liability of Manufacturer for Injury to Consumer.

a Deleterious and Foreign Substances

1. In his action to recover damages resulting from foreign and deleterious substances in a bottled drink the burden is on the plaintiff to show the presence of foreign or deleterious substances therein, and where the plaintiff's evidence is to the effect that he swallowed

FOOD A *a—Continued.*

something and spit, and that where he spit a fly was immediately found, but that he could not swear that the fly was ever in his mouth, with evidence of another witness that he had found a substance in a drink bottled by the defendant, but could not swear in what year he found it, the plaintiff's evidence is too vague and indefinite to establish the defendant's negligence, and his motion as of nonsuit should have been granted. *Reece v. Bottling Co.*, 661.

FOOT TRACKS see Criminal Law G p.

FRAUD (Election of remedies see Election of Remedies—Cancellation of instruments for fraud see Cancellation of Instruments A b—Fraudulent conveyances see Fraudulent Conveyances—False pretense see False Pretense—Presumption of Fraud from sale of equity by mortgagor see Mortgages F c).

B Right of Action and Defenses.

c Ratification

1. Where in an action to recover for material furnished the contractor for the erection of a building, involving the liability of the surety on the contractor's bond, the defense of fraud in the procurement of the bond was pleaded, to which the plaintiff replied alleging a compromise by the surety and owner in a certain sum, to which last pleading a demurrer was interposed on the ground that it set up a new cause of action: *Held*, the alleged compromise being for the benefit of the material furnishers who were protected by the bond, it enured to their benefit, and was a ratification of the surety's liability on the original bond, and the demurrer was bad: and, *Held further*, the interpretation of the compromise agreement was not before the Supreme Court on this appeal. *Glass Co. v. Hotel Corporation*, 10.

FRAUDS, STATUTE OF.

A Promise to Answer for Debt or Default of Another.

a Applicability and Defenses

1. Where a grantor makes deed to one of the defendants for the benefit of the others, at their request and for their convenience, and a prior mortgage debt is assumed by the grantee therein, who later makes a deed to the other defendants in which the prior mortgage was assumed by them: *Held*, in the original grantor's action on the mortgage debt to recover against the defendants for whose benefit the grantee defendant took title, the statute of frauds does not apply since each of the defendants had a pecuniary interest in the transaction. C. S., 987. *Coxe v. Dillard*, 344.

FRAUDULENT CONVEYANCES.

A Transfers and Transactions Invalid.

j Knowledge and Interest of Grantee

1. Where a father having a remainder in land after a life estate conveys by deed his interest in the land to his children, and in an action to set aside the deed for fraud against a creditor of the father the jury finds that there was no consideration for the deed, the fact that the children were not of sufficient age to have participated in the fraud is immaterial. *Rhodes v. Tanner*, 458.

GIFTS (By party to marriage promise contract see Marriage Promise B a).

A Inter Vivos.

a Requisites and Essentials

1. To constitute a gift of personal property *inter vivos* there must be actual or constructive delivery of the thing given with the present intent to pass the title to the donee. *Harrell v. Tripp*, 426.

b Construction of Transaction as a Gift Inter Vivos

1. A certificate of deposit issued by a bank in the name of the husband, payable to his or his wife's order on return of the certificate properly endorsed, creates an agency in the wife to withdraw the money which is revoked at the death of the husband, and does not operate as a gift *inter vivos*. *Jones v. Fullbright*, 274.

GUARDIAN AND WARD (Liability of ward's estate on his contract see Infants B a 4).

C Custody and Care of Ward's Person and Estate.

a Liability of Guardian and Surety for Loss to Estate in General

1. The liability of a guardian and the surety on his bond for a loss to the estate of the ward caused by the failure of a bank in which the guardian kept deposits of the estate, does not attach when it is found that the guardian exercised good faith and due diligence, and the refusal of the trial court to substantially submit this issue to the jury under the evidence in this case is reversible error. *Pierce v. Pierce*, 348.

HEALTH see Drainage Districts.

HEIRS see Descent and Distribution.

HIGHWAYS (Preventing use of public way as trespass see Trespass A c).

A State Highway Commission.

a Powers of Highway Commission in Regard to Location, Abandonment, etc., of Highways

1. The State Highway Commission is given exclusive authority by statute to eliminate and close grade crossings of railroad tracks on the highway, and when it has so closed a grade crossing and substituted an underpass in the interest of public safety, 3 C. S., 3846(j), 3846(7), the commissioners of a county are without power to order the grade crossing abandoned by the Commission reopened to the public, and this power is not given the county by C. S., 3846 (e 5), authorizing the county commissioners to reincorporate into the county systems any portion of highway abandoned by the State Highway Commission. See, also, the declaratory statute ratified 18 March, 1929. *Rockingham County v. R. R.*, 116.

B Use of Highway and Law of the Road.

c Speed on Highway

1. The operating of an automobile upon a public highway or street at a speed in excess of the limit fixed by law is negligence *per se*. *Whitaker v. Car Co.*, 83.

HIGHWAYS B *c—Continued.*

2. Negligence in exceeding the legal speed limit on a public highway or street is insufficient for a recovery of damages unless there is a causal connection between the breach of duty imposed by law and the injury complained of. *Ibid.*

g Contributory Negligence

1. Where the action for damages arising from the defendant's truck and trailer being nearly across a public road near the corporate limits of a town at night without lights, etc., in violation of C. S., 2615, and the plaintiff's own evidence shows that his collision therewith was caused by his excessive speed in driving his motorcycle through rain and partial sleet, and that otherwise he could have passed in safety: *Held*, notwithstanding the defendant's negligence, the plaintiff's own evidence disclosed contributory negligence barring his recovery, and defendant's motion as of nonsuit was properly granted. *Davis v. Jeffreys*, 712.

h Pleadings in Action for Injury Caused by Negligence on Highway

1. Allegations in the complaint liberally construed that the defendant's driver of its truck, acting within the scope of his employment and in furtherance of his master's business, stopped the truck he was driving on a dangerous place on the highway on top of a hill near a curve in the road, at night, that he turned off the rear light of the truck and turned it on again when he heard an automobile approaching, and that the plaintiff's intestate was guiding a car being towed by the car heard by the driver of the truck, and that the light on the truck was turned on too late for the intestate to see the danger and guide his car in safety behind the lead car: *Held*, the allegations of actionable negligence against the defendant are sufficient against a demurrer. *Lee v. Produce Co.*, 714.

HOME SITE.

A Nature and Extent and Rights Therein.

a Property Constituting Home Site

1. Where a mortgagor of lands at the time of the execution of the mortgage is in possession of a certain part thereof on which, with the usual outbuildings, he lives with his family as a home, such land is a "home site" within the meaning of C. S., 4103, and held in this case that a 54.75 acres of farm land is not excessive for the purpose. *Boyd v. Brooks*, 644.

b Conveyance or Mortgage of Home Site and Rights of Parties Thereunder

1. Where the wife does not join in a mortgage made by her husband on the statutory "home site" in his lands, or have her privy examination taken as required by statute, the mortgagee takes subject to the provisions of C. S., 4103, and the purchaser at the foreclosure of such mortgage sale does not acquire under his deed the right to immediate title or possession to the land. *Boyd v. Brooks*, 644.

2. C. S., 4103, limits the effect of the conveyance of a "home site" by a husband's deed or mortgage made without the privy examination of the wife, but does not make the conveyance void, and the effect of the statute is to postpone the title and the right of possession of

HOME SITE—A *b—Continued.*

the "home site" under such deed until the death of the husband, when it then passes to the grantee subject only to the dower right of the wife if she survives him. *Ibid.*

HOMESTEAD.

D Abandonment, Waiver of Forfeiture.

a Agreements to waive

1. A promise on the face of a note to waive the homestead exemption and to pay attorneys' fees in its collection is not enforceable in this State. *Howell v. Robertson*, 572.

HOMICIDE.

A Homicide in General.

a Elements of and Distinctions Between First and Second Degree Murder

1. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation; while murder in the second degree is the unlawful killing of a human being with malice, the presence in one case of premeditation and deliberation being the distinguishing difference between these two grades of an unlawful homicide. *S. v. Miller*, 445.

B Murder.

a Murder in the First Degree

1. Where there is evidence that the prisoner had been engaged in manufacturing intoxicating liquors in violation of statute and had threatened to kill any officer who attempted to arrest him, particularly the deceased, and this threat was made known to the deceased, who was killed by the prisoner in a gun battle on the street while the deceased was attempting to arrest the prisoner under a valid warrant: *Held*, the evidence of deliberation and premeditation is sufficient to sustain a verdict of guilty of murder in the first degree. *S. v. Miller*, 445.

2. Where one with a previously fixed purpose to kill an officer if the officer attempted to arrest him, voluntarily intoxicates himself to carry out his purpose, or deliberately brings on the difficulty when the officer attempts to arrest him under a valid warrant, and kills the officer according to his previously fixed design, the law will not mitigate the offense, but pronounces his crime murder in the first degree. *Ibid.*

C Manslaughter.

a Negligence of Defendant

1. One driving an automobile on a public highway while drunk, recklessly and in disregard of statutes for the regulation of automobiles thereon, resulting in death to another, is guilty at least of manslaughter without reference to whether he intended to inflict injury or not. *S. v. Palmer*, 135.

2. Where the injury to another would not have occurred except for the criminal negligence of the defendant in violating the safety statutes regulating the operation of automobiles upon the public highway, he is not relieved of guilt by the fact that he did all that he rea-

HOMICIDE C *a—Continued.*

sonably could to avoid the injury at the time of the occurrence under the existing conditions, provided his inability to stop was due to his prior recklessness. *Ibid.*

b Negligence of Deceased

1. One may not be convicted for driving an automobile upon a public highway in violation of safety statutes when the negligence of the injured person is the sole proximate cause of the injury, but it is otherwise if the concurring negligence of both combined was the proximate cause. *S. v. Palmer*, 135.

2. Where in a prosecution for manslaughter for the negligent killing of the deceased through the reckless driving of an automobile, the defense is interposed that the deceased met her death through her own negligence in unexpectedly running in front of defendant's car under circumstances making it impossible for him to avoid striking her: *Held*, the defendant is entitled to show as a complete defense that the death was caused by the act of the deceased and not by his negligence, and an instruction that denies him this right is reversible error to his prejudice entitling him to a new trial. The doctrine of contributory negligence does not apply. *S. v. Eldridge*, 626.

c Evidence in Prosecutions for Manslaughter

1. Evidence that the defendant while driving on a public highway stopped at a filling station and came out with a bottle of whiskey, from which he took two or three drinks, and that later one of the passengers got out of the automobile because of fear of the defendant's reckless driving, is admissible as substantive evidence and also as corroborative of other evidence of his reckless driving in a prosecution for manslaughter. *S. v. Palmer*, 135.

G Evidence.

a Weight and Sufficiency

1. Circumstantial evidence of the prisoner's guilt of murder in the first degree is held under the facts of this case sufficient to be submitted to the jury. *S. v. Fox*, 478.

2. Circumstantial evidence that the deceased was killed with a stick identified as that carried by one of the defendants; that at the time of the killing the deceased had large amounts of money on his person; that neither of the defendants had money immediately before, but had money thereafter on the night of the killing, with circumstances tending to show a division of the particular money of which the deceased was robbed, and the identity of the pocketbook of the deceased as that seen soon after the killing in the possession of one of the defendants, foot tracks of two persons, one identified as having been made by the boots of one of the defendants; that one of the defendants was seen talking to the deceased just before the killing, is *held*, with other circumstantial evidence in this case, sufficient to be submitted to the jury and to sustain a verdict of guilty as to both defendants of murder in the first degree, the one as the actual perpetrator of the crime and the other as aiding and abetting therein. *S. v. McKinnon*, 576.

HOMICIDE G *a—Continued.*

3. Where the evidence of the State is sufficient to be submitted to the jury on the question of defendant's guilt of murder in the second degree, motive for the killing is not an essential element of the State's case without which a conviction may not be had. *S. v. Allen*, 684.

4. Where the evidence in a trial for homicide tends to show that the prisoner and the deceased were seen talking together immediately before the latter was shot, and the deceased just after being shot said some one had shot him, but that he did not know who, and that the prisoner appeared in a neighboring house soon after the shooting, commented upon the fact that a man had been shot, and was anxious about having a pistol with him which he hid in consequence, and shells of the kind used in the pistol he had had and of the same size were found at the place of the killing, is upon the facts of this case held sufficient to be submitted to the jury and sustain a verdict of guilty of murder in the second degree. *Ibid.*

b Presumptions and Burden of Proof

1. The presumptions from the use of a deadly weapon in committing a homicide are that the killing was unlawful and that it was done with malice, which constitutes murder in the second degree, and in order for such homicide to constitute murder in the first degree the State must show beyond a reasonable doubt that it was done with premeditation and deliberation. *S. v. Miller*, 445.

H Trial.

a Instructions

1. Upon the trial for a homicide, where the evidence tends to show that another struck the blow resulting in death, and that the defendant struck a blow which was not mortal, and the inference is not permissible from the evidence that they acted in concert, or that the two blows were struck at the same time, an instruction that is capable of the interpretation that if the other person struck the mortal blow the defendant would be guilty, is error prejudicial to the defendant entitling him to a new trial on appeal. *S. v. Barber*, 554.

HOSPITALS (Right to recover money received by patient for hospital expenses under judgment against *tort-feasor* see Money Received A a).

B Charitable Hospitals.

b Liability to Employees

1. A charitable hospital not operated for gain, but only for benevolent purposes, is liable in damages for a negligent injury inflicted by it on an employee as distinguished from a patient therein. *Cowans v. Hospitals*, 41.

HUSBAND AND WIFE (Marriage promise see Marriage Promise—Divorce and alimony see Divorce—Dower see Dower—Home site see Home Site—Deposit payable to wife not gift see Gifts A b 1).

A Abandonment of Wife and Children.

a Elements of the Crime

1. Where the defendant is indicted under C. S., 4447, for failure to provide adequate support for his minor children, and in the prosecu-

HUSBAND AND WIFE A *a—Continued.*

tion of the action the evidence tends to show that the defendant and his wife were living apart and that he had not provided any support for his minor children for some time, and that a judgment had been entered in a civil action by the wife awarding all his personalty except his personal belongings, and that he had transferred his realty to his daughter for the support of the wife and minor children, there is no presumption of wilfulness from the failure to provide adequate support, C. S., 4448, and an instruction that leaves out this essential element of the crime will be held for reversible error. S. v. Roberts, 662.

d Judgments

1. A judgment that the defendant be confined in the common jail for one year upon each count in the indictment, the term under one count to begin at the expiration of the term under the other, the judgment to be fully satisfied at the expiration of both terms, with provision that the judgment be suspended upon the payment to his abandoned wife and children certain monthly sums for a definite period and the giving of a bond for compliance therewith, is in this case held to be sufficiently certain and definite in its terms. *S. v. Vickers,* 62.

B Rights, Duties and Liabilities (wife's liability on note under seal see Bills and Notes A a 2).

c Wife's Right of Action for Injuries to Husband, Loss of Consortium, Expenses, etc.

1. A wife may recover from one who has negligently injured her husband such moneys as she has been required to pay from her separate estate by reason of his sickness or incapacity so caused, but she may not recover for nursing him, or loss of consortium, or mental anguish, or loss of support and maintenance, or for damages he or his personal representative might recover in an action against the *tort-feasor. McDaniel v. Trent Mills,* 342.

E Alienation.

b Right of Action, Defenses, and Burden of Proof

1. Where in an action by a wife against the step-father and brother of her husband for the alienation of her husband's affections, the evidence introduced by the wife fails to show any malice or ill-will of the defendants toward her or that the defendants did anything to alienate the affections of the husband or cause him to separate himself from her and continue to live apart from her, but tends to show that his separation was caused by a groundless delusion due to his mental condition, with further evidence that the husband lived with the defendants after the separation, is insufficient to be submitted to the jury, and a nonsuit should be granted, the law not imputing any purpose to injure the plaintiff from the fact that the defendants allowed the husband to live with them after the separation. *Townsend v. Holderby,* 550.

2. In an action by a wife against the step-father and brother of her husband for alienating her husband's affections, and causing him to continue to live apart from her, the burden is upon her to prove these matters when alleged by her and denied by the defendants. *Ibid.*

HUSBAND AND WIFE—*Continued.*

F Actions.

a Right to Bring Action Without Joinder of Husband or Wife and Necessity of Joinder in Actions Against

1. An action brought by the wife against her husband's step-father and brother for alienating his affection from her and causing his continuous separation is in tort and does not require the joinder of her husband therein, and is not a defect of parties. *Townsend v. Holderby*, 550.

c Testimony Against Each Other or of Communications Between

1. Testimony of a witness that at the time of the arrest of the defendant, by the officers of the law, his wife was present and said to him: "I told you that you would get into it if you did not stay with me like I wanted you to," to which he replied: "hush," is not a confidential communication between husband and wife within the contemplation of C. S., 1802, and may be testified to by the witness who was present and heard it, and is some evidence of guilt in connection with the other evidence in the case. *S. v. Freeman*, 376.

ILLEGITIMATE CHILDREN—Right to distribution see Descent and Distribution B b.

INDEPENDENT DEALER—Determination of whether party is agent or independent dealer see Principal and Agent A b.

INDICTMENT.

D Amendment.

a Power to Allow Amendments

1. Where the defendant indicted for driving an automobile while intoxicated on a public highway of the State appeals from a conviction in the recorder's court, an amendment allowed by the judge in the Superior Court to make the indictment conform to the statute "or other road over which the public has a right to travel," and in accordance with the evidence: *Held*, the amendment did not effect a substantial change in the offense charged and was properly allowed by the judge in the exercise of his discretion. *S. v. Hunt*, 707.

INDUSTRIAL COMMISSION see Master and Servant B.

INFANTS.

B Contracts.

a Validity and Right to Disaffirm

1. The defense of infancy of the defendant in a civil action must be set up in the answer, or it will be considered as waived. *Cole v. Wagner*, 692.

2. The contracts of an infant are voidable and not void. *Ibid.*

3. A father who furnishes to his infant child a living under his own roof is not ordinarily liable to a stranger for furnishing his infant child such service as the parent may not reasonably consider necessary, yet where the child has met with a serious accident rendering it necessary for him to receive treatment at a hospital in order to save his life and usefulness, the hospital may recover upon a *quantum meruit*. *Ibid.*

INFANTS B *a—Continued.*

4. Where in an action by the owners of a hospital to recover against a guardian of an infant it is alleged that the infant has recovered damages in an action against another for a negligent injury and that a part of the consideration recovered in the judgment was for hospital services rendered by the plaintiff in consequence of such injury: *Held*, the moneys recovered on account of the hospital treatment, etc., are necessaries and the plaintiff is entitled to recover from the guardian the amount so paid as moneys had and received by the infant to the use of the plaintiff as upon a *quantum meruit*. *Ibid.*

c Recovery of Property or Consideration by Infant

1. Where in a contract for the purchase of an automobile an infant is allowed a certain sum for a truck traded in by him, upon disaffirmance of the contract by the infant during his minority and his suit, brought by his next friend, to recover the consideration paid by him, the contract is binding upon neither party thereto, and he is entitled to recover such sums as he has paid on the purchase price and the reasonable market value of the truck at the time of the trade, and if the truck is returned to him, the market value at the time of the trade should be fixed by assessing a reasonable amount for depreciation and use, if any, while in the possession of the defendant, and an instruction that fixes the value of the truck at the amount allowed therefor in the contract is reversible error. *Collins v. Norfleet-Baggs*, 659.

d Liability of Infant for Tortious Use or Destruction of Property Received Under Contract He has Disaffirmed

1. Where an infant disaffirms his contract for the purchase of personal property during his minority he is not required by law to account for its use while in his possession or for its loss if squandered or destroyed by him before avoidance of the contract, but he is accountable for its tortious use or destruction after such avoidance and before its surrender. *Collins v. Norfleet-Baggs*, 659.

INJUNCTIONS.

B Subjects of Protection and Relief.

c Contracts

1. Where it is made to appear that the plaintiff will be damaged by the breach by his former employee of a contract not to solicit or do business of certified public accountant for the customers of his employer within three years after the termination of the employment, a sufficient consideration is shown for the granting of injunctive relief, and the fact that the work was not unique does not affect the question. *Scott v. Gillis*, 223.

D Preliminary and Interlocutory Injunctions.

b Continuing, Modifying, or Dissolving

1. Where injunctive relief is sought to restrain the violation of warranties and covenants in deed restricting the location of residences on a lot sold in a development plan under a deed duly recorded, and a serious question is presented as to whether such violation would

INJUNCTIONS D *b—Continued.*

cause substantial and irreparable injury to the development company, the restraining order will be continued to the hearing until the matters may be determined at the trial. *Realty Co. v. Barnes*, 6.

2. Where the evidence upon the return of a preliminary restraining order raises serious questions as to the existence of facts which make for plaintiff's rights, and sufficient to establish them if found in his favor, and damages may not be ascertained in law, the preliminary order will be continued to the final hearing. *Scott v. Gillis*, 223.

3. Where upon the hearing the court finds that the defendant failed to comply with the terms of his contract for the purchase of certain lands and had abandoned the contract, and had thereafter trespassed upon the lands and cut and removed timber therefrom, and that the defendant is insolvent, a judgment continuing a temporary restraining order to final hearing will be affirmed on appeal. *Salmon v. McFarland*, 493.

INSTRUCTIONS see Trial E.

INSURANCE (Surety bonds see Principal and Surety).

E The Contract in General.

b Construction and Operation

1. The rule that a liberal construction of ambiguous language will be given in favor of the insured has no application when the words employed clearly express the terms upon which the policy has been issued. *Anderson v. Ins. Co.*, 72; *Gant v. Ins. Co.*, 122.

2. The terms and conditions of the standard form of a fire insurance policy, C. S., 6436, 6437, and the stipulations as to a valid waiver thereof are valid and binding on the parties. *Midkiff v. Ins. Co.*, 139.

H Cancellation, Surrender, Abandonment or Rescission of Policy.

a Cancellation or Rescission by Insurer

1. The provisions in the standard fire insurance policy requiring the insurer to give the insured five days previous written notice before it cancels the policy is for the protection of the insured and must be complied with by the insurer before it can make a valid cancellation. *Urey v. Ins. Co.*, 385.

I Avoidance of Policy for Misrepresentation or Fraud.

b Matters Relating to Person Insured

1. Where in an application for a policy of accident insurance the plaintiff answered no to the question as to impairment of sight, and the jury has found that he had answered truthfully under the evidence tending to show that he had at one time an injury to his eye, but that it was cured at the time of the application: *Held*, the defense that the answer was incorrect and was a false representation affecting the validity of the policy, cannot be maintained. *Bridgeman v. Ins. Co.*, 599.

INSURANCE—*Continued.*

J. Forfeiture of Policy for Breach of Promissory Warranty, Covenant, or Condition Subsequent.

b Nonpayment of Premiums

1. A policy of fire insurance for a term of years containing a provision excluding the insurer from liability for a loss that may occur while any installment note given for the premium remains past due and unpaid, by its valid terms does not render the insurer liable when the insured has not paid the premiums, but has given notes therefor, and a fire occurs after the maturity of the unpaid notes, in the absence of a valid waiver by the insurer of the provisions of the policy in this respect. *Smith v. Ins. Co.*, 621.

d For Failure to Give Notice of Accident and Claim for Damages

1. Where a policy of automobile accident insurance contains the condition that the insured shall give immediate notice to the insurer of accidents and claims for damages, the condition is material, affording the insurer opportunity to gather the facts for its protection when fresh in the minds of witnesses, etc., and is a condition precedent to the right of recovery by the insured. *Peeler v. Casualty Co.*, 286.

2. The failure by the insured to give the insurer notice of an accident and claim for damages by the person injured required by a condition in the automobile accident policy will make the policy void without an express forfeiture clause in the policy to that effect. *Ibid.*

3. One who is injured by the insured in an automobile accident covered by the policy of accident insurance, and sues the insurer under the provisions of the policy providing therefor upon return of execution against the insured unsatisfied, the injured person is in the same position with reference to the insurer's liability as the person insured, and is bound by a provision of the policy requiring the insured to give notice of accidents and claims for damages, and where the insured has forfeited the policy by a breach of this condition, the person injured may not recover thereon. *Ibid.*

K Estoppel, Waiver, or Agreements Affecting Right to Avoid or Forfeit Policy.

a Knowledge, Waiver, or Agreements of Agent Binding on Principal

1. Where a policy of fire insurance stipulates that it would not be binding until countersigned by its local agent, the policy is made by the local agent on behalf of the company, and knowledge of the agent of existing conditions contrary to the express provisions of the policy at the inception of the contract is imputed to the company. *Midkiff v. Ins. Co.*, 139.

3. Where the local agent of a fire insurance company, before issuing the policy on a stock of merchandise, knows that included therein are explosives that under the terms of the policy will render it void unless waived in writing attached to its face, and nevertheless the agent issues the policy upon payment of the premium, the knowledge of the local agent is imputed to the company, and the contract being completed the insurer is estopped to deny its liability for a

INSURANCE K *a—Continued.*

fire loss covered by the policy so issued. It is otherwise if such knowledge is acquired after the policy has been delivered and the contract of insurance completed. *Ibid.*

4. Knowledge of the local agent of a fire insurance company that the insured kept explosives in his stock of merchandise covered by the policy contract, will not be imputed to the principal, when such knowledge is acquired after the policy has been issued, and where a waiver has not been obtained according to specific provisions of the policy or otherwise sufficient in law, the forfeiture provision of the policy relating thereto will be enforced. *Midkiff v. Ins. Co.*, 144.

b Acts or Knowledge of Insurer or Agent Operating as Estoppel or Waiver

1. Evidence that merchandise of the class insured usually contained explosives is incompetent to show a waiver of the policy provisions making the policy void in such instances. *Midkiff v. Ins. Co.*, 144.

2. Where a policy of fire insurance provides that the insurer would not be liable for loss covered by the policy during the time notes given for premiums were past due and unpaid, evidence that other policies issued the plaintiff, containing the same provisions had been reinstated upon the payment of the premiums, without evidence of demand by the insurer for the payment of the premium on the policy sued on after the maturity of the notes, is insufficient evidence of a valid waiver by the insurer of this provision, and the burden being upon the plaintiff to show a valid waiver, a motion as of nonsuit should be granted. *Smith v. Ins. Co.*, 621.

3. Where an insured can read and understand his policy of fire insurance, and has full opportunity to do so, and the insurer does nothing to prevent him from reading the policy, the neglect of the insured to have acquainted himself with the conditions on which the policy was issued and written cannot be taken as evidence of the waiver by the insurer of the conditions imposed. *Ibid.*

N Persons Entitled to Proceeds and Liability of Company.

c Under Loss Payable Clause

1. Where the owner of lands borrows money thereon under two separate mortgages from different persons, one registered prior to the other, and the mortgagor contracts with each to take out certain policies of fire insurance for their benefit, the rights of the mortgagees to the proceeds under the policies will be determined by the contracts as executed in the loss payable clauses in the policies, and where they are of the New York standard form, and made payable to the mortgagees "as interest may appear," the mortgagee under the prior registered mortgage has a superior lien on the proceeds to the one having the later registered security. C. S., 6420, 3311. *Bank v. Bank*, 68.

2. If neither of two mortgagees, for whom insurance has been procured, has any priority of claim or of liens, the proceeds of the policies will ordinarily be divided between them in proportion to their respective claims. *Ibid.*

INSURANCE—*Continued.*

O Payment and Subrogation.

b Subrogation

1. Where a company, under a policy covering damage to an automobile alone, has paid the insured the loss resulting from the act of a *tort-feasor*, it is entitled to maintain an action against the *tort-feasor* by subrogation to the owner's rights. *Underwood v. Dooley*, 100.

P Actions on Policies.

c Burden of Proof

1. Where the defense to an action to recover upon a fire insurance policy is that the policy was canceled by the plaintiff's agent the burden is on the defendant claiming it to show that plaintiff's agent so acted with the knowledge or authority of the plaintiff under the facts and circumstances of this case. *Urey v. Ins. Co.*, 385.

R Accident and Health Insurance.

a Construction of Contract as to Risks Covered and as to Whether Injury was Accidental

1. Where a policy of accident insurance indemnifies first against injury to the insured while a pedestrian in connection with being struck down by certain classes of motor-driven vehicles, and second, against accident from a collision while riding in certain classes of motor-driven cars, the qualifying terms of each class will be applied to the risks of its particular class, and will not be construed together so as to make the risks of one class of such vehicles or cars apply to an injury covered by the other. *Anderson v. Ins. Co.*, 72.

2. A policy insuring a person against accident by collision while riding or driving in any horse-drawn vehicle or motor-driven car by interpretation clearly excludes an accident occurring while the insured was riding on a motorcycle, a car by usual significance being an automobile, affording greater security to the one riding therein than a motorcycle. *Ibid.*

3. A motorcycle is a motor vehicle designed to travel on not more than three wheels in contact with the ground as distinguished from a motor car which has four wheels, and a body within which a person rides, affording greater safety. *Ibid.*

4. When a policy of accident insurance limits the liability of the company to injuries caused the insured by being struck by a moving automobile, its plain and unambiguous meaning will not be extended in favor of the insured to cover an injury caused by being struck with a plank hurled against her by a revolving wheel of an automobile. *Gant v. Ins. Co.*, 122.

5. Where the evidence of the plaintiff in his action to recover on a policy of accident insurance discloses that several years prior to the issuance of the policy he had been shot in the foot, the shot remaining in his foot without causing special pain or trouble, and that after the issuance of the policy he had accidentally sprained his ankle, which resulted in inflammation and necessitated an operation for the removal of the shot, and finally made it necessary to

INSURANCE B *a—Continued.*

amputate the foot, and there is no evidence that the operation necessitated the amputation: *Held*, a directed verdict on the issue of whether the injury was caused by accidental means was proper, though the burden was on the plaintiff to show that his injury was within the provisions of the policy. *King v. Ins. Co.*, 566.

INTOXICATING LIQUOR (Intoxication as affecting capacity to commit crime see Criminal Law B a; as affecting premeditation see Homicide B a 2).

B Possession and Presumption from Possession.

a Constructive Possession, and Evidence Thereof

1. Possession of intoxicating liquor necessary to convict of the offense under our prohibition law may be constructive and shown by circumstantial evidence, which in this case is held sufficient to sustain the verdict of the jury for conviction. *S. v. Weston*, 25.

2. Constructive possession of intoxicating liquor is sufficient to take the case to the jury under an indictment for violating our prohibition law by receiving, possessing, transporting, selling intoxicating liquor, and having it on hand for the purpose of sale. *S. v. O'Neal*, 548.

b Actual Possession and Evidence Thereof

1. With evidence tending to show that at night the defendant on trial for violating the prohibition law for possession and transporting of intoxicating liquor, left his automobile on the highway and went into a wood and returned with a half-gallon jar of whiskey under each arm, which he broke and sought to escape arrest, testimony is competent that the officers returned the next morning and found five gallon cans "in the same spot where they went" as a competent circumstance with the other evidence. *S. v. Rhyne*, 146.

JUDGES—Power of special judge to hear controversy without action see Controversy Without Action A a 1—Where appeal is not perfected to order overruling demurrer another judge may not again pass on question see Pleading D e 2).

JUDGMENTS (In criminal cases see Criminal Law K—in prosecution for abandonment see Husband and Wife A d—in claim and delivery proceedings see Replevin F e—Appeal from refusal to enter judgment on pleadings see Appeal and Error A d 1—Execution on see Execution).

D Judgments by Default.

b By Default and Inquiry

1. A judgment by default and inquiry entitles the plaintiff to nominal damages without further proof, but the inquiry should be made at the next succeeding term, and when it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made according to law. C. S., 596. As to whether a party may waive this provision of the statute, *quære? Foster v. Hyman*, 189.

2. It is proper for the judge of the Superior Court to set aside a judgment by default and inquiry on defendant's counterclaim under the provisions of Public Laws of 1924, ch. 18, when the plaintiff, or his

JUDGMENTS D *b—Continued.*

attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made. *Lumber Co. v. Welch*, 249.

G Lien and Priority, as against attachment see Attachment E b 1.

K Attacking and Setting Aside Judgments.

b Setting Aside for Surprise and Excusable Neglect (see, also, Appeal and Error J e 1).

1. Where the judge presiding at a term of the Superior Court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, C. S., 600, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed. *Bowie v. Tucker*, 671.

L Merger and Bar of Causes of Action and Defenses (Estoppel by judgment see Estoppel B).

b Matters Adjudicated and Operation of Judgments as Bar to Subsequent Action

1. Where the mortgagee brings action to foreclose on his mortgage on the defendant's stock of goods, and thereafter the plaintiffs bring a creditors' bill to recover on their claims and to set aside the mortgage on the grounds of fraud, and the two actions are consolidated, and upon trial it is adjudged that there was no evidence of fraud in procuring the mortgage, and upon this phase of the action is nonsuited, it is further adjudged that the balance arising from the sale of the stock, after paying the mortgage, be turned over to a receiver, appointed in the action, for the benefit of the creditors: *Held*, a subsequent creditors' bill, seeking the same relief, is barred by the prior action, the plaintiffs having had their day in court, and being still in court in the other action. *Hardware Co. v. Whitten*, 251.

2. A judgment rendered as a matter of law upon pleadings which raise issues of fact determinable only by a jury, is not an estoppel between the parties and those claiming under them in a subsequent action involving the same subject-matter. *Richardson v. Satterwhite*, 609.

3. Where the trial court enters a judgment sustaining a demurrer to the complaint and therein grants the parties additional time to file amended pleadings in his plenary discretionary power, the order sustaining the demurrer, unappealed from, does not work an estoppel upon the plaintiff to proceed on the amended pleading. *Bowie v. Tucker*, 671.

4. A possessory action in ejectment in the court of a justice of the peace terminates in that court upon an issue of title to lands or of equitable rights therein being raised by the defendant, C. S., 1476, 1477, and in the Superior Court the defendant is required to set up

JUDGMENTS L *b—Continued.*

his equities, if any he have, and where he fails to do so an independent action by him thereon is barred by the prior judgment, it being assumed that the court rendering the judgment had jurisdiction of the parties and the subject-matter of the action. *Ogburn v. Booker*, 687.

JUDICIAL NOTICE see Evidence A.

JUDICIAL SALES.

B Setting Aside.

a For Irregularity, Defective Title, or Upon Equitable Grounds

1. The purchaser at a judicial sale of land under proceedings for partition may, by motion when the matters are *in fieri*, have the court to exercise its equitable discretion to set aside the deed when it appears that his title is substantially defective and that the parties may be put in *statu quo* and the action of the court in so doing when the proper findings of fact are supported by the evidence will be upheld on appeal. *Perry v. Wiggins*, 502.

C Title, Rights and Liabilities of Purchaser.

a In General

1. The doctrine of *caveat emptor* does not apply to judicial sales under orders of court in its equitable jurisdiction, and where under such order an entire tract of land is to be sold the purchaser at the sale has a right to rely upon the court to give him a good title to the whole tract, nothing appearing to put him on notice that a less estate would be offered at the sale. *Perry v. Wiggins*, 502.

JURY.

C Right to Trial by Jury (In criminal cases see Criminal Law I a).

a Preservation or Waiver of Right

1. In an action to enforce a lien for material furnished the contractor and used in the construction of the owner's building when the defendant owner excepts to the order of reference and preserves her right to trial by jury throughout, and tenders exceptions to the referee's findings with demand in apt time for a trial of the facts by jury: *Held*, error for the trial court to confirm the referee's report and deny defendant's right to a trial by jury. *Brown v. Broadhurst*, 738.

2. The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Art. IV, sec. 12, but the manner of such waiver is governed by statute, C. S., 568, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time for the preservation of its right to trial by jury, C. S., 868, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived. *Electric Co. v. Electric Co.*, 766.

LABORERS' LIEN AND MATERIALMEN'S LIENS.

B Proceedings to Perfect and Form a Claim of Lien.

b Form and Requisites of Claim of Lien

1. Where a materialmen's lien under the provisions of C. S., 2433, is for a complete contract for a gross sum, it is not necessary that the statement be itemized as required in the case of divisible contracts for goods or labor. *King v. Elliott*, 93.

2. Where the claimant has attached and made a part of his lien an itemized statement of his account for labor and material he has furnished the owner of the building upon which he claims his lien under the provisions of C. S., 2433, showing on several specific dates "money advanced for payroll," "furnace contract," etc., each in stated amounts, it is held a sufficient itemization of his claims as required by the statute. *Ibid.*

3. An affidavit to a lien filed under the provisions of C. S., 2433, that the "foregoing statement of account showing the goods sold, delivered, installed, and work done," etc., for a "furnace contract": *Held*, sufficient to show a complete contract for the furnace at the price itemized in the statement. *Ibid.*

4. Where it has been agreed by the parties that the trial judge find the facts upon the trial of the question of the sufficiency of a lien filed for material and labor furnished for a building, C. S., 2433, his finding that the contract was "to do certain work and furnish certain materials for a stated amount" under the evidence in the case is interpreted to mean that the contract referred to was entire. *Ibid.*

5. Where a lien filed under the provisions of C. S., 2433, gives the date to each item of labor or material furnished in relation to the building upon which the lien is sought, it will be presumed, nothing else appearing, that the dates given in the statement are correct. *Ibid.*

C Operation and Effect.

b Nature, Amount and Extent of Subcontractor's Lien

1. The right of a subcontractor to recover for material furnished the owner of a building is out of the funds due the original contractor by the owner at the time notice is given by the subcontractor, and under the provisions of our statutes is enforceable by suit into the contract between the owner and the original contractor, and where the original contractor has abandoned his contract and the owner has been forced to spend more money to complete the contract than was due the original contractor under its terms, the subcontractor can recover nothing in his action against the owner for material furnished, there being nothing due the original contractor. C. S., 2437, 2439, 2442. *Electric Co. v. Electric Co.*, 495.

c Priority

1. The lien for labor and material furnished to the owner of a building under the provisions of C. S., 2433, and notice filed as required by C. S., 2469, 2470, where furnished under an entire or complete contract for the various items as a whole, relates back to the time of the first delivery and work done under the contract, and is superior to a mortgage lien subsequently given and properly recorded. ***King v. Elliott*, 93.**

LACHES see Limitation of Actions A a 1.

LANDLORD AND TENANT (Adverse claim by tenant see Adverse Possession A f).

D Terms for Years.

b Assignment and Subletting

1. A condition in the lease of a store that the lessee should not sell or assign the lease without the consent of the lessor is not violated by the lessee's subletting for a shorter period than the unexpired term specified in the original lease without the lessor's consent, the words "sell or assign" not excluding a sublease, the status between the lessor and the original lessee remaining unchanged by the sublease made by the latter. *Millinery Co. Little-Long Co.*, 168.

H Rent and Advancements.

a Liens Therefor

1. Where a tenant leases the premises to another who raises a crop thereon, the crops so raised by the subtenant are subject to a lien for advances made to him by his immediate lessor and also to the original lessor or owner of the land, and the latter being a landlord's lien is superior to the lien of the lessor tenant, and the crop is subject to seizure for the payment of rent due to the owner of the land. *Land Co. v. Cole*, 452.

LAW OF THE LAND see Constitutional Law I.

LEASES see Landlord and Tenant D.

LICENSE—Abuse of as trespass see Trespass A b.

LIENS—Of landlord see Landlord and Tenant H a—of laborers and materialmen see Laborers and Materialmen's Liens—of warehousemen see Warehouseman A a—lien and priority of judgments, mortgages, attachments see Particular Heads.

LIMITATION OF ACTIONS.

A Statutes of Limitation.

a Nature, Operation, and Construction in General

1. Where the purchase price in a contract to convey lands has been paid in accordance with its provisions, the purchaser has the equitable title which merges with the legal title, and the vendor and those claiming under him are merely naked trustees, and when the purchaser has been in continued peaceful possession from that time neither the statute of limitations nor laches will bar his right to have the claim of the devisees of the vendor removed as a cloud upon his title. *Sears v. Braswell*, 515.

B Computation of Period of Limitation.

b Demand

1. The application of the three-year statute of limitations, C. S., 441(1), will be construed in regard to the unpaid balance due a corporation by a subscriber to its capital stock in *pari materia* with C. S., 1165, authorizing a call on them for assessments by the directors of the corporation from time to time, and C. S., 1160, creating an

LIMITATION OF ACTIONS B *b—Continued.*

obligation on each stockholder, enforceable by the receiver, for the amount due on his subscription necessary to satisfy the creditors of the corporation. *Redrying Co. v. Gurley*, 56.

2. While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. C. S., 441(1), 1160, 1165. *Ibid.*

f Ignorance of Cause of Action or Mistake

1. The mere fact that a deed sought to be set aside by a creditor for fraud had been registered more than three years next preceding the time of action commenced is not alone sufficient to bar an action by a creditor to set it aside for fraud when the debtor remained in continuous possession as owner and at the time of mortgaging the land to the creditor to secure a note given for the debt the debtor falsely represented that there were no encumbrances on his title, under such circumstances it not being required that the creditor receiving the mortgage search the record in the office of the register of deeds, there being nothing to put an ordinarily prudent man upon inquiry, and the question of imputed notice under the circumstances is for the jury. C. S., 441, sec. 9. *Rhodes v. Tanner*, 458.

LIS PENDENS—Not necessary in attachment see Attachment E b 1.

LOGGS AND LOGGING see Deeds and Conveyances F.

LOST OR DESTROYED INSTRUMENTS.

A Proceedings to Establish, Restore or Recover on Lost Instruments.

a Evidence and Proof of Instrument

1. Where in an action to recover lands the plaintiffs introduce certain ancient deeds in order to show a common source of title, and it is claimed by the defendants that the deceased's common source of title made a contract to convey the lands to the one under whom they claim upon the payment by him of certain notes for the purchase price, and that this contract had been lost and could not be found after due diligence, and the defendants introduced an inventory of the administrator of the deceased and relies upon such inventory and the recitations in the deeds introduced by the plaintiffs: *Held*, the deeds and inventory so introduced, made *ante litem motam* and against the interest of the original owner, which tend to establish the contract to convey under which the defendants claim, are competent evidence of the execution of such contract and the payment of the consideration thereunder under the ancient document rule, and the plaintiffs are not entitled to have such evidence restricted to the purpose of showing a common source of title. *Sears v. Braswell*, 515.

MANDAMUS—To compel new registration see Elections D c 2, I a 1—To compel sale of current see Electricity B a—Right to jury trial in mandamus proceedings see Jury C a 2.

MARRIAGE PROMISE.

B Operation and Effect.

a Gifts to Third Persons by Parties to Contract

1. Where the parties have been bound by a contract to marry, neither can give away his or her property without the consent of the other, and notice before the marriage does not hinder the party injured from insisting on the invalidity of the gift before marriage. *Taylor v. Taylor*, 197.

MASTER AND SERVANT.

B North Carolina Industrial Commission.

a Creation, Existence, and Nature of Commission

1. The North Carolina Industrial Commission created by the statute is an agency of the State and subject to the fixed policy of the State requiring each department of the State government to operate within the appropriations allowed to it by the Budget Bureau under the statute creating it. *Industrial Commission v. O'Berry*, 595.

2. The moneys received under section 73 (j) of the Workmen's Compensation Act is a special fund available to the Industrial Commission for its maintenance, but comes within the statute creating the Budget Bureau, and the two statutes should be construed in *pari materia*, and *Held*, the Budget Bureau is authorized and required to allocate to the Industrial Commission so much of the special fund created by said section 73 (j) as is necessary to carry out its function efficiently, and also allocate additional money from funds of a similar nature to the extent and amount necessary to the Industrial Commission for this purpose. *Ibid.*

C Master's Liability for Injuries to Servant.

a Nature and Extent of Liability in General

1. Where the *alter ego* of a principal orders an employee whose regular duty is to haul dirt for the construction of a highway, to take a box of dynamite caps to a tool-house, and fails to warn the servant of the danger in connection therewith, and the employee takes the box of caps to the tool-house in his pocket and deposits the box there, about a half hour being required therefor, and on the next day the employee is injured by an explosion supposed to have been caused from dynamite caps remaining in his pocket: *Held*, the master is not liable in damages for the failure to warn the servant, the injury having occurred after the particular employment had terminated. *Watson v. Construction Co.*, 586.

2. Where an employee at a cotton mill chooses of his own volition to run his hand into a revolving screen to clean it of a piece of cotton, knowing that it would be injured, except for his quickness in withdrawing it, and that the machinery should have been first stopped: *Held*, there is no presumption of negligence on the part of the defendant from the fact of injury, and the plaintiff must establish negligence of the defendant as the proximate cause of his injury, and in this case the action was properly dismissed. *Sasser v. Holt Mills*, 603.

MASTER AND SERVANT C—*Continued.*

b Tools, Machinery and Appliances, and Safe Place to Work

1. An employer of labor who assumes to transport his employees to and from work is held in the exercise of ordinary care to do so with reasonable safety, and is liable in damages to one of them injured by the negligent acts of an agent or authorized representative he has selected for that purpose when such injury is thereby proximately caused, irrespective of whether the agency thus selected and acting is an independent or subcontractor, or has contracted to do so for compensation or otherwise. *Mehaffey v. Construction Co.*, 22.

2. Where the plaintiff demands judgment for the defendant's failure to have properly heated a small office in which he was sometimes required to work at night, and the plaintiff had furnished an oil stove and oil to heat the office, and the defendant continued his employment without complaint to or knowledge of the employer of the insufficiency, the evidence is insufficient to sustain a verdict adverse to the defendant upon the issues of negligence, contributory negligence and assumption of risks, and defendant's motion as of nonsuit should have been allowed. *Hemphill v. Oil Co.*, 339.

3. In this case held, evidence of the master's negligence in failing, in the exercise of reasonable care, to provide the servant a reasonably safe place to work and reasonably safe and suitable tools and appliances was properly submitted to the jury, and defendant's motion for judgment as in case of nonsuit was properly overruled. *Langford v. Lumber Co.*, 396.

4. Where it is shown that the servant in using an electrically driven saw furnished him by the master and under the master's control, has been injured in its use by an electrical shock which would not ordinarily occur under the circumstances, a presumption of the master's negligence in furnishing an improper appliance will arise, which does not affect the burden of proof in the servant's action, but which is sufficient to sustain an affirmative answer to the issue of negligence unless the defendant has satisfied the jury otherwise under the evidence. *Bryant v. Construction Co.*, 639.

c Methods of Work, Rules and Orders

1. Upon evidence tending to show only that the defendant's driver of its truck was sent to defendant's filling station to load a heavy pump on the truck, and that usually there was sufficient help, but that on this occasion, without the knowledge of the employer, there was no help, and without using the available method of communicating the fact by telephone to the employer, the plaintiff assumed to load the pump without help: *Held*, the evidence is insufficient upon which the plaintiff could recover damages for the consequent injury upon the ground that the defendant had failed in its duty to supply sufficient help, and defendant's motion for judgment as of nonsuit should have been allowed. *Hemphill v. Oil Co.*, 339.

f Assumption of Risk

1. The burden of proof is on the defendant on the issues of assumption of risk by the plaintiff's' intestate in plaintiff's action to recover damages for a negligent killing. *Candler v. R. R.*, 399.

MASTER AND SERVANT C *f—Continued.*

2. Where there is evidence tending to show that the defendant railroad company had a rule for the safety of its employees, and there is conflicting evidence as to whether the plaintiff's intestate knew of the customary abrogation of the rule by defendant's employees, the question of assumption of risk is properly for the jury. *Ibid.*

g Contributory Negligence of Servant

1. A servant's action against the master for damages for negligently injuring him while engaged in blasting rock in a quarry is barred by an adverse verdict on the issue of contributory negligence, but the burden of proving contributory negligence is on the master. *Lipscomb v. Cox*, 64.

2. The burden of proof is on the defendant on the issue of contributory negligence in plaintiff's action to recover damages for a negligent killing. *Candler v. R. R.*, 399.

D Master's Liability for Injury to Third Persons (Acts of mercy to injured not admission of liability see Evidence F b 1).

b Scope of Employment and Furtherance of Master's Business

1. Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in defendant's store on Saturday when the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. C. S., 567. *Norman v. Porter*, 222.

2. One injured while riding on the running board of a truck as an invitee of the driver, an employee of a transportation company, may not hold the transportation company liable under the doctrine of *respondeat superior* for an injury resulting from the negligence of the driver in the absence of allegations and evidence that the driver was acting within the scope of his employment in giving the invitation, or had authority expressed or implied to invite or permit persons to ride on the defendant's truck, or that the employer had knowledge or acquiesced in his so doing on former occasions, and where the evidence fails to disclose such authority a judgment as of nonsuit is proper. *Cotton v. Transportation Co.*, 709.

3. In order to hold a master responsible for the negligence of the servant in causing an injury to a third person, it is essential that the latter should be acting in the scope of his employment and in the furtherance of the master's business, and in an action against an auto-bus line for damages resulting from the negligence of its driver in running over and killing plaintiff's intestate, a motion as of nonsuit should be entered if the plaintiff's own evidence tends only to show that a bus of the defendant was at the time of the injury being driven by an employee of the garage in which the defendant stored its buses who was returning the bus to the garage after the driver thereof had ridden home in it contrary to the express orders of the defendant and without his knowledge or acquiescence. *Martin v. Bus Line*, 720.

4. Where the plaintiff's evidence in his action against the owner of an auto-truck for damages resulting from the negligence of the de-

MASTER AND SERVANT D *b—Continued.*

fendant's driver tends to show that a truck was found on the highway on a business day during business hours and was operated by the regular employee of the defendant, whose regular business or employment was the duty of driving and operating the said truck: *Held*, the evidence is sufficient to furnish a basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business, and makes out a prima facie case, and upon contradictory evidence, the question is for the jury. *Jeffrey v. Mfg. Co.*, 724.

E Federal Employers' Liability Act.

a In What Cases Federal Statutes and Decisions Apply

1. In an action brought under the Federal Employers' Liability Act in the State Court against a railroad company to recover damages caused to a servant, the Federal statutes and decisions control. *Potter v. R. R.*, 17.

2. The liability of a railroad company to its employees for injuries sustained by him while engaged in interstate commerce, in an action brought in the State courts, is governed by the Federal Employers' Liability Act and the Federal decisions thereunder. *Austin v. R. R.*, 319; *Candler v. R. R.*, 399.

b Nature, Grounds, and Extent of Master's Liability Under Federal Act

1. The duty of a railroad company to provide for its employees engaged in interstate commerce reasonably safe and suitable cars, engines, appliances, machinery, track, roadbed, works, etc., "or other implements" as required by the Federal Employers' Liability Act is held to mean such instrumentalities and appliances as are personal or movable, or implements and appliances of manual operation, and where such negligent failure is relied on in respect to such "appliances," defendant's motion as of nonsuit will be granted unless there is some evidence that the implements complained of fall within the class intended by the Federal Statute. *Potter v. R. R.*, 17.

2. A railroad company engaged in interstate commerce owes to its employee the duty to use due care to furnish him a reasonably safe place in which to work. *Candler v. R. R.*, 399.

3. While it is the nondelegable duty of the railroad company to furnish its employees engaged in interstate commerce a reasonably safe place to work, in the exercise of due care, the plaintiff's evidence is insufficient when it tends only to show that he was experienced in the work, and that the injury in suit occurred under the usual conditions ordinarily obtaining in like work, he being held to have assumed the risk under the Federal Employers' Liability Act, under which the action has been brought in the State Court, and defendant's motion as of nonsuit upon this evidence should be allowed. *Potter v. R. R.*, 17.

4. *Held*, in order for a recovery under the Federal Employers' Liability Act there must appear under the evidence that the defendant was guilty of some negligence or the violation of a Federal statute which proximately caused the injury in suit. *Austin v. R. R.*, 319.

MASTER AND SERVANT E *b—Continued.*

5. Where the evidence tends only to show that the plaintiff's intestate was employed by the defendant as a track inspector, and that he was found one morning, after a severe storm during the night, near the track under circumstances tending to show that he had been struck by one of the defendant's trains, with further evidence that he had been continuously at work for a length of time in excess of that allowed by the Federal Statute, without evidence as to how the injury occurred: *Held*, the evidence raises conflicting inferences in favor of both parties and falls within the field of conjecture, and, the burden being on the plaintiff to establish negligence of the defendant and the causal connection between it and the injury, defendant's motion as of nonsuit should have been granted. *Ibid.*

6. Under the facts of this case *Held*, contributory negligence of plaintiff's intestate, in an action against a lumber company to recover damages for the wrongful death of the intestate, caused while working on defendant's logging road, is not a bar to recovery, but was properly considered upon the question of diminution of damages, and the evidence of defendant's negligence was sufficient to be submitted to the jury and to overrule its motion as of nonsuit. *Stamey v. Lumber Co.*, 391.

7. Where the jury has found the issue of negligence in favor of the plaintiff and the issue of contributory negligence in favor of the defendant railroad company in an action in the State court for the negligent killing of the plaintiff's intestate while he was engaged in interstate commerce, under the Federal Employers' Liability Act, the plaintiff's right to recover is not barred, but the amount of damages are properly reduced under the rule of comparative negligence. *Candler v. R. R.*, 399.

8. Where there is evidence tending to show that a conductor of the defendant railroad company, was struck and injured while crossing the defendant's tracks in the performance of his duties in interstate commerce by the negligence of an independent crew of another of defendant's trains in shunting a car a distance of two hundred yards without warning to persons or employees rightfully in the yard, in violation of rules of defendant, with conflicting evidence as to whether plaintiff's intestate knew of the customary violation of the rule, with further evidence of contributory negligence: *Held*, defendant's motion for judgment as of nonsuit was properly denied. *Ibid.*

MATERIALMEN—Liens of, see Laborers' and Materialmen's Liens.

MENTAL CAPACITY—To commit crime see Criminal Law B a—To make deed see Deeds and Conveyances A g.

MONEY RECEIVED.

A Liability for Money Received.

a Money Belonging to Another in Good Conscience in General

1. Where an infant by his next friend has recovered judgment against another for a negligent personal injury, and included therein is the

MONEY RECEIVED A *a—Continued.*

hospital expenses incident to the injury, and the judgment has been paid, the hospital may recover upon *quantum meruit* the amount of money so adjudicated for its services as for money had and received to its use. *Cole v. Wagner*, 692.

MORTGAGES (Right of mortgagee to proceeds under loss payable clause see Insurance N c—Cancellation for fraud see Cancellation of Instruments A b—Inchoate dower in mortgaged lands see Dower B b 2).

E Assignment of Mortgage or Debt.

a Rights of Assignee

1. The one who is the last and highest bidder at the foreclosure of a mortgage or deed of trust on lands is but a proposed purchaser within the ten days before confirmation, C. S., 2591, and where the mortgagee has become such purchaser and within ten days allowed by statute for an increase bid a third person pays the mortgage debt and has the notes and mortgage assigned to him, such person has the right of lien and foreclosure under the terms of the mortgage securing the note. *Davis v. Ins. Co.*, 617.

F Transfer of Mortgaged Property.

b Rights and Liabilities of Purchaser of Equity of Redemption

1. The grantee in a deed to lands subject to an existing mortgage recited therein does not personally assume the mortgage indebtedness by accepting the deed unless the language thereof clearly imports that he does so. *Harvey v. Knitting Co.*, 177.

2. Where the owner mortgages his property and later agrees with the mortgagee that a part of the mortgaged premises be released from the mortgage and sold partly for cash with notes for the balance taken and secured by a mortgage from the purchaser of the released part, and that the original mortgagee hold the notes and mortgage on the released part as security for the original mortgage debt, the execution of the original mortgage is in itself an application of the mortgaged premises to the security of the debt and includes the substitution in part therefor of the mortgage of the released part, and the original mortgagor is entitled to have the proceeds of the notes, as they are paid, applied to his debt, and the purchaser of the original equity of redemption is subrogated to the right of the mortgagor in this respect. *Ibid.*

3. Where the mortgagor, under agreement with the mortgagee, sells a part of the premises mortgaged for a cash payment and notes for the balance secured by a mortgage from the purchaser, and the original mortgagee holds such notes as security for the original debt, and thereafter a receiver is appointed for the original mortgagor, who sells the property at judicial sale under order of court, the purchaser at the judicial sale, not assuming the amount of the original mortgage in his deed, is subrogated to the rights of the original mortgagor and is entitled to have the proceeds of the notes applied to the original mortgage as they are paid as against the other creditors of the insolvent mortgagor. *Ibid.*

MORTGAGES F—*Continued.*

c Transfer to Mortgagee and Presumption of Fraud Therefrom

1. In order for fraud to be presumed from the mortgagee's obtaining a deed from the mortgagor the deed must be a conveyance of the mortgaged premises, and the presumption does not apply when the mortgage is upon a distinct and separate tract owned by the husband of the mortgagor. *Tull v. Harvey*, 329.

H Foreclosure (Rights of parties upon foreclosure on home site see Home Site A b 1—Provision for acceleration in mortgage does not affect notes see Bills and Notes D a 1).

a Nature of Foreclosure and Acts Constituting Foreclosure

1. Where the receiver of the insolvent husband, under order of court, sells and conveys the husband's lands, and the husband and wife join in his deed under agreement that her right of inchoate dower should attach to the proceeds, and the land sold is subject to prior mortgage liens which the purchaser at the sale assumes, the effect of the transaction is not a foreclosure of the mortgaged property either technically or substantially. *Blower Co. v. McKenzie*, 152.

b Right to Foreclosure and Defenses (Right of assignee of mortgagee to foreclose see Mortgage E a 1)

1. An usurious charge of interest does not affect the validity of a mortgage, and an injunction against foreclosure will not be granted on the ground of usury. *Newberry v. Draughon*, 298.

2. The plaintiff in a suit to enjoin the foreclosure of a mortgage on his lands upon the ground that he does not owe the entire amount claimed in that usury was charged in the notes secured by the mortgage, must pay the amount admitted to be due with six per cent interest, or the temporary restraining order theretofore issued will be dissolved upon the principle that one seeking equity must do equity. *Edwards v. Spence*, 495.

e Parties

1. Where the decree of foreclosure of a mortgage has been made by the court with the provision that all junior lien holders be notified of the time and place of the sale and to show cause at the next succeeding term why they should not be bound by the decree and sale, their rights are protected by the decree and the refusal of the court to continue the action for foreclosure so that they might be made parties is not held for error under the facts of this case. *Davis v. Ins. Co.*, 617.

l Disposition of Proceeds and Surplus

1. Where the plaintiff has obtained a judgment in the court of a justice of the peace, and has had it recorded in the Superior Court, his remedy to have the surplus after the foreclosure of a prior mortgage subjected to the payment of the judgment is by independent action against the parties interested in the fund, and not by motion in the original cause to make the mortgagee show cause why this should not be done. *Skinner v. Coward*, 466.

2. A mortgagee who has foreclosed his mortgage on lands and has a surplus beyond the mortgage debt is not required to search the record and is not fixed with notice of an existing judgment against

MORTGAGES H *l—Continued.*

the mortgagor duly recorded subsequent to the registration of the mortgage, and after a time he is presumed to have distributed the surplus according to law, and actual notice by the judgment creditor of the existence of the judgment, given seven years after the foreclosure sale, will not fix the mortgagee with liability therefor. *Ibid.*

m Title and Rights of Purchaser at Sale and His Vendees

1. The sale of land under foreclosure of a mortgage or deed of trust is only voidable for failure to advertise for the period of time fixed by law, and the innocent purchaser at the foreclosure sale, without notice of an irregularity, acquires the absolute title which he may convey to another who likewise holds it unaffected by the infirmity, if he has not participated in the fraud or irregularity. *Brown v. Sheets*, 268.

2. The purchasers of land at a foreclosure sale of a mortgage thereon acquire title free from the lien of a judgment docketed subsequently to the proper registration of the mortgage. *Skinner v. Coward*, 466.

o Reopening and Resale

1. Under the provisions of C. S., 2591, relating to the foreclosure of mortgages, it is the duty of the clerk of the Superior Court to readvertise and resell the mortgaged property as often as the statute is complied with and the money for the advance bid deposited and the bid made within ten days from the date of the sale, and the last and highest bidder at a prior sale acquires no rights in the property until his bid has finally been accepted and the order made for the deed to be made to him; and such order having been made by the clerk prematurely, it is proper for him to make an entry revoking it and order a resale, and an injunction will not lie to restrain the resale where the order has been thus revoked and the statute complied with. *Hanna v. Mortgage Co.*, 184.

2. While the clerk of the Superior Court is without authority to order a resale of lands foreclosed under mortgage without an increase bid filed with him under the provisions of C. S., 2591, and the payment of the deposit required, the provisions of the statute relating thereto are to be liberally construed to effectuate its intent to protect mortgagor, and when within the statutory time limit the offerer has communicated with the clerk of the court by phone and offered to come from an adjacent town and make a sufficient deposit, and is informed by the clerk that it would be sufficient to send a cashier's check by mail on that day, and a good cashier's check is accordingly mailed, a substantial compliance with the statute has been made, though the check was received by the clerk after the expiration of the time limit of the statute. *Banking Co. v. Green*, 534.

p Setting Sale Aside for Irregularities

1. Where lands have been foreclosed under mortgage or deeds of trust and many times resold under the provisions of C. S., 2591, and the owner of the equity of redemption has not protected himself at the sales, he may not have the deed at the final foreclosure sale set aside for irregularity when the last purchaser is an innocent purchaser for value in good faith. *Brown v. Sheets*, 268.

"MOTOR-DRIVEN CAR" see Insurance R a 2, 3.

MUNICIPAL CORPORATIONS (Election of officers see Elections—Bonds see Taxation).

B Governmental and Private Powers and Functions.

a Powers of Municipal Corporations in General

1. The powers of a municipal corporation are those granted in express words or necessarily implied thereby, incident or essential to the declared objects and purposes of the corporation as ascertained from the interpretation of its charter, and special and general statute and the organic law. *Holmes v. Fayetteville*, 740.

d Private or Quasi-Public Powers

1. Where a city has its own poles and electric wires for the supplying of electric current supplied under the contract with a private corporation to supply it, with the statutory authority to furnish for profit individuals, corporations, etc., within the limits of the city and a territory extending three miles in all directions therefrom, it is not inhibited by the State or Federal Constitutions from supplying such current to another corporation for the purpose of furnishing electricity to consumers within the city limits of its extended territory when such service does not affect the service rendered in this respect to its own citizens, and tends to diminish and not to increase the rate of taxation of its citizens, and this is not objectionable on the ground that it does not contribute to the fulfillment of its municipal functions as an agency of the State Government for local purposes. *Holmes v. Fayetteville*, 740.

2. A municipality has the power to purchase electricity for its own use and the use of its citizens, and where it is authorized by general and special statutes to purchase current from a power company and to resell and distribute it at a profit to its citizens and to those within a three-mile zone therefrom, the grant of power to do so is effective in law under the authority of the Legislature to grant municipal corporations any powers which promote the welfare of the public and the communities in which they are established unless prohibited by the organic law. Article VIII, section 4; C. S., 2807, as amended; Private Laws 1929, ch. 190. *Ibid.*

D Officers, Agents and Employees.

a Election, Appointment, Expiration of Term and Abolition of Office

1. An act authorizing a municipality to create in its discretion an office local thereto implies the power to abolish the office, the act being a valid delegation of legislative power in exception to the general rule, and one accepting the position cannot acquire a vested right therein by contract for a definite term of employment. *Simmons v. Elizabeth City*, 404.

E Torts of Municipal Corporations (Damages to land by sewerage plant see Eminent Domain C c 2).

a Governmental and Corporate Functions

1. A city is not liable in damages for negligence causing injury or death to its employee while performing his duty as such in connection with removing a wire on a pole used by the city in connection with its police and fire alarm system. *Cathey v. Charlotte*, 309.

MUNICIPAL CORPORATIONS—*Continued.*

G Public Improvements.

a Power of City to Make Improvements or Grant Aid Therefor

1. Where a railroad company by proceedings in mandamus has been compelled to construct an underpass for a street crossing, the city has the power to sign an agreement in the proceedings obligating itself to pay for street improvements along the underpass, and where this has been done the city may accept the signature of the railroad company to a petition to improve the street as an owner of lineal feet abutting thereon and to pay the part assessed against such right of way for the improvements, and where the relevant provisions of the statutes in regard to street improvements have been complied with this furnishes no evidence of fraud. C. S., 2705, 2706, 2708, 2709, 2710, 2711, 2712, 2713, 2714. *Jones v. Durham*, 127.

b Petition for Improvements and Preliminary Proceedings

1. The right of way of a railroad company abutting on a street proposed to be improved by a city is properly included in the lineal feet in the petition for improvement under the provisions of C. S., 2707, requiring that a petition for local improvement shall be signed by at least a majority of the owners representing at least a majority of all the lineal feet of frontage upon the street, etc., proposed to be improved. *Jones v. Durham*, 127.

2. Where the municipal authorities have approved the petition of owners of land abutting upon a street proposed to be improved in accordance with the provisions of statute, their approval and order for the improvements to be made is final, except where it appears from the face of the petition, as a matter of law, that the signers do not represent a majority of the owners or of the lineal feet required by statute. *Ibid.*

c Assessments Therefor and Lien

1. An assessment made upon adjoining land for a street improvement by a town is a charge upon the land constituting a lien superior to all others, C. S., 2713, and not enforceable against the personalty or other lands of the owner, and when the owner of land has been thus assessed payable in installments, C. S., 2716, and he subsequently dies, it is not a debt of the deceased payable by his personal representative, but a charge against the land itself. The provisions of C. S., 93, as to the order of payment of debts of the deceased has no application. *Carawan v. Bennett*, 511.

d Enforcement of Assessments and Procedure of Those Objecting Thereto

1. The remedy of owners of property abutting upon a street proposed by petition to be improved, assessing the land of such owners, is given by statute, C. S., 2714, providing them an opportunity to be heard, and the right of appeal to the Superior Court by giving notice of appeal within ten days after confirmation by the municipal authorities, and when this has not been done, and the work has been completed, injunctive relief against the collection of the assessments by the city will not lie. *Jones v. Durham*, 127.

MUNICIPAL CORPORATIONS G *d—Continued.*

2. Where notice of appeal from the levying of assessments for street improvements had not been given by the property owner objecting thereto within the statutory time limit for the giving of such notice, the entry on the books of the city commissioners, made after the expiration of the statutory time limit, that the owner had appealed therefrom is not a waiver of the requirements of the statute in this respect. *Noland v. Asheville*, 300.

J Actions.

a Parties and Process

1. In an action by a taxpayer, in behalf of himself and others, to vacate and set aside a deed to the city by a cemetery association on the ground of collusion and fraud between the association and the two commissioners who since have been succeeded by others, but were in office at the time of the issuance of the summons: *Held*, as the city officials were in office when the action was commenced the service was proper, and an allegation of demand upon and refusal of the city to bring suit was not required, and upon the facts of this case, the defendant's plea in bar was properly overruled with leave to file answer. *Atkinson v. Greene*, 118.

MURDER see Homicide.

NEGLIGENCE (Of master see Master and Servant C, D—Of power companies see Electricity—Of railroads see Railroads D—Of manufacturer of food see Food—In driving on highway see Highways B—Sufficient for manslaughter see Homicide C a—Wife's right of action for negligent injury to husband see Husband and Wife B c—Acts of mercy to injured not admission of liability see Evidence F b 1).

A Acts or Omissions Constituting Negligence.

b Due Care

1. The degree of care which a person is required to exercise in a particular situation to absolve himself from the imputation of negligence may vary with the obviousness of the risk; but with respect to his liability, the ultimate question is whether he exercised due or commensurate care under the circumstances. The former doctrine of degrees of negligence disapproved. *Watson v. Construction Co.*, 586.

c Condition and Use of Lands, Buildings, etc.

1. The owner of a store for the sale of merchandise is not an insurer of the safety of its customers or invitees therein, but is liable only for injuries resulting from failure to exercise reasonable care to provide for their safety while on the premises; and where there is evidence tending only to show that the plaintiff was injured while coming down the stairs of the store by a fall caused by her heel catching in a piece of metal strip two inches wide lying one-sixteenth of an inch above the wooden tread of the step, the tread being nine inches and the rise of the step eight inches, and the width of the stair being four feet, with a hand-railing on each side: *Held*, the injury could not have been reasonably anticipated, but resulted from an accident, and defendant's motion as of nonsuit should have been granted. *Bohannon v. Stores Co.*, 755.

NEGLIGENCE A—*Continued.*

d Anticipation of Injury

1. Evidence tending to show that the defendant while endeavoring to get his family automobile from the garage on ground covered with ice and snow had planks placed under the wheels of the machine which were thrown, by the spinning of the wheels, against the plaintiff, his wife, as she stood watching him about fifteen feet from the rear of the car, causing her serious injury: *Held*, injury from the act could not have been foreseen by the defendant as an ordinarily prudent man, but would have required omniscience, and the defendant is not liable in damages, and a judgment as of nonsuit should have been granted on his motion. *Gant v. Gant*, 164.

2. Where the *alter ego* of a principal gives an employee a box of dynamite caps to take to a tool-house, and the lid of the box is sprung, allowing, from conjecture, some of the caps to escape from the box into the pocket of the employee, where they exploded the next day: *Held*, the defendant cannot be held to have reasonably anticipated that any harm would result from the fact that the lid of the box was sprung, and he is not liable in damages for the injury resulting therefrom. *Watson v. Construction Co.*, 586.

e Res Ipsa Loquitur (See, also, Master and Servant C a 2, C b 4)

1. The question of whether the doctrine of *res ipsa loquitur* applies to a given state of facts is one of law for the court, and when facts upon which the doctrine applies are established the reasonableness of defendant's explanation is for the jury. The principles upon which this doctrine rests discussed by BROGDEN, J. *Springs v. Doll*, 240.

2. Upon evidence tending to show that the plaintiff as an invited guest was riding in the defendant's car with the defendant driving, and that the latter was forced from the highway by a truck negligently driven thereon, causing her car to skid on the wet road, which resulted in the injury in suit, the doctrine of *res ipsa loquitur* does not apply, and the jury's verdict that the defendant was not guilty of negligence is upheld under the facts of this case. *Ibid.*

B Proximate Cause.

c Intervening Causes

1. Where a passenger in an automobile is injured in a collision of an automobile and a train at a grade crossing, and sues the railroad company for damages resulting therefrom, and his own evidence tends only to show that the accident resulted from the negligent driving of the automobile by another, and that this negligence of the driver was the sole proximate cause of the injury, or that cause which acting in unbroken sequence produced the injury, and without which it would not have occurred, and that the negligence of the railroad company, if any, would not have caused injury except for the intervening negligence of the driver: *Held*, the railroad company is not liable in damages to the plaintiff, and a judgment as of nonsuit was properly entered. *Herman v. R. R.*, 718.

NEGLIGENCE—*Continued.*

C Contributory Negligence.

a Of Persons Injured in General (Of servant see Master and Servant C g—on highway see Highways B g)

1. Where one seeks to recover damages for a negligent personal injury resulting from his diving into the shallow water of a public swimming pool, about twenty feet from the diving board, and hitting his head on the concrete bottom, his own negligence in not ascertaining the depth of the water before diving will bar his recovery. *Richardson v. Ritter*, 108.

2. In an action to recover damages for an injury alleged to have been negligently caused by the defendant, plaintiff's contributory negligence that will bar his recovery is that which, concurring and cooperating with the negligence of the defendant, becomes the real, efficient and proximate cause of the injury, or that cause without which the injury would not have occurred, and it is not necessary that the plaintiff's negligence be the sole proximate cause. *Davis v. Jeffreys*, 712.

d Burden of Proving Contributory Negligence

1. The burden of proof is on the defendant on the issue of contributory negligence in a personal injury action. *Lipscomb v. Cox*, 64.

D Actions for Negligent Injury.

c Nonsuit

1. Where the evidence offered by the plaintiff shows contributory negligence barring his right to recover a nonsuit is proper. *Krouse v. R. R.*, 541; *Davis v. Jeffreys*, 712.

2. Where evidence discloses that intervening negligence of third person was sole proximate cause of injury nonsuit is proper. *Herman v. R. R.*, 718.

NEW TRIAL.

B Grounds Therefor.

g Newly Discovered Evidence

1. The party moving for a new trial upon the ground of newly discovered evidence must show to the sound discretion of the trial court, its materiality and competency, and that he was not guilty of laches in not discovering it in time for introduction at the trial, and that the evidence is not merely cumulative and its reception would probably change the verdict as rendered. *Brown v. Sheets*, 268.

2. A motion for a new trial will not be granted where the newly discovered evidence is not material to the answer to the issue and its consideration would not tend to vary the result. *Connor v. Mfg. Co.*, 66.

NONSUIT see Trial D a.

NORTH CAROLINA—Highway Commission see Highways A—Industrial Commission see Master and Servant B—Park Commission see Eminent Domain B a.

NUISANCE—Attractive, see Electricity A b.

"OFFICE" see Municipal Corporation D a.

OFFICERS—Surety bonds of see Principal and Surety B c—Election of see Elections.

OPTION see Vendor and Purchaser.

PARENT AND CHILD—Abandonment of child see Husband and Wife A a 1, A d 1—Liability on child's contract see Infants B a 3—Liability for injuries to third person by son in employment see Master and Servant D b 1.

PARK COMMISSION see Eminent Domain B a.

PARTIES—Misjoinder of parties and causes see Pleadings D b—Right of alien to sue in this State see Aliens A a—Joinder of husband or wife see Husband and Wife F a—In action to foreclose see Mortgages H e—Who may move to dismiss appeal from commission see Corporation Commission C a—In action against railroad under Federal control see Railroads E a).

B Defendant (Fraudulent joinder see Removal of Causes C b)

a Necessary Parties Defendant

1. In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. *Music Store v. Boone*, 174.

2. An estate for life conveyed by deed upon conditions affecting a reversion cannot be judicially determined when the heirs at law of the deceased grantor having a possible interest therein are not made parties, and when this defect of parties appears on the record the Supreme Court will remand the case in order that they may be joined. *Hamilton v. Henderson*, 353.

PARTITION—Setting aside partition sale see Judicial Sales B, C.

PARTNERSHIP.

D Rights and Liabilities as to Third Persons.

a Partnership Acts in General

1. Where a partnership executes a contract to purchase a certain tract of land, and the agreement is executed in the name of one of the partners for the firm as a matter of convenience, and the deed made to him upon his execution of a mortgage and notes for the purchase price, it may be shown that the transaction was a partnership act and that the partnership was liable thereon. *Justice v. Sherard*, 237.

2. A complaint alleging that the plaintiff at the request and for the convenience of the defendants made a deed to a certain tract of land to one of them for the benefit of them all in which the grantee assumes the obligation of a prior mortgage for them all, and that the grantee defendant subsequently conveyed to the other defendants upon like condition their proportionate share, specifying the

PARTNERSHIP D *a—Continued.*

interest of each, states a cause of action as to each, and a demurrer thereto, on the grounds of misjoinder of parties and causes of action and that it fails to allege a cause of action, admits the truth of the allegations, and is properly overruled. *Coxe v. Dillard*, 344.

PAYMENT see Bills and Notes; Principal and Surety A c 1.

PHYSICIAN AND PATIENT—Communications between see Evidence D e.

PLEADINGS (Indictment see Indictment—Of usury see Usury C a—Admissibility in evidence see Evidence F e—Appeal from refusal of judgment on see Appeal and Error A d 1).

A Complaint.

b Verification

1. Objection to the sufficiency of the verification of the complaint by plaintiff's next friend on the ground that the affiant had no personal knowledge of the matters alleged will not be sustained when the allegations are not made to appear to be outside the personal knowledge of the affiant. *Foster v. Hyman*, 189.

c Amendment

1. A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power, in the exercise of his sound discretion, to allow the plaintiff to amend the original complaint upon motion made within ten days after receipt by the clerk of the Superior Court of the certificate showing that the judgment of the Superior Court had been affirmed. C. S., 515. *Morris v. Cleve*, 253.

2. The judge of the Superior Court has plenary power to permit amendments to the pleadings when the amendment does not substantially change the cause of action originally alleged or set up a new cause of action. *Bridgeman v. Ins. Co.*, 599.

B Answer.

f Matters in Abatement

1. Where it does not appear upon the face of the complaint that another action is then pending in another county in which the same relief could be obtained, the objection may be taken by way of answer. C. S., 517. *Bank v. Broadhurst*, 365.

C Counterclaim and Set-off.

c Effect and Subsequent Pleadings

1. Public Laws of 1924, ch. 18, providing that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff or his attorney, is not referred to in Public Laws of 1927, ch. 66, and construing the two acts together there is no repugnancy between them so as to repeal by implication the former law on the subject. *Lumber Co. v. Welch*, 249.

PLEADINGS—*Continued.*

D Demurrer (Right of appeal from judgment overruling see Appeal and Error A c—Question presented for review upon appeal from see Appeal and Error J f—Usury may not be taken by demurrer see Usury C a 1—Demurrer to complaint alleging ratification of fraud see Fraud B c 1).

a On Ground that Complaint Fails to Allege Cause of Action (In action for negligence on highway see Highways B h 1)

1. A demurrer to a pleading on the ground that the complaint does not state a cause of action will not be sustained if its allegations are sufficient to state a good cause, and facts establishing its insufficiency may not be pleaded in the demurrer. *Justice v. Sherard*, 237.

2. Where the complaint alleges that a partner purchased a certain tract of land for the partnership, but in his own name for the convenience of the partnership, and the deed is taken in the name of the partner and the mortgage and notes for the purchase price are executed by him, a demurrer by the other partners on the ground that a cause of action is not stated against them is bad, since it may be shown that the transaction was a partnership undertaking and that the partnership was liable. *Ibid.; Coxe v. Dillard*, 344.

3. A demurrer to the complaint on the grounds that it does not state a cause of action does not deal with the merits of the controversy, but only with the sufficiency of its allegations, admitting them to be true for the purpose. *Morris v. Cleve*, 243; *McDaniel v. Trent Mills*, 342.

4. Where allegations in a complaint are insufficient to state a cause of action to set aside a deed for fraud, but sufficient to state a cause of action against the grantee therein for failing to account for the purchase price, a demurrer to the complaint is properly sustained on the first cause of action, and overruled as to the second, and the trial court properly retains the second cause for trial, and may permit the plaintiff to amend her complaint as to the second cause in proper instances. *Tull v. Harvey*, 329.

5. Where the defendant's motion for judgment upon the pleadings and that the action be dismissed is in the nature of a demurrer *ore tenus* on the ground that the complaint does not state facts sufficient to constitute a cause of action, C. S., 511(6), the pleadings will be liberally construed with a view to substantial justice between the parties. C. S., 535. *Cole v. Wagner*, 692.

6. Where in an action by the trustees of a hospital against a minor and his guardian it is alleged that the hospital gave the infant medical attention necessary to save his life and usefulness after his injury in an accident, and that the guardian of the infant had recovered judgment for the negligent injury, and that hospital and medical attention was a substantial part of the consideration of the judgment recovered by the guardian of the infant: *Held*, the allegations are not so vague and uncertain as to fail to state a cause of action, but allege a cause of action upon *quantum meruit* and for money had and received, and the defendants should have asked, if they desired the complaint to be made more definite, for a bill of particulars, C. S., 534, or move that the plaintiff be required to amend. C. S., 537. *Ibid.*

PLEADINGS D *a—Continued.*

7. Upon a demurrer the pleadings are liberally construed in the light most favorable to the pleader, and where there are conflicting allegations, and one of them is sufficient to allege a cause of action, the demurrer thereto will not be sustained. C. S., 535. *Lee v. Produce Co.*, 714.

b Misjoinder of Parties and Causes of Action

1. Where a sheriff has been elected for successive terms of office, and appointed for a third term by the county commissioners after the office for his third term had been declared vacant, an action against him and the sureties on his bonds given under the provisions of C. S., 3930, for defalcation during the successive terms is a misjoinder of parties and causes of action, and a demurrer thereto is good. *Pender County v. King*, 50.

2. A demurrer for defect of parties and causes of action will not be sustained where the debt alleged relates to parties not necessary to the proper determination of the action. *Shuford v. Yarborough*, 150.

3. A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. *Ibid.*

4. Where an action is instituted against two defendants and only one of them is served with summons and the action is solely against the one served and this appears from the face of the complaint, a demurrer for misjoinder of parties and causes of action is properly overruled. *C. I. T. Corp. v. Drake*, 162.

5. A complaint in proceedings by the wife under the provisions of 3 C. S., 1667, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good, and a demurrer thereto for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject-matter or transaction. *Taylor v. Taylor*, 197.

6. Failure to demur to the pleadings upon the ground of misjoinder of parties and causes of action or to take exception thereto on these grounds is a waiver of the right. *Morris v. Cleve*, 253.

c Speaking Demurrer

1. Where the complaint alleges that a written contract in the name of one partner was in fact for the benefit of them all and a partnership act, and so recognized by them all, a demurrer on the grounds that it fell within the meaning of the statute of frauds as being a promise to answer for the debt or default of another, or that the defendants were estopped by the written contract from showing parol matters contrary to its terms, is bad as a "speaking demurrer" and is properly overruled. *Justice v. Sherard*, 237.

PLEADINGS D—*Continued.*

d When Demurrer May be Taken

1. A motion which is in effect to the sufficiency of the complaint to allege a cause of action, or in the nature of a demurrer *ore tenus* may be taken at any time, or the Supreme Court may take knowledge thereof on appeal on its own motion. *Cole v. Wagner*, 692.

2. Demurrer to the sufficiency of the complaint to state a cause of action may be made at any time, though answer has been filed, in the Superior Court or in the Supreme Court, or the Supreme Court on appeal may take cognizance thereof *ex mero motu*. C. S., 518. *Power Co. v. Peacock*, 735.

e Effect of Sustaining or Overruling Demurrer and Subsequent Pleadings and Procedure

1. Where the trial court enters a judgment sustaining a demurrer to the complaint and therein grants the parties additional time to file amended pleadings in his plenary discretionary power, the order sustaining the demurrer, unappealed from, does not work an estoppel upon the plaintiff to proceed on the amended pleading. *Bowie v. Tucker*, 671.

2. Where a demurrer to a complaint in a civil suit on the ground of its insufficiency to state a cause of action, has been overruled, the procedure for the defendant is to except and duly appeal to the Supreme Court, and where he has appealed, but has failed to prosecute it, he may not plead and again demur before another judge of the Superior Court at a subsequent term of court, the action of the former judge in refusing the motion being conclusive. C. S., 601. *Power Co. v. Peacock*, 735.

3. Demurring *ore tenus* to the sufficiency of the complaint to state a cause of action after a former judge has refused the motion is in effect appealing from one Superior Court judge to another upon matters of law or legal inference which is the sole province of the Supreme Court under the provisions of our State Constitution, Art. IV, sec. 8. *Ibid.*

POWER COMPANIES see Electricity.

PRIMA FACIE CASE see Master and Servant D b 4.

PRINCIPAL AND AGENT.

A The Relation.

b Determination as to Whether Party is Agent or Independent Dealer

1. The form of a written contract for the local sale of automobiles will not control the question of whether the local representative is a purchaser thereof or an agent therefor, but the correct interpretation of the writing itself as to its effect will fix the status of the local representative in this respect. *Ford v. Willys-Overland*, 147.

2. Where a partnership has a written agreement for the local sales of automobiles and thereafter the partnership is incorporated and continues to act under the agreement with the implied acquiescence of the company distributing the automobiles to local dealers, the unmodified or original agreement will govern the relationship as to whether the corporation was an independent local dealer purchasing the machines or a sales agent. *Ibid.*

PRINCIPAL AND AGENT A—*Continued.*

c *Determination of Which of Two Parties Must Bear Loss Occasioned by Wrongful Act of Agent*

1. Where the defendant purchased an automobile through a local dealer under a title retaining contract securing notes for monthly payments and was sued thereon by the financing corporation claiming as a holder in due course for value, and the defense of payment was pleaded with evidence tending to show that the defendant made payment through a third party who sent his certified check to the plaintiff for the full balance due by the defendant, and that the check was rejected by the plaintiff on account of a check given for a prior installment having been returned unpaid, and the rejected check was returned to the drawer and credited to his account, and the evidence as to whether the check was certified by the drawer or the payee was conflicting: *Held*, the question of whether the drawer was acting as agent of the purchaser or the seller should have been submitted to the jury under the evidence in this case. *Investment Trust v. Windsor*, 208.

2. Where the lender of money makes a loan secured by a mortgage on the land containing a warranty that the title was free from encumbrances, and has no actual knowledge of a prior registered mortgage, and sends its check payable to the attorney securing the loan and the borrower, and the borrower endorses the check and gives it to the attorney and trusts him to pay off the prior mortgage lien, the attorney is the agent of the borrower for the purpose of paying the prior mortgagee, and the lender may recover from the borrower upon the default of the attorney to pay off the existing mortgage lien and his appropriation of the money to his own use. *Bank v. Liles*, 413.

3. Where one of two parties must suffer loss by the fraud or misconduct of another acting as agent in the transaction between the contracting parties, he who reposes the confidence in the agent, or by whose negligent conduct makes it possible for the loss to occur, without the knowledge or concurrence of the other, must bear the loss, and *Held*, under the facts of this case, evidence of the declarations of the agent in respect to the transaction was incompetent as evidence. *Ibid.*

C Rights and Liabilities as to Third Parties.

b *Powers of Agent*

1. As between the vendor and purchaser it is immaterial in what form the agent authorized to purchase certain merchandise signed the contract, which in case of an incorporated agent is sufficient if signed by its president. C. S., 1139. *Pick v. Hotel Co.*, 110.

2. An agent appointed for the purchase of goods, without being given the money for which to pay for them, has implied authority to purchase them on the credit of his principal, and to do such other things in pursuance of the authority directly given as are reasonably necessary to consummate the transaction, and in this case, involving a large expenditure for the furnishing of a hotel, the execution of a contract wherein the vendor retained title for the security of the purchase price. *Ibid.*

PRINCIPAL AND AGENT C—*Continued.*

d Wrongful Acts of Agent

1. Where the applicant to a land bank for a loan negotiates his loan through an attorney, and represents in his application that the land upon which the proposed loan was to be made was free from mortgage liens or encumbrances, and in his deed of trust on the land securing the loan warrants the title to be free and clear from encumbrances, and thereupon after the investigation of the title for the land bank by the attorney and his certificate to the land bank, the loan is made by check payable to the attorney and to the borrower, and the latter endorses the check and gives it to the attorney with the understanding that the attorney should cancel a prior registered mortgage with the proceeds: *Held*, the negligence of the borrower in not personally seeing to the cancellation of the prior lien makes him liable to that extent to the lender upon the failure of the attorney to have it canceled and his appropriation of the money to his own use, and a directed verdict upon evidence establishing these facts is proper. *Bank v. Liles*, 413.

PRINCIPAL AND SURETY.

B Rights and Liabilities of Surety (On replevin bonds see Replevin G b—Joinder of principal and surety see Pleadings D b 1, 2, 3).

c On Bonds of Public Officers and Agents

1. A judgment upon the admissions in the answer of the administrator bank of a deceased county treasurer is not competent in an action by the county commissioners as evidence against the surety on the official bond of the deceased when the bank has been made a party defendant and the surety at once raises the issue as to whether a part of the defalcation was moneys defaulted from the bank when the deceased was acting as its assistant cashier, the interest of the bank and the surety being in conflict, and C. S., 358, not applying in such cases. *Commissioners of Chowan v. Bank*, 410.

2. Where a bank has received from the sheriff of the county funds of the county for deposit, and thereafter the bank becomes insolvent, and a judgment has been obtained against the surety on the sheriff's bond for the sum deposited, which has been paid, the effect of the judgment is to subrogate the surety to the rights of the county to a pro rated share in the distribution of the assets of the bank, and the sheriff being insolvent, a personal debt of the sheriff to the bank cannot be used as an off-set to the right of the surety thereto. *Indemnity Co. v. Corp. Com.*, 562.

3. The various bonds separately required to be given by the sheriff for the proper accounting for and paying of moneys received by him as sheriff by the provisions of C. S., 3930, impose a distinct liability on the sureties on each bond separately for the terms of office for which given, and where one is given by the same surety for the same sheriff for more than one successive term, the giving of the bond for the succeeding term does not discharge the bond previously given nor release the surety from liability thereon, and a separate cause of action lies against the surety on the bond for each term. *Pender County v. King*, 50.

PRINCIPAL AND SURETY B *c—Continued.*

4. The liability of a surety on a sheriff's bond, given under the provisions of C. S., 3930, is not affected by the fact that the sheriff, pending the life of the bond, has been put upon a salary instead of a fee basis, or the amount of his salary has been changed under the authority of a statute. *Ibid.*

5. Where under the provisions of C. S., 3932, the board of county commissioners has declared the office of sheriff of that county vacant for his failure to give the bonds required by C. S., 3930, and has appointed another who likewise failed to give the bonds, and has again appointed the former sheriff, who gives the necessary bonds and then qualifies, his term is by virtue of his appointment by the board of county commissioners, and the liability of the sureties on his official bonds commences from the time of his appointment. *Ibid.*

PROCESS—In action against city see Municipal Corporations J a 1.

PUBLIC IMPROVEMENTS see Municipal Corporations G.

QUASI CONTRACTS (For services rendered deceased see Executors and Administrators D a).

B Reasonable Value.

b Submission of Question to Jury

1. Where in an action upon *quantum meruit* the defense is interposed by the infant defendant that the amount sought to be recovered as necessary hospital expenses was excessive and exorbitant; the question is for the jury, the trial court having the power to set aside the verdict if excessive. *Cole v. Wagner*, 692.

QUIETING TITLE AND SUITS TO REMOVE CLOUD.

B Proceedings and Relief.

a Pleadings and Evidence

1. The defendant in an action to recover lands may maintain a counterclaim and ask that the plaintiff's claim be removed as a cloud on his title. *Sears v. Braswell*, 515.

QUO WARRANTO see Elections I a.

RAILROADS (As carriers see Carriers—Forfeiture of charter see Corporations K a, K b—Order requiring submission of plans for new station is appealable see Corporation Commission C c 1).

D Operation (Liability to employees see Master and Servant E).

b Duty in Regard to, and Accidents at Crossings

1. Where a railroad company has knowingly permitted automobiles and other vehicles to cross its right of way for a long period of time at a certain road crossing, from one public highway to another, it owes the duty to keep such crossing in a reasonably safe condition whether the crossing was constructed by the railroad company or not, and it is liable in damages for injuries proximately caused by its negligent failure to do so. *Stone v. R. R.*, 429.

2. Where a railroad company has knowledge that automobiles and other vehicles have been accustomed to cross its tracks at a certain

RAILROADS D *b—Continued.*

roadway, for a long period of time, it owes the duty to keep the crossing in reasonably safe condition for this purpose, and where there is evidence tending to show that the public had so crossed at this place for a long period of time and that the railroad company had left a hole on its right of way which caused plaintiff's automobile to get stuck and consequently struck by defendant's train, without fault or negligence on plaintiff's part, the question of defendant's actionable negligence is for the jury under correct instructions from the court. *Ibid.*

3. In an action to recover damages for the negligent killing of the plaintiff's intestate, evidence tending to show that the defendant's rapidly moving train collided with an automobile the plaintiff was driving at a much used public crossing, coming upon him without signal or warning at a place where the defendant's tool and supply houses obstructed the intestate's view so that he could not apprehend the danger in time to avoid it, is sufficient to take the case to the jury upon the question of whether the defendant's negligence was the proximate cause of the injury in suit. *Moseley v. R. R.*, 628.

4. Where the plaintiff's intestate has been killed in a collision of his automobile with the train of the defendant at a public crossing, and the question is involved as to whether the defendant negligently omitted to give warning of its approaching train, testimony of witnesses who were present that they did not hear the bell ring or the whistle blow is sufficient to take the case to the jury on this question. *Ibid.*

5. Where there is evidence that the defendant's train colliding with an auto truck of the plaintiff's intestate as he was attempting to cross the defendant's tracks at a public crossing, with the train speedily coming upon him without warning, the question is for the jury as to the negligence of the intestate in failing to stop before attempting to cross under the rule of the prudent man under the facts of this case. *Ibid.*

6. While it is negligence *per se* for a railroad company not to observe a statutory requirement of maintaining gates or safety devices, or watchmen at a grade crossing, it is also incumbent upon it, in the absence of statute, to do so when the crossing is much used by the public and is more than ordinarily dangerous, and the failure to do so would be a great menace to the public, and the question of whether or not such precautions were required is for the jury under correct instructions under the evidence in this case. *Ibid.*

7. Where the collision between an automobile and a train at a grade crossing is caused solely by the negligence of the driver of the automobile, an occupant therein may not recover damages for his injuries sustained therein from the railroad company. *Herman v. R. R.*, 718.

g Fires

1. In order for the plaintiff to recover damages from a railroad company for setting fire to his barn off the right of way by sparks from the defendant's locomotive, the burden is on the plaintiff to

RAILROADS D *g—Continued.*

show that the fire was caused by sparks from the locomotive, and then on the railroad company to show that its engine was properly equipped and operated, and upon supporting evidence the issue of negligence is for the jury, and the defendant's motion as of nonsuit is properly denied. *Heath v. R. R.*, 541.

2. Where there is evidence that plaintiff's barn off the right of way of the defendant railroad company was set afire by sparks from the defendant's locomotive shifting nearby, it is some evidence that the locomotive emitting the sparks was in a defective condition or that it was improperly operated. *Ibid.*

3. Evidence that the defendant railroad company's locomotive was shifting cars near the property of the plaintiff, throwing off heavy smoke with live sparks that were carried by the wind to the plaintiff's barn, off the right of way, and that soon thereafter the barn caught fire and was destroyed, and that there was at the time no fire on the plaintiff's premises which could have started the conflagration, is sufficient to be submitted to the jury upon the defendant's actionable negligence. *Ibid.*

4. Where there is evidence tending to show that defendant's locomotive was throwing off heavy smoke with live sparks which caused the fire in suit, testimony that the same locomotive on the night previous was emitting smoke and live sparks is competent upon the question of the defective condition of the locomotive on the issue of defendant's negligence in this respect. *Ibid.*

E Actions.

a Parties

1. A contract made with the Director General of Railroads during Federal control to the effect that the railroad would pay for a side track to plaintiff's manufacturing plant upon condition that the freight tonnage would amount to a certain quantity, which during Federal control it did not do, will not now lie against the railroad company operating its own road, the required tonnage being now the amount agreed upon, the agent designated by the President (U. S. Compiled Statutes, Cum. Sup. 1925, sec. 10071¼ cc) not having been made a party to the action. *Brick Co. v. R. R.*, 442.

RATIFICATION OF FRAUD see Fraud B c.

RECEIVING STOLEN GOODS.

D Verdict.

a Form and Requisites

1. Where the evidence is conflicting as to whether the defendant knew at the time of receiving goods that they were stolen, and the charge of the court fails to instruct that finding of such knowledge was necessary for conviction, the verdict of guilty without finding that the defendant possessed such knowledge at the time he received the goods is defective, and a *venire de novo* will be ordered on appeal. *S. v. Barbee*, 248; *S. v. Scurlock*, 475.

RECORDS—Torrens deeds see Deeds and Conveyances G.

REFERENCE—Right to trial by jury upon objection to order for, see Jury C a 1.

REGISTRATION—Of conditional sales see Sales I a—Under Torrens Act see Deeds and Conveyances G.

REMOVAL OF CAUSES.

A Right to Removal in General.

a Statutory Restraint on and Agreements in Charter Against Right to Removal

1. A nonresident insurance company has the right to remove a suit brought against it from the State to the Federal Court under the Federal removal statute, and the State statute, C. S., 6295, providing that upon its attempt to do so the insurance commissioner shall revoke its right to do business in this State is unconstitutional in this respect, and the right to removal obtains notwithstanding that under the statute the company has filed an application to do business in the State waiving its right to removal. *Rhodes v. Ins. Co.*, 337.

C Citizenship of Parties.

b Separable Controversy and fraudulent joinder

1. Upon a petition of the nonresident defendant for removal of the cause to the Federal Court for trial on the grounds of diversity of citizenship and separable controversy, the allegations of the complaint will alone be considered as to whether a joint tort is alleged, and where the allegations are sufficient and the resident defendant recognizes the jurisdiction of the State court by obtaining an extension of the time to answer, the petition for removal will be denied. *Cathey v. Charlotte*, 309.

2. Allegations in the complaint in an action for wrongful death that the plaintiff's intestate was an employee of a city and was injured by the joint negligence of the city and the nonresident telephone company in connection with removing, by order of the city, its wire, used in its police and fire alarm system, from a pole erected by the nonresident telephone company under authority of an ordinance requiring that sound poles be used, and that the injury resulted from defects in the pole causing it to break and throw plaintiff's intestate to the ground: *Held*, a cause of action against both defendants as joint *tort-feasors* is stated, and the petition of the nonresident defendant for removal of the cause to the Federal Court for trial should be denied. *Ibid.*

3. Where a city and a nonresident telephone company are sued in the State Court a joint tort causing the death of the plaintiff's intestate, and the city does not file a demurrer but obtains an extension of time in which to answer, the nonresident defendant cannot raise the question by its petition for removal of the cause to the Federal Court on the ground that the action is separable, whether or not the city was liable for that its employee was injured in the exercise of the city's governmental functions. *Ibid.*

4. An action against a nonresident corporation and its resident superintendent, brought by an employee who alleges that he was under the

REMOVAL OF CAUSES C *b—Continued.*

direction and control of the resident superintendent, and that both defendants were negligent in failing to provide a safe place to work, in changing the method of work without warning the plaintiff, in employing a dangerous method of doing the work, and in failing to warn and instruct the plaintiff as to the change of method of work: *Held*, the complaint alleges a joint *tort*, and the petition of the nonresident defendant for removal to the Federal Court will be denied. *Johnson v. Utility Co.*, 393.

5. An action against a nonresident corporation and its resident foreman, brought by an employee who alleges that he was under the direction and control of the resident foreman, and that both defendants were negligent in ordering the plaintiff to operate an "electrical stacker" and failing to instruct him how to use the machine which was new and not in general use, and in failing to give him a helper necessary for the safe operation, of the machine, and in failing to warn and instruct the plaintiff as to the danger incident to the work: *Held*, the complaint alleges a joint *tort*, and the petition of the nonresident defendant for removal to the Federal Court will be denied. *Slaughter v. Lumber Co.*, 395.

REPLEVIN—Claim and Delivery.

G Liabilities on Bonds and Undertakings.

b Liability of Surety

1. The sureties on a replevy bond in claim and delivery are parties of record in an action on the bond before final judgment has been rendered, and notice to the principal on the bond is sufficient notice to the surety of every motion or proceeding made in the ordinary and reasonable purview and compass of the action. *Land Co. v. Cole*, 452.

2. A judgment in claim and delivery proceedings which adjudicate and determine the rights of the parties to the action without reservation of further power by the court to proceed therein is a final judgment, and notice thereafter to the principal on the replevy bond of further proceedings therein on motion of a party, which substantially changes the effect of the judgment, is not notice to the sureties on his bond, the effect of the judgment being to terminate the agency of the principal in such instances, and judgment later rendered on the motion does not affect the liability of the sureties, and as to them it is void. *Ibid.*

F Trial and Judgment.

c Instructions

1. Where, in an action in claim and delivery involving the title to an automobile, there is evidence tending to show that the plaintiff bought the car for himself and *per contra* that he made a gift of the car to the two daughters by delivering the car with intent to pass title either to their father for them or to them direct, an instruction that limits the defense to the evidence to the effect of an immediate delivery by the father to his daughters and deprives the defendant of their defense upon the second phase thereof of the gift direct to the daughters is reversible error. *Harrill v. Tripp*, 426.

REPLEVIN F—*Continued.*

e Rendition and Form of Judgment

1. Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against him should require the delivery of the property with damages for its detention and costs and against the surety on the bond for damages and costs within the amount of the penalty thereon, or, in the event that delivery of the property cannot be had, for the value at the time of its wrongful detention with interest as damages therefrom, and costs, and likewise against the surety within the penalty of the bond, the surety to be discharged upon such payment. *Harrell v. Tripp*, 426.

RESERVATIONS see Deeds and Conveyances C d.

RES IPSA LOQUITUR see Negligence A e.

RESTRAINT OF TRADE see Contracts A f.

RULES OF COURT see Appeal and Error F b; E a, Criminal Law L.

SALES.

F Warranties (Measure of damages for breach of see Damages F b 1).

c Liability of Manufacturer or Distributor for Warranties Made by Agents or Independent Dealers

1. Where a contract creating a local representative for the sale of automobiles, by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited. *Ford v. Willys-Overland*, 147.

H Remedies of Buyer.

a Recovery of or Defense to Action for Purchase Price on Ground of Worthlessness of Article

1. Where a seller contracts for the sale of a cotton gin and delivers to the purchaser an article that is worthless except for junk, there is a failure of consideration, and evidence that the gin was worthless except for junk is admissible in the seller's action for the purchase price. *Hyman v. Broughton*, 1.

2. Where the article sold is worthless there is a failure of consideration and the vendee may resist the vendor's action for the purchase price without alleging or proving fraud in the procurement of the contract or compliance with a stipulation of the contract requiring that notice of defects and an opportunity to remedy same be given the vendor. *Ibid.*

3. Where in an action on a note, the evidence tends to show that the consideration for the note was certain shares of bank stock and the promise of the payee to make the payer a director of the bank, and that the payer was made a director and, acting as such director, voted for and received dividends upon his stock, the execution of the note being admitted, upon the later insolvency of the bank the payer may not maintain the position that there was a total failure

SALES H *a—Continued.*

of consideration, and an instruction that the jury should answer the issue of indebtedness in favor of the defendant if they found the stock to be worthless is reversible erorr. *Owens v. Carstarphen*, 424.

c Actions and Counterclaims for Breach of Warranty

1. The vendee may not recover damages for the delivery of a cotton gin on the ground that it was inferior in quality to the one purchased in the face of a stipulation in the written contract of sale that any agreement, verbal or otherwise, not in the writing would not be considered. *Hyman v. Broughton*, 1.

I Conditional Sales.

a Registration and Priority

1. Between the parties to a conditional sales contract probate and registration is not required by statute. C. S., 3312. *Pick v. Hotel Co.*, 110.

2. Where a chattel mortgage for the purchase price of an automobile expressly retains title to the automobile and all improvements made thereon, and stipulates that the giving of possession thereof to the purchaser was not to pass title to him, and the instrument is duly registered, the purchaser during the continuance of the contract may have repairs made that are necessary for its operation, and the seller's mortgage is superior to a mortgage for repairs given to a mechanic in lieu of his mechanic's lien which he had lost by surrender of possession of the car. *Motor Co. v. Motor Co.*, 371.

b Rights of Parties Under Unregistered Conditional Sales Contracts

1. An unregistered conditional sales contract is valid as against all persons except creditors and purchasers for value, and upon conflicting evidence as to whether one defendant was a purchaser for value from the vendee under the conditional sales contract, the issue is properly submitted to the jury, and a motion as of nonsuit is properly denied. C. S., 3311, and *held further:* joinder of vendee and one claiming as innocent purchaser for value from him is not misjoinder. *Music Store v. Boone*, 174.

d Form, Requisites and Validity of Conditional Sales Contract

1. The description in a chattel mortgage for the purchase price of an automobile "one S. H. Coupe No._____ Model T" is sufficient to admit evidence *aliunde* for the purpose of identification when the purchaser owned only one automobile, the abbreviation "S. H." meaning "second-hand," and "Model T," a certain type of Ford; and when registered and identified is superior to a later registered mortgage given by the purchaser to others. *Motor Co. v. Motor Co.*, 371.

SCHOOLS AND SCHOOL DISTRICTS.

B Enlarging Districts.

a Power of County Board of Education to Exercise Eminent Domain to Enlarge District

1. Construing C. S., 5469, in connection with the former statutes giving the county board of education the power to condemn lands neces-

SCHOOLS AND SCHOOL DISTRICTS B *a—Continued.*

sary for public school purposes within the limitation of ten acres, it is *Held*, the fact that one of these schools had already acquired a less amount of land did not preclude the county board of education from acquiring by another proceeding sufficient lands to meet the enlarged and necessary requirements of the school for additional lands within the limitation imposed by statute. *Board of Education v. Pegram*, 33.

2. Where the county board of education has the power to condemn land under former statutes the question of whether a later statute is declaratory of the existing law or whether it confers additional power upon the board becomes academic. *Ibid.*

SCOPE OF EMPLOYMENT see Master and Servant D b.

SEDUCTION—Testimony of physician as to virtue of prosecutrix see Evidence D e 1.

SHERIFFS.

B Compensation.

a Distinction Between Salary and Fee Basis

1. The payment by the county for the services of a tax collector upon a salary or wage basis differs from that of a fee or commission basis in that in the former the payment for such services depends upon a period of time of service in such capacity, and in the latter, upon the particular acts of collection or value of the services rendered. *Ferguson v. Martin*, 301.

C Powers, Duties and Liabilities.

d Duty to Turn Over Tax Books Upon Expiration of Term of Office

1. Where an act which says in its caption that its purpose is to regulate salaries, etc., repeals all former laws, and provides that the sheriff of a certain county should receive for his services as sheriff the fees of his office, and for his services as tax collector he should receive a certain sum per annum, payable monthly: *Held*, in the collection of taxes the sheriff was on a salary basis, and under the provisions of chapter 213, section 7, Public Laws 1927, he is required to turn over to his successor the tax books upon the termination of his term of office, and mandamus will lie to compel him to do so. *Ferguson v. Martin*, 301.

D Liability for Public Funds (Liability of surety on bonds see Principal and Surety B c).

a Nature and Extent of Liability in General

1. The liability of a sheriff for moneys he has collected for the county is that of insurer, the moneys so collected being regarded as held by the sheriff in trust for the county, and his liability for such funds can be discharged only by payment to the county under the provisions of the statute. *Indemnity Co. v. Corp. Com.*, 562.

STATE—Exercise of eminent domain see Eminent Domain B a—Highway Commission see Highways A—Industrial Commission see Master and Servant B—Park Commission see Eminent Domain B a.

STATUTE OF FRAUDS see Frauds, Statute of.

STATUTES (Authorizing bonds see Taxation A a—Creating drainage districts see Drainage Districts A a—Table of statutes construed see Consolidated Statutes).

A Enactment, Constitutionality and Validity.

a Constitutional Requirements in Enactment (creating drainage district see Drainage Districts B a 2)

1. The provisions of the act creating the North Carolina Park Commission are constitutional and valid. Chapter 48, Public Laws of 1927. *S. v. Lumber Co.*, 4.

c Constitutionality and Validity of Retroactive, Curative and Ex Post Facto Statutes (Statute changing procedure only see Banks and Banking H a 7)

1. An *ex post facto* statute prohibited by the State Constitution, Art. I, sec. 32, relates only to criminal statutes, and though vested rights may not be affected by retroactive laws, contingent interests may be affected thereby, and where there is a voluntary trust estate with the limitation over upon a contingency determinable at some future time as to the persons who take thereunder, the power of revocation of the trust given by C. S., 996, is not objectionable as falling within the Constitutional inhibition. *Stanback v. Bank*, 292.

2. A statute passed to preserve the credit of a certain county in enabling it to meet the payment of its bonds when due, authorizing the issuance of refunding bonds and ratifying the act of the county commissioners in borrowing from the general county fund pending the authorization and issuance of the refunding bonds, is not objectionable as a retroactive statute under the facts of this case. *Barbour v. Wake County*, 314.

3. A retrospective act to cure an irregular or defective statute and to ratify proceedings thereunder, which the Legislature originally had the authority to enact, and which does not impair the obligations of a contract or affect vested rights is valid and constitutional. *Greene County v. R. R.*, 419.

d Vague or Contradictory Statutes

1. C. S., 4103, limiting the effect of a conveyance by the husband of the "home site" without the voluntary signature and assent of his wife signified by her private examination according to law, is valid, and does not fall within the principle that a statute too vaguely worded to express a definite meaning, and which is not susceptible of interpretation by the courts, will be declared void. *Boyd v. Brooks*, 644.

e Special Acts in Regard to Charters of Corporations

1. The provisions of Article VIII, section 1, of our State Constitution, prohibiting the Legislature from creating a corporation or extending, altering or amending its charter by special act has been held to apply only to private or business corporations; and where the Legislature by special act amending the charter of a city authorizes it to purchase electricity and resell it to its inhabitants and those

STATUTES A *c—Continued.*

within a three-mile zone of the city, the power to sell to such individuals and corporations does not detract from the public service or destroy the public character of the municipality, and where the same power is given the city by general statute also, the exercise of the power thus conferred will not be enjoined. *Holmes v. Fayetteville*, 746.

B Construction and Operation.

a General Rules for Construction of Statutes

1. A statute will be interpreted in accordance with the meaning and intent of the Legislature as gathered from its terms, and where a technical interpretation will destroy the manifest spirit, the latter will prevail. *Machinery Co. v. Sellers*, 30.

2. Where the meaning of a statute is at all in doubt, reference may be had to the title and context as legislative declarations of its purpose. *Ibid.*

C Repeal and Revival.

b Repeal by Implication

1. Repeals of statutes by implication or construction are not favored by the courts, and for a later statute to repeal a former one the repugnancy between them must be clear, and then the repeal will operate only to the extent of the repugnancy. *Lumber Co. v. Welch*, 249.

SUBMISSION OF CONTROVERSY see Controversy Without Action.

SUBROGATION see Principal and Surety B c 2, Insurance O b, Bills and Notes I d 1.

SURETIES see Principal and Surety.

TAXATION (Drainage assessments see Drainage Districts B—Assessments for public improvements see Municipal Corporations G c).

A Constitutional Requirements and Restrictions.

a Necessity of Submission of Question of Issuance of Bonds to Voters

1. Bonds issued by a county for the construction and maintenance of its highways are for a necessary county expense within the intent and meaning of the State Constitution, Art. VII, sec. 7, and may be validly authorized by general or special statute and issued by the county thereunder without submitting the question of their issuance to the approval of the voters of the county. *Barbour v. Wake County*, 314.

2. Where the municipal finance act does not apply to refunding certain bonds of a county, issued prior to its operating effect, and the bonds become due and payable, and there is no provision made for their payment, the act of the board of county commissioners in paying them out of the general county fund as a temporary arrangement, using the bonds as collateral to secure the repayment by refunding bonds to be authorized by the Legislature: *Held*, the bonds later authorized by the Legislature and issued by the county to refund the indebtedness to the general county fund are for a special pur-

TAXATION A *a—Continued.*

pose and do not fall within the general limitation of fifteen cents on the one hundred dollars valuation prescribed by the Constitution, Art. V, sec. 6. *Ibid.*

3. The board of county commissioners, having the supervision and control of roads, bridges, and the levying of taxes and the finances of the county, Constitution, Art. VII, sec. 2, have the authority by proper resolution to borrow from the general county fund moneys with which to pay maturing bonds of the county when due, being necessary to preserve the credit of the county, and to issue refunding bonds for the purpose of repaying this loan under a valid statute providing therefor and declaring itself to be a special statute validating and legalizing the transaction. *Ibid.*

4. Township bonds issued for aiding the construction and operation of a railroad therein are not for a necessary expense, and require the approval of the voters of the township under a valid statute authorizing the issuance of the bonds. *Greene County v. R. R.*, 421.

5. Where a deficit has accumulated in the running expenses of a public school of a township, and the voters of the township under a valid statute have approved its payment by the township, it is not necessary that the question of the issuance of bonds, authorized by a later statute for paying the indebtedness, be submitted to the voters of the township in order to validate the bonds so issued, the later statute merely prescribing the method by which the former authority should be executed. *Wolfe v. Mt. Airy*, 450.

6. Where an incorporated city under authority of statute furnishes through its own transmission lines electricity for its citizens for hire within a circumscribed territory adjoining its limits, and the expenses incident thereto are paid out of its surplus profits, the proposition is not one that requires the approval of the voters as it does not fall within the provisions of our State Constitution, Art. VII, sec. 7, nor is it in violation of the Fourteenth Amendment to the Federal Constitution. *Holmes v. Fayetteville*, 740.

c *Uniform Rule and Ad Valorem*

1. Township bonds to aid in the construction of a railroad, issued in accordance with a valid statute, are not objectionable on the grounds that taxes levied against such railroad are to be expended in paying the interest coupons of the bonds and in maintaining the sinking fund provided for in the act, the provision of the Constitution requiring uniformity in the levy of taxation not applying to the distribution of the revenue derived therefrom. *Greene County v. R. R.*, 419.

d *Classification for Taxation*

1. The statute classifying trucks, etc., hauling freight for hire for license taxes in accordance with the distance of route along the State's highway is held to be upon a reasonable and substantial basis, and there being no constitutional inhibition against such classification, it is held not to be discriminatory contrary to the provisions of our State Constitution, Art. V, sec. 3, or section 1, Fourteenth Amendment of the Constitution of the United States. *Clark v. Maxwell*, 604.

TAXATION A—*Continued.*

f Form and Requisites of Statutes Authorizing Bond Issue

1. Where a statute authorizing a township to issue bonds to aid in the construction of a railroad therein omits to specify the amount of the issuance, and the commissioners have called an election upon a petition therefor to vote thereon in an amount not to exceed $100,000, and this election is carried and the bonds are issued in that sum and held in escrow, and later a curative statute is enacted likewise fixing the amount of the issue in that sum: *Held*, the bonds are not invalid by reason of the omission in the original act. *Greene County v. R. R.*, 419.

g Form and Requisites of Bonds Issued Under Valid Authority

1. Where an act authorizing the issuance of township bonds provide that they shall be in the sum of $100 each, and a curative act is passed providing that the signature of the chairman and the clerk of the board of county commissioners "shall be conclusive of said form and details" the denomination of the bonds, nothing else appearing, is to be regarded as a detail, and the bonds are not affected by the fact that they were issued in larger denominations. *Greene County v. R. R.*, 419.

B Liability of Persons and Property (Assessments for public improvements see Municipal Corporations G).

a Solvent Credits

1. Where the grantors in a timber deed retain title as security for the payment of the purchase price, and the deed provides for payment as the timber is cut and removed and for the execution of notes for the deferred payments which were to be unaffected by failure to cut and remove the timber: *Held*, the notes thus given, being unconditional promises to pay money are solvent credits and subject to taxation under the provisions of chapter 102, Public Laws 1925, chapter 71, Public Laws 1927, providing for the taxation of solvent credits under the authority of our State Constitution, Art. V, sec. 3. *Alston v. Warren County*, 470.

TENANT see Landlord and Tenant.

TORRENS ACT see Deeds and Conveyances G.

TORTS—Negligence see Negligence—Negligence of master see Master and Servant C—Of railroads see Railroads D—On highway see Highways B—Torts of municipal corporations see Municipal Corporations E—Particular torts see Fraud, Trespass, and Particular Titles of Torts).

TRESPASS.

A Acts Constituting Trespass and Liability Therefor.

b Abuse of License

1. The permission of a carrier by rail to its patrons to store cotton on its platform confers upon them the right to remove the cotton, but does not extend to the right to permit a competitive carrier to do so for the purpose of transporting the cotton over its own line, and the competitor's acts in so doing is trespass *ab initio*. *R. R. v. Transit Co.*, 505.

TRESPASS A—*Continued.*

c Obstructing or Preventing Use of Property Rights or Public Ways

1. Where an alley has been dedicated to the public and accepted by it, an allegation of the complaint in an action against an abutting owner that he has closed the alley with an obstruction and fastened the end on to the plaintiff's abutting property on the other side is one to the effect that the defendant has trespassed upon the property rights of the plaintiff and is sufficient to allege a good cause of action. *Bowie v. Tucker*, 671.

TRESPASSERS AND LICENSEES see Electricity A b.

TRIAL (Right to trial by jury see Jury C, Criminal Law I a—Trial in criminal cases see Criminal Law I—Trial in particular forms of action see Particular Heads).

B Reception of Evidence (Harmless error in reception of evidence see Appeal and Error J e 3, 4, 5).

c Objections and Exceptions

1. Where the master is sued for damages for a negligent injury inflicted on his servant by reason of defective tools or appliances furnished the latter to do his work, an exception must be duly taken to an incompetent question calling forth admission of the master's vice-principal, and when taken only to the answer of the witness on motion to strike out, the exception will not ordinarily be considered on appeal when the answer is responsive to the question. *Bryant v. Construction Co.*, 639.

D Taking Case or Question from Jury.

a Nonsuit (In negligent actions see Negligence D c—Sufficiency of evidence see Particular Causes of Action)

1. Where the only evidence in an action upon an accident insurance policy tends to show that the defendant was not responsible under the terms of the policy, the defendant's motion as of nonsuit is properly granted. *Gant v. Ins. Co.*, 122.

E Instructions (In criminal cases see Criminal Law I g—In caveat proceedings see Wills D i).

c Form, Requisites, and Sufficiency of Instructions

1. In an action to recover damages of a bus line where there is sufficient evidence tending to show that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit: and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of C. S., 564, requiring that the court instruct the jury on the law arising from all substantial features of the case, and constitutes reversible error. *Williams v. Coach Co.*, 12.

TRIAL E *c—Continued.*

2. Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff, under the provisions of C. S., 564, requiring him to charge upon the principles of law arising from the evidence in the case. *Lipscomb v. Cox*, 64.

3. Where the issues of negligence, contributory negligence, assumption of risk, and damages are submitted to the jury, it is required that a trial court charge the jury as to the effect of a finding of negligence and contributory negligence on the issues of damages, and his failure to do so is reversible error. The correct form of these issues is given. *Oates v. Herrin*, 171.

4. Where the trial court gives conflicting instructions upon a material phase of the case it cannot be assumed that the jury followed the correct part of the charge in answering the issue, and a new trial will be awarded on appeal. *Coe v. Loan Co.*, 689.

d Applicability to Pleadings and Evidence

1. Where, in an action in claim and delivery involving the title to an automobile, there is evidence tending to show that the plaintiff bought the car for himself and *per contra* that he made a gift of the car to the two daughters by delivering the car with intent to pass title either to their father for them or to them direct, an instruction that limits the defense to the evidence to the effect of an immediate delivery by the father to his daughters and deprives the defendant of their defense upon the second phase thereof of the gift direct to the daughters is reversible error. *Harrell v. Tripp*, 426.

e Requests for Instructions

1. Where there is error in the charge upon a substantial feature of the case the appellant is entitled to a new trial upon error assigned without having made a special prayer for instructions in regard thereto. *Oates v. Herrin*, 171.

2. In an action to recover damages for injury alleged to have been negligently caused by a collision between plaintiff's car and the defendant's truck on a public highway, an instruction requested by the defendant is properly refused when not based upon evidence in the case, but on an inference that had the plaintiff blown his horn it would have aroused the defendant's driver of the truck from his inattention in time to have avoided the injury in suit. *Kjellander v. Baking Co.*, 206.

g Construction and General Rules Upon Review

1. Hypothetical illustrations explaining the law arising upon the evidence in a case will not be held for reversible error in the absence of potential prejudice to the complaining party. *Dulin v. Dulin*, 215.

h Additional Instructions and Order for Jury to Again Retire

1. The trial court has the power, if he is under the impression, created by inconsistent answers to separate issues, that the jury had not understood his charge, to give additional instructions and have the jury again retire for further consideration. *Oates v. Herrin*, 171.

TRIAL—*Continued.*

F Issues (In caveat proceedings see Wills D j).

a Form and Sufficiency in General

1. Where the issues submitted to the jury fully present all phases of the controversy and fully determine the rights of the parties, they are sufficient, and the court's refusal to submit other issues tendered will not be held for reversible error. *Bank v. Bank*, 526; *Ayden v. Lancaster*, 556.

G Verdict (In prosecution for receiving stolen goods see Receiving Stolen Goods—In particular actions see Particular Titles).

b Form and Validity of Answers to Issues

1. A verdict in an action against a corporation and individually against its president that the defendant corporation was answerable in damages for breach of plaintiff's contract of employment and that the plaintiff's mortgage for moneys loaned by the individual defendant was subject to be foreclosed is not objectionable as inconsistent. *Connor v. Mfg. Co.*, 66.

TRUSTS.

D Revocation of Trusts.

a Voluntary Trusts of Personalty

1. A trust estate in personalty created by the donor in consideration of one dollar and natural love and affection is a voluntary trust and may be revoked by the donor of the trust under the provisions of C. S., 996, as amended. *Stanback v. Bank*, 292.

2. Where a voluntary trust is created in the stock of a bank for the life of the donor or until he reach the age of fifty years, and at the termination to his issue or in the absence of issue to his next of kin under the statute of distributions, those who take in remainder take upon a contingency, the vesting of which depends upon the uncertain happening of a future event, and the trust may be revoked by the donor under the provisions of C. S., 996. *Ibid.*

USURY (As grounds to enjoin foreclosure see Mortgages H b).

C Pleading, Evidence and Trial.

a Pleading

1. Usury must be pleaded and the question may not be raised by demurrer. *Berger v. Stevens*, 234.

VENDOR AND PURCHASER.

B Construction and Operation of Contracts for Sale of Realty.

a Time

1. An option good "until" a day specified includes that day. *Wimbish v. Hattaway*, 107.

VENUE—Removal for convenience of witnesses within discretionary power see Appeal and Error J b 1.

VERDICT see Trial.

"WANTON" INJURY see Execution K a 3.

WAREHOUSEMEN.

A Rights and Remedies of Warehousemen.

a Liens

1. Under the provisions of C. S., 2459, construed in *pari materia* with sections 8107, 2459, 2460, 4925(a), *et seq.*, 5118, the persons, firms or corporations entitled to the possession and lien on property stored in warehouses applies to such as operate warehouses as a business for compensation, and not to an isolated instance in which goods or chattels are left in a store or building of the claimant. *Machinery Co. v. Sellers*, 30.

WARRANTIES see Sales F, H c—In deeds see Deeds and Conveyances.

WATER AND WATERCOURSES.

C Surface Waters, Dams and Ponds.

a Mutual Rights and Duties of Proprietors

1. The upper proprietor of adjoining lands has the right to accelerate the flow of water upon his own lands without changing the course upon the lands of the lower proprietor without liability for damage to the land of the lower proprietor. *Sykes v. Sykes*, 37.

2. Where the evidence is conflicting as to whether a ditch was on the land of an upper proprietor or on a public roadway the question is for the jury under proper instructions from the court, and upon their finding that the roadway was private the upper proprietor is not liable for damages caused to the land of the lower proprietor by filling the ditch and accelerating the flow of surface water. *Ibid.*

"WILFUL" INJURY see Execution K a 3.

WILLS (Administration and Execution see Executors and Administrators—Descent see Descent and Distribution).

C Requisites and Validity.

d Holographic Wills

1. In order to establish a valid holographic will it is not necessary that the papers among which it is found after the death of the testator be the most valuable of his papers, and it is sufficient if he regarded them as papers of value, and worthy of preservation. *Dulin v. Dulin*, 215.

2. Evidence that a paper-writing was in the handwriting of the deceased, signed by her, and found among her valuable papers is sufficient to be submitted to the jury on the issue of *devisavit vel non*, and *held further*, under the facts of this case the paper-writing, being found in a box in which she kept papers of value, evidently regarded as valuable by her, and evidencing her intent that the paper-writing operate as her will, was found among her valuable papers within the meaning of C. S., 4144, and evidence that her husband also kept certain valuable papers of his own in the same box does not vary the result. *In re Will of Shemwell*, 332.

WILLS—*Continued.*

D Probate and Caveat of Wills.

b Caveat Proceedings in General

1. In a suit by the executor to interpret the will of the testator wherein the issue of *devisavit vel non* has been raised, the court, with the consent of all the parties interested may treat the case as having arisen upon the issue ordinarily raised upon the caveat to the will probated in common form, and construe the instrument upon an affirmative finding upon that issue. *Dulin v. Dulin*, 215.

h Evidence and Burden of Proof in Caveat Proceedings

1. Upon the trial of the issues of *devisavit vel non* it is competent for the disinherited child of the testator to testify as to her financial condition, the fact of disinheritance, and affectionate relationship between her and the testator upon the question of the mental capacity of the testator. *In re Will of Casey*, 347.

2. Upon the trial of a caveat to a will where it is contended that one of the several sheets of the writing had been substituted for the original, the caveators must show a fraudulent substitution, and they cannot prevail in this contention when there is no evidence thereof; and where it appears on appeal that the jury has accepted the evidence to the contrary under correct instructions, the judgment of the lower court sustaining the paper-writing as the will will be sustained. *In re Will of Brockwell*, 545.

i Instructions in Caveat Proceedings

1. An instruction that the caveators must prove that "every part" of the paper-writing be in the handwriting of the deceased includes the signature and is sufficient and correct. *Dulin v. Dulin*, 215.

2. Where the judge in his charge upon a caveat to a will uses the word "will" in referring to the paper-writing being propounded, it will not be held as an expression of the court upon the weight and credibility of the evidence contrary to the requirements of the statute when it appears from the context of the instruction that he was only referring to the writing itself, and must have been so understood by the jury. *Ibid.*

j Form and Sufficiency of Issue of Devisavit Vel Non

1. The form of an issue submitted to the jury upon the caveat to a will "is the paper-writing and every part thereof offered in evidence the last will and testament of the deceased" is sufficient to present every phase of the case to the jury under proper instructions from the court, and when the writing is sought to be established as a holographic will, it is not error for the court to refuse to submit an issue with further inquiry as to its having been found among the testator's valuable papers, or other evidentiary matters arising in the inquiry under the issue submitted. *Dulin v. Dulin*, 215.

E Construction and Operation of Wills.

a General Rules of Construction

1. A will and codicils thereto will be considered together as one instrument and construed in their entirety to effectuate the intent of the testator as gathered from the language used. *Tate v. Amos*, 161.

WILLS E *a—Continued.*

2. A will will be construed so as to avoid intestacy when this can be reasonably done, and the word "or" will not be construed as "and" when the latter word would defeat the testator's intent under a proper interpretation of the instrument. *Ibid.*

3. In construing a will effect will be given to the intention of the testator as gathered from the written instrument unless in contravention of some rule of law, and wherever possible effect will be given to every clause and every word, and a devise of real property will be construed as a devise in fee simple unless the will or some part of it shows an intent to convey an estate of less dignity, C. S., 4162. *West v. Murphy,* 488; *Brown v. Lewis,* 704.

4. In construing a will there is a presumption against intestacy. *Ibid.*

5. By will an estate may pass by mere implication from the language used, without any express words to direct its course, but the implication must be necessary, or highly probable, and not merely possible. *Ibid.*

6. In the absence of a general residuary clause in a will, realty owned by the testator at his death and not devised in the will descends to his heirs at law as in case of intestacy. *Cheek v. Gregory,* 761.

b Estates and Interests Created

1. In a devise of a certain city lot to a designated beneficiary "or to her children," the devisee having a child, to whom a devise is made under a different item of the will, the word "or" will not be construed to mean "and" when the latter interpretation would defeat the intent of the testator or have the legal effect of rendering the devise void, but will be construed to vest the fee-simple title in the mother should she survive the testator, otherwise to her child or children. *Tate v. Amos,* 161.

2. A bequest to the wife by her husband of all his personal property during her life, to dispose of as she may see fit, and such not disposed of to be sold after her death, with limitation over to his and her heirs, does not give the wife the power to dispose of any of the property by will. *Jones v. Fulbright,* 274.

3. Where a certificate of deposit issued by a bank in effect creates an agency in the wife to withdraw the money during her husband's lifetime, it cannot be held that the provisions in the husband's will bequeathing his personalty to her for life to dispose of as she pleased during her life, with limitation over, enlarges the wife's life estate or gives her the power of disposition by will. *Ibid.*

4. Where the owner of the fee devises his land to his granddaughter so long as she should live, and if no children, then to her brother by name, the granddaughter being but a child at the date of the will: *Held,* upon the granddaughter dying leaving her surviving a child, the child takes a remainder in the lands by implication as purchaser under the will, the granddaughter having but a life estate, and her brother taking no interest in the land, the contingency upon which his estate was to be divested having happened. *West v. Murphy,* 488.

WILLS E *b—Continued.*

5. Where two items of a will are apparently in conflict, one a devise to the testator's wife of the residue and remainder of the estate "all her heirs, executors, administrators and assigns," and the preceding item, "I want whatever part of my estate is left at the death of my wife, and after the younger children have been educated, equally divided among my living children at that time": *Held*, the wife takes an absolute fee-simple title to the lands thus devised, she being regarded as the primary object of the testator's bounty, and a devise being construed to be in fee simple unless a contrary intention is shown by the will or some part thereof. C. S., 4162. *Brown v. Lewis*, 704.

6. Under a devise of the remainder of the testator's estate to his wife and "all" heirs: *Held*, the word 'all" may be construed "and," giving the estate to her "and her heirs," or a devise in fee simple; and construed in connection with another item of the will, "I want whatever part of my estate that is left at the death of my wife to be divided among my living children," the word "want," so used, is a precatory word not affecting the quality of the estate devised to the wife, and does not create a trust. *Ibid.*

7. Where a testator in disposing of his property by will devises certain of his lands to his widow for life and by various other items certain other lands to his mother, brother and sisters, and then by a subsequent item "after the foregoing I want my personal property and all my moneys on hand" equally divided between his wife and son, followed by another item "if there is over ten thousand dollars each for him and his mother besides real estate and property named, the balance I wish to go to my brother and sisters and their children": *Held*, the word "balance" thus used refers only to the personal property, and there being no residuary clause after the life estate devised, the lands thus devised go to the son as the sole heir at law of the testator, as to this property the testator having died intestate. *Cheek v. Gregory*, 761.

f Designation of Devisees and Legatees and Their Respective Shares

1. Where the obvious language of a will manifests the intent of the testator that his nieces and nephews are to take as beneficiaries thereunder, his brothers and sisters are excluded by necessary implication. *Dulin v. Dulin*, 215.

2. Where according to the direction of a will the estate is to be equally divided between the nieces and the two nephews of the testator after deducting a certain amount of money from the shares of the nephews, the amount named is to be deducted from the sum of both of their shares, each share burdened with one-half the amount named, before equal distribution of the balance is to be made. *Ibid.*

3. A direction to an executor to educate certain beneficiaries under the will includes the support and maintenance of such beneficiaries, under the facts of this case, and the degree of education to be given them is within the discretion of the executor, and the executor has the authority to deduct within his reasonable discretion a certain

WILLS E *f—Continued.*

amount of money from the corpus of the estate for this purpose before making distribution among other beneficiaries as further directed by the will. *Ibid.*

i Actions to Construe Wills

1. An executor of a will may seek the advice of the court in the interpretation of the instrument and the disposition of the testator's estate within the intent and meaning of the language used therein, and where in the action a caveat has been filed, the court may construe the will upon an affirmative finding upon the issue of *devisavit vel non. Dulin v. Dulin*, 215.

WITNESSES—Privileged communications see Evidence D e—Testimony as to transactions with decedent see Evidence D b.

WRIT OF ASSISTANCE see Assistance, Writ of.